

APPELLATE CIVIL.

*Before Sir Richard Couch, Kt., Chief Justice Mr. Justice L. S. Jackson and
(Mr. Justice Mitter).**

1873
April 23.

KALLY PROSONNO BOSE (PLAINTIFF) *v.* DINONATH MULLICK
(DEFENDANT).*

*Execution of Decree out of Jurisdiction of Court which passed it—Sale of
Estate partly within and partly without the Jurisdiction—Civil Procedure
Code (Act VIII of 1859), ss. 249, 284, 285, & 286—“Part of an
Estate”—Certificate of Non-execution—Jurisdiction—Nominal Purchaser—
Benami—Non-joinder.*

A money-decree was made by the Judge of the 24-Pergunnahs against a mortgagor, who was possessed of property in the 24-Pergunnahs, and also of an estate called Kismut Kosdaha, 18 mouzahs of which lay in Zillah 24-Pergunnahs, and 42 mouzahs in Zillah Nudd ea. The whole estate was entered in the *taujih* of, and the Government revenue was payable in, the Collectorate of Nuddea. The Judge of the 24-Pergunnahs, without selling the property of the judgment-debtor which was within his jurisdiction, transmitted a certificate, under s. 285 of the Civil Procedure Code, to the Judge of Nuddea, stating that no portion of the amount of the decree had been realized by the Court of the 24-Pergunnahs. Thereupon, Kismut Kosdaha was attached and sold by order of the Nuddea Court. In a suit brought against the purchaser for possession of the 18 mouzahs lying in the 24-Pergunnahs by a person who claimed to have bought the right, title, and interest of the judgment-debtor in those mouzahs, but who, in fact, was not the real purchaser :

Held, that the suit ought to have been dismissed, because of the non-joinder as plaintiff of the real purchaser.

Held further, that “part of an estate” in s. 249, Act VIII of 1859, means an aliquot part of an estate.

Held also, that although the Court of the 24-Pergunnahs strictly ought not to have granted the certificate until the property in the 24-Pergunnahs had been sold the error in so doing did not make the certificate void, or avoid the proceeding in the Nuddea Court, Kismut Kosdaha being substantially in the Nuddea District.

The Maharajah of Burdwan v Sree Narain Mitter (1) commented on.

The facts of this case were that the Land Mortgage Bank, having obtained a decree in the Court of the 24-Pergunnahs

* Regular Appeal, No. 12 of 1872, from a decree of the second Subordinate Judge of the 24-Pergunnahs, dated the 12th October 1871.

against Hubeebul Hossein and his wife, Dooreentunnissa Bibee, for Rs. 2,48,991-4, principal and interest, and Rs. 4,493-12, costs and interest, applied to that Court for execution of the decree by attachment and sale of a dwelling-house and land in Bhowani-pore, in Zillah 24-Pergunnahs, and of property described as Lot Kosdaha, Pergunnah Kosdaha, in *tauji*h No. 298, in Zillah Nuddea, the Government revenue of which was Rs. 11, 261-11-4. On the 25th of August 1869, it was ordered that the property situated within the local jurisdiction of the Court of the 24-Pergunnahs should be attached. On the 26th of August, the Land Mortgage Bank, by its manager, petitioned the Judge that the property in the 24-Pergunnahs should be sold, and a certificate be granted as regarded the property situated in Zillah Nuddea for the attachment and sale thereof in that zillah. On the 1st of September, it was ordered by the Judge of the 24-Pergunnahs, that the original certificate, copy of the decree, and copies of the two petitions, should be sent to the Judge of Zillah Nuddea, and the case should be struck off from the file of the cases, pending decision in that Court. The attachment and sale of the property in the 24-Pergunnahs was not proceeded with. The certificate of the Judge of the 24-Pergunnahs, dated the 1st of September, stated that no portion of the amount of the decree had been realized by means of that Court. The Land Mortgage Bank thereupon applied to the Subordinate Judge of Nuddea for execution of the decree by attachment and sale of the right, title, and interest of the judgment-debtors in "Kismut Kosdaha lying within Thannah Gyeghata, mehal No. 298 of the *tauji*h of the Collectorate of this zillah, the Government revenue of which is Rs. 11,261-14-4, and which is recorded in the name of Hubeebul Hossein." It was accordingly attached and sold by auction to the respondent for Rs. 3,00,100. Kismut Kosdaha consisted of 60 mouzahs; 18 in Zillah 24-Pergunnahs, and 42 in Zillah Nuddea, the whole being entered in the *tauji*h of the Collectorate of Nuddea as "No. 298, Pergunnah Kismut Kosdaha, talookdar Hubeebul Hossein, Government revenue Rs 11,261 14-4." Hubeebul Hossein, applied under s. 256 of Act VIII of 1859 to have the sale set aside; and the case was tried on the 14th of April 1870, when the Subordinate

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Judge of Nuddea ordered that the sale should be confirmed. Among the pleaders present on behalf of Hubeebul Hossein was Baboo Kedarnath Bose.

The plaintiff then brought the present suit to have the sale set aside. The plaintiff's case was that the Nuddea Court had no power to sell the 18 mouzahs ; and that the sale of them was void. He alleged in his plaint that Hubeebul Hossein, in consideration of Rs. 5,000, had absolutely sold to him on the 19th Magh 1277 (31st January 1871) whatever rights and interests he had in those mouzahs. But the evidence of Kedarnath Bose, who was examined as a witness for the defendant, and who said that he was Hubeebul Hossein's pleader in almost all cases, showed that he, Kedarnath Bose, was the real purchaser. He said that he and the plaintiff, who was his cousin, were living jointly, and the property, if recovered, would become their joint property. The plaintiff's suit was dismissed by the Subordinate Judge, and he appealed to the High Court.

Mr. Woodroffe (Baboos Mohesh Chunder Chowdhry and Anund Chunder Ghosal with him) for the appellant.

The Advocate-General, *offg.* (Mr. Paul) (Baboos Sreenath Doss and Bhuggobutty Churn Ghose with him) for the respondent.

Mr. Woodroffe and Baboo Mohesh Chunder Chowdhry contended, 1st, that the execution-proceedings were void, inasmuch as the Judge of the 24-Pergunnahs had no power to grant a certificate under s. 286 of Act VIII of 1859 ; and, 2ndly, that, even assuming the certificate to have been rightly granted, the Nuddea Court was incompetent to sell property situated beyond the local limits of its jurisdiction. As a general rule, it is the duty of a Court which passes a decree to execute that decree. By s. 284, where the decree "cannot be executed within the jurisdiction of the Court whose duty it is to execute the same," it "may be executed within the jurisdiction of any other Court in the manner" provided by the succeeding sections. Therefore, before a decree made by one Court can be sent for execution to another Court, the first Court must satisfy itself that the decree

cannot be executed within its own jurisdiction—*The Maharajah of Burdwan v. Sree Narain Mitter* (1). Nothing in ss. 285 and 286 extends the authority granted by s. 284. In the present case the judgment-debtor had property in the 24-Pergunnahs which might have been sold in satisfaction of the decree, and this appeared on the face of the petition itself upon which the certificate was granted. So long as that property remained available, the Judge of the 24-Pergunnahs had no authority to grant a certificate: execution-proceedings based on his illegal certificate were absolutely void, and could pass no property to the purchaser at an execution-sale. With regard to the second point, a portion of the property was without the jurisdiction of the Nuddea Court. [JACKSON, J.—The estate originally was wholly, and now the greater portion of it is, situated within the Civil District of Nuddea. COUCH, C.J.—The Government revenue is till payable in Nuddea.] The right of a Court to sell property is based on the attachment sections of the Civil Procedure Code; ss. 232, 235, and 239, which relate to execution against immoveable property, all refer to property within the jurisdiction—*Haji Jiva Nur Muhammad v. Abubakar Ibrahim Meman* (2). Suppose a claimant under s. 246 were to allege that he had at a private sale bought the portion of the estate lying without the local limits of the jurisdiction, could the Court adjudicate on his claim? The whole purview of the sections referred to shows that the power of the Court to attach is only co-extensive with its power to give possession. Where, upon sanction obtained under s. 12 of Act VIII of 1859, a suit is brought for immoveable property partly within and partly without the local limits of jurisdiction, execution might possibly issue against the whole, but that case is very different from the present one in which the property has been attached in execution of a simple money-decree.

Baboo *Sreenath Doss* for the respondent.—The plaintiff's suit was rightly dismissed, the Judge having found that the nominal plaintiff was not the real purchaser. In this country,

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(1) 9 W. R., 346.

(2) 8 Bom. Rep., O. C., 29, at p. 37.

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where there is no distinction between legal and equitable estates, the only person who can sue is he who has the beneficial interest. [MITTER, J., referred to *Grishchandra Lahury v. Fakir Chand* (1). COUCH, C.J.—Can we dismiss a suit simply because the plaintiff is wrongly named?] The point was decided in *Fuzeelun Beebe v. Omdah Beebe* (2). It is not a

(1) B. L. R., Sup. Vol., p. 503.

(2) *Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.*

The 7th December 1868.

FUZZEENLUN BEEBE, WIDOW AND
HEIRESS OF SHAIKH ABDOOL
WAHED (PLAINTIFF) v. OMDAH
BEEBEE AND ANOTHER (DEFEND-
ANTS).*

*Parties—Sale of Land—Benami—Non-
joinder of real Purchaser—Vakeel and
Client.*

THIS was a suit for possession of property valued at Rs. 13,764. The plaintiff stated that the defendants, Omdah Beebe and her brother Syud ShahJonab Ali, were the two shareholders of property left by their father; that the respective shares having been determined in a suit brought against Omdah Beebe by her brother, Omdah Beebe sold a *mokurrari*, lease of part of her share to the plaintiff for Rs. 100, and subsequently sold to him a further part of her share, together with a moiety of her proprietary rights in the property included in the *mokurrari* for the sum of Rs. 3,000. The *mokurrari* was alleged to have been obtained, and the purchase made by the plaintiff through the instrumentality and with the assistance of his paternal uncle Moonshee Keramut Ali. The plaintiff produced the deed of sale, which recited that out of the Rs. 3,000, the sum of Rs. 2,500 was to be satisfied by setting off an old debt, the nature of such debt not being stated; the remaining Rs. 500 was paid in cash.

The defendants alleged, *inter alia*, that

Shaikh Abdool Wahed was only the nominal plaintiff, and that Moonshee Keramut Ali, had got up the case and forged the *mokurrari* pottah and deed of sale, and that, as he had not been joined as a co-plaintiff, the suit ought to be dismissed.

Mr. Money (with him Baboo Joggoda, and Mookerjee) for the appellant.

Baboo Ashootosh Chatterjee, Girja Sunker Mojomdar, and Gopenath Mookerjee for the respondents.

The judgment of the Court was delivered by

PEACOCK, C.J.—(The portion of the judgment relating to the point mentioned was as follows):—The first issue in bar is whether the suit is bad by reason of Keramut Ali not having been made a co-plaintiff in it?

That involves two questions: first assuming that a sale took place by Mussamat Omdah Bdebee, the defendant No. 1, whether Abdool Wahed was the real purchaser, or whether his father-in-law Keramut Ali, the vakeel of Omdah Beebe, was the real purchaser of the estate from his client?

The suit is valued at Rs. 13,764. Of part of the property for which the suit is brought a *mokurrari* was purchased for Rs. 100 in the name of the plaintiff Abdool Wahed. As to the residue of the property, it is said that it was sold to the plaintiff for the sum of Rs. 3,000 of which Rs. 500 were paid, and the residue settled by giving up certain debts. There is no evidence in the

* Regular Appeal. No. 98 of 1868. from a decree of the Principal Sudder Amceet of Beerbhoom, dated the 15th February 1868.