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has held that he is barred from setting up this title, because in a former suit against the same defendants, when he sought to obtain other property which had belonged to Ramnath, it was decided between the parties that he, the present plaintiff, was not the adopted son of Ramnath. I think that this last mentioned decision does not afford a legal bar to his proving in the present suit, if he can, by legal evidence, that he is the adopted son of Ramnath, for he here seeks to obtain a different property upon a different cause of action. It seems to me, therefore, that the lower appellate Court has made a mistake in this respect, and that the suit ought to be remanded for re-trial. The first issue will, of course, be whether the plaintiff is, as he says he is, the adopted son of Ramnath, and the other issues will be those which properly arise on the merits of the question, whether or not he is, supposing him to be found to be the adopted son, entitled now to recover the property which he seeks.

The costs will abide the event.

Before Mr. Justice Phear and Mr. Justice Hobhouse,

LALA JAGAT NARAYAN *v.* TULSIRAM.*

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July 2.

Validity of Attachment—Decree—Act VIII. of 1859, *ss.* 119 *and* 240.

The effect of granting an application under section 119 of Act VIII. of 1859, is to declare that there has not been yet a valid decree in the suit, and thereby any attachment, that has issued in execution of the decree which has been set aside, becomes invalid.

See also Page 56 Page 84

A. obtained a decree *ex parte* against B. Property belonging to B was attached in execution. While under attachment, B. sold the property to C. Afterwards B. applied for, and obtained an order, under section 119 of Act VIII. of 1859, to set aside A.'s decree and for a new trial.

Held, that C.'s purchase was not null and void, under section 240 of Act VIII. of 1859.

THIS was a suit to obtain possession of a certain share of a village in Pergunna Bal, in the district of Sarun. The plaintiff alleged that he had purchased the property from one Gobind Ram for Rs 6,000; and that the said vendor had caused his

* Special Appeal, No. 81 of 1868, from a decree of the Principal Sudder Ameen of Sarun, reversing a decree of a Moonsiff of that district.

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brother-in-law, the defendent Tulsiram, to obtain a collusive decree against Gobind Ram, in order to deprive the plaintiff of the property he had purchased. Defendant, Tulsiram, answered that he had lent money to Gobind Ram under a registered bond, and that he, Tulsiram, obtained an *ex parte* decree against Gobind Ram for the amount he had lent; and that when Gobind Ram's property was attached in execution of that decree, he, Gobind Ram, obtained an order, under section 119 of Act VIII. of 1859, setting aside the decree, and appointing a day for proceeding with the suit; that pending this new trial, Gobind Ram, acting in collusion with the plaintiff, sold to him (plaintiff) the property which had been attached.

It appeared that the plaintiff's purchase was effected on the 13th of March 1865, and a short time before, namely, on 2nd of February 1865, Tulsiram had obtained a money-decree against the plaintiff's vendor, and in process of execution of this decree, the property, which was the subject of suit, was attached by order of Court, on the 2nd of February 1865. The plaintiff's vendor applied to the Court, under section 119 of Act VIII. of 1859, on the 4th July 1865, and the Court gave a second decree (against him) on the 22nd of August 1865.

The Moonsiff found that the defendant, Tulsiram, had been acting in collusion with Gobind Ram, and gave a decree for the plaintiff.

On appeal, the Principal Sudder Ameen reversed the decision of the Moonsiff, and held, that "the plaintiff's purchase, subsequent to the attachment, could not operate prejudicially against the defendant's decree, and consequently the sale was null and void by reason of the provisions of section 240 of Act VIII. of 1859. The attachment was in full force."

Against this decision the plaintiff appealed to the High Court.

Baboo *Kali Krishna Sen* for appellant.

Baboo *Hem Chandra Banerjee* for respondent.

The judgment of the Court was delivered by

PHEAR, J.—(After stating the facts). As the plaintiff's purchase was effected on the 13th of March after the attachment was

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issued, and before his vendor's application for a new trial on the 4th of July, it was evidently made while the attachment was pending. But we think that the effect of granting an application made under section 119 of Act VIII. of 1859, is to declare that there has not been yet a valid decree in the suit. There are two sets of grounds upon which the Court may set aside its own decree within section 119. The *first* is, that the summons was not duly served upon the defendant who applies for a new trial; and the *second*, that the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing. If the Court is satisfied that either of these two grounds is made out, it sets aside its original judgment, and proceeds with the hearing of the suit. But the attachment of the 2nd February 1865 was issued in process of execution of the first decree. It owed its validity as an attachment entirely to the foundation afforded by the decree, and when that decree was set aside and declared invalid, the attachment, in our opinion, fell with it. Without a decree, the attachment could not be made. The mere fact of seizure and affixing a notice would alone have no legal effect; and, therefore, as soon as it appeared that a valid decree had not been passed, necessarily the form of attachment which had been gone through by the officer of the Civil Court, came to nothing.

We, therefore, think that the Principal Sudder Ameen was wrong in holding, that the plaintiff's purchase was, necessarily, void, merely because it was made between the 2nd of February and 4th of July 1865. It may yet be that the plaintiff's purchase, on the facts of the case, may turn out to have been a pretence, and not to have been a real transfer on the part of his alleged vendor, but that is a question which has not yet been tried by the lower appellate Court. We, therefore, reverse the decision of the Principal Sudder Ameen, and remand the case for re-trial on its merits.

The costs will abide the event.