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IN THE MATTER OF J. HOLLICK AND OTHERS.

required for one execution; for the order prohibiting the creditor from receiving the debt must be made by the Small Cause Court within whose jurisdiction the creditor is residing. The execution of a debt is to be made by attachment, and the attachment is to be made by written order. There is no law which requires the Court which passed the decree to make one-half of the execution and then to send a certified copy of the judgment to another Court to make another part of the execution. Two orders cannot be necessary for the attachment of one debt. A copy of the written order should also be delivered to the creditor and to the Paymaster at Jamalpore.

The 3rd question is substantially answered in our answer to to the 2nd question.

I observe that the Judge of the Small Cause Court has directed the Paymaster to attach and hold in attachment the pay due to the judgment-debtor. That is a mistake. The order attaching the debt must be made by the Court, and a copy served upon the debtor.

Before Mr. Justice Bayley and Mr. Justice Macpherson.

1868 Dec. 12.

TARA CHAND GHOSE, DECREE-HOLDER, *v.* ANAND CHANDRA CHOWDHRY, JUDGMENT-DEBTOR.*

Set-off—Decrees—Special Appeal.

See also Act. XIV of 1882 Sec 246.

A and B having obtained a decree for a sum of money against C & D, sold part of their interest therein to E, who afterwards sold the same to F. G obtained a decree against F, and, in execution, attached and sold F's interest in the decree obtained by A and B, and H became the purchaser of the same. H applied for execution against C and D. C claimed to have set off the amount of a decree obtained by his son, I, against G, and which C alleged was held by I benami for him as a cross-decree within the meaning of secton 209 of Act VIII. of 1859. *Held*, the decrees could not be set off.

Also *held*, that a special appeal lies from a regular appeal heard *ex parte*

HARAN CHANDRA MEHALDAR and Ramjiban Mehaldar obtained a money-decree against Anand Chandra Chowdhry and Madhusudan Mittra.

Haran and Ramjiban sold to Chandranath Dutt a 15-anna share of their rights in the decree, reserving one anna share for themselves.

* Miscellaneous Special Appeal, No. 397 of 1868, from a decree of the Officiating Judge of Jessore, reversing a decree of the Principal Sudder Ameen of that District.

Subsequently, Chandranath sold his interests in the decree to one Bhagwan Chandra Poddar.

Jagat Chandra Chowdhry, a son of Anand Chandra Chowdhry, obtained a decree for a sum of money against the said Bhagwan Chandra Poddar.

Samacharan Ghose obtained a decree against Bhagwan Chandra Poddar, and in execution of this decree caused the right, title, and interest of Bhagwan, as the purchaser of a 15-anna share of the decree, which Haran and Ramjiban had obtained against Anand and Madhusudan, to be sold, and the appellant, Tarachand Ghose, became the purchaser thereof.

Tarachand, as the purchaser, applied to the Principal Sudder Ameen for execution of the decree against Anand and Madhusudan.

Anand Chandra claimed to have set off the amount of the decree held by Jagatchandra against Bhagwan, on the ground that Jagatchandra was a mere benamidar for himself.

The Principal Sudder Ameen disallowed the claim to set off.

On appeal, the case was heard *ex parte* in the absence of Tarachand Ghose, the then respondent. The Judge reversed the decision of the Principal Sudder Ameen, and Anand Chandra allowed to set off the decree of Jagat Chandra Chowdhry against the decree of which execution was sought by Tarachand.

Tarachand Ghose applied to the Judge for a re-hearing, but the Judge rejected the application.

Tarachand appealed to the High Court from the *ex parte* judgment of the Judge.

Baboo *Anand Chandra Ghosal* (Mr. *Rochfort* with him) for the respondent.

Baboo *Anukul Chandra Mookerjee* (Baboos *Kalimohan Das* and *Debendra Chandra Ghose* with him), for the appellant.

The judgment of the Court was delivered by

MACPHERSON, J.—That the lower Appellate Court has erred in allowing these decrees to be set off, the one against the other, I have no manner of doubt. For the decrees are not "cross-

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decrees between the same parties," within the meaning of section 209 of Act VIII. of 1859, or indeed in any other sense.

Even if the facts were as stated by the Judge, I think the decision at which he arrived would be quite wrong, for so long as the parties on the record are different, it is impossible to say that the decrees are "cross-decrees between the same parties," whatever may be the position of trust or *benamiship* which exists among any of the parties. But the record shews clearly that the facts are not as stated by the Judge, and that it is not the case that "Bhagwan obtained a decree against Anand."

The facts, stated accurately, are as follows: Haran Mehaldar and Ramjiban Mehaldar held a decree against Anand Chandra Chowdhry and Madhusudan Mittra. Haran and Ramjiban sold a 15-anna share of their rights as decree-holders to Chandranath Dutt, who thus became jointly interested in the share as decree-holders. Subsequently the interest of Chandranath became vested in Bhagwan, who thereupon, jointly with Haran and Ramjiban, held the decree against Anand and Madhusudan.

One Jagat Chandra Chowdry, the son of Anand, held a decree against Bhagwan.

Shamacharan Ghose also had a decree against Bhagwan, and in execution of that decree, the right, title, and interest of Bhagwan, as one of the holders of the decree against Ananda and Madhusudan, was sold, and was purchased by the present appellant, Tarachand.

Tarachand having thus placed himself in Bhagwan's position as one of the holders of the decree against Anand and Madhusudan, applied to have the decree executed. Thereupon Anand applied to have the decree held by Jagat Chandra against Bhagwan set off as a "cross-decree between the same parties" under section 209 of Act VIII. of 1859, upon the ground that his son Jagatchandra really held that decree against Bhagwan, merely *benami* for him, Anand.

The parties to the decrees were not the same in any possible sense, and if Anand and Bhagwan had been the only parties to the one suit, and Jagat Chandra and Bhagwan had been the only parties to the other, I should still have held that the decrees could not be st off under section 209, whether Jagat was or

was not merely a trustee or a *benamidar* for Anand. I say nothing of the very special circumstances in this case, which also tend towards the same conclusion. But the respondent contends that no appeal will lie.

On the 31st of March, 1868, the Subordinate Judge of Jessore held that the decrees could not be set off. On the 9th of June, the Zilla Judge reversed the decision, the appeal being heard *ex parte*, as the respondent did not appear. Subsequently an application was made for a re-hearing, which was rejected by the Judge on the 1st of August. Thereupon the special appeal now before us was brought, being an appeal from the decision of the 9th of June. It is argued that under section 37 of Act XXIII. of 1861, a rule similar to that provided by section 119 of Act VIII. of 1859, in the case of applications for the re-hearing of a suit which has been disposed of *ex parte*, should be applied; and that as under section 119 no appeal will lie from a Judgment passed *ex parte* against a defendant who has not appeared, so in the present case no appeal will lie. But section 119 is inapplicable. Section 37 of Act XXIII. in no way indicates in what cases appeals will lie. It merely relates to the powers which the Appellate Court can exercise when they are dealing with appeals, *i. e.*, when an appeal does lie, and is before the Court. It appears to me that the sections of the Civil Procedure Code which apply, are sections 346, 347, and 372.

Section 346 enacts that if the appellant fails to appear, his appeal shall be dismissed for default; and if the respondent fails to appear, the appeal shall be heard *ex parte* in his absence. Section 347 provides that if an appellant whose appeal has been dismissed for want of prosecution applies (within thirty days from the date of the dismissal) for the re-admission of the appeal, the Courts may re-admit it. But nothing is said as to rehearing the case upon the application of the respondent against whom an *ex parte* decree has been passed. No provision is made for any re-hearing in the latter case; nor is it declared that there shall be no appeal from the *ex parte* decision of the Appellate Court. Then comes section 372, which says that "unless otherwise provided by any law for the time being in force, a special appeal

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shall lie from all decisions passed in regular appeal," &c. An *ex parte* decree is none the less a "decision passed in regular appeal," because *ex parte*, and it is nowhere provided by any law that there shall be no appeal from a decree because *ex parte*.

I am, therefore, of opinion that a special appeal does lie from an *ex parte* decision passed by an Appellate Court in regular appeal.

The present appeal arises out of an order made in execution of a decree, but, under sections 11 and 38 of Act XXIII. of 1861, the ordinary rule of procedure applicable to civil suits before final judgment will apply.

I think this appeal will lie, and that the decision of the lower Appellate Court ought to be reversed with costs, and that the original order of the Subordinate Judge declaring that these decrees cannot be set off under section 209 ought to be affirmed.

Before Mr. Justice Loch, and Mr. Justice Glover.

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Dec. 16.

RAJA LILANAND SING BAHADUR, v. THE GOVERNMENT AND THAKUR MANORANJAN SING AND TEKAIT LOKNATH SING.*

Ghatwali Tenure—Resumption—Compensation.

In the Kuruckpore ghatwali mahals, the profits of the lands, minus the the quit-rent paid to the zemindar, were the remuneration given to the ghatwals for police services. Government illegally resumed those lands, dispensing with the services of the ghatwals, and settled the tenures with the ghatwals, at half the rates current in that part of the country. The resumption proceedings having been set aside, it remained to determine to whom, and in what proportions, Government should refund the half jumma taken by it as rent from the ghatwals, during the period of settlement. *Held* that, inasmuch as the ghatwals rendered no service during the period of settlement, the moiety of the jumma retained by them was ample compensation for any loss they might have sustained; and the zemindar was entitled to receive the whole of the moiety taken by Government partly as quit-rent due to him, and partly as compensation for loss of the ghatwals' services during the continuance of the settlement.

THIS was an application to the High Court for review of a decision of the late Sudder Court, sitting as Special Commissioners, on the 17th April, 1852, and is supplemental to the class of

* Application for Review, No. 2529 of 1856, of the judgment of the late Sudder Court, exercising the powers of Special Commissioners, passed in Special Commission Appeal, No. 2529, on the 17th of April, 1852.