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IN THE
MATTER OF
KOKYA DINE
DECEASED.

granted under the old law, but Mr. Justice Norman in *Sharo Biba v. Baldeo Das* (1), speaking in 1867, uses the present tense, from which it may be inferred that the will of a Hindu does require probate for the purposes of evidence. My own opinion is, that the District Court has jurisdiction to grant probate to the will of a Buddhist made after the 1st of January 1866. But that it is not necessary that the will should be executed according to the formalities required by the Indian Succession Act."

The judgment of the Court was delivered by

PEACOCK, C. J.—We are of opinion that in this case the view taken by the learned Recorder is correct, and that probate may be granted of the will of a Buddhist made after the 1st of January 1866, but that it is not necessary that the will of a Buddhist should be executed according to the formalities required by the Indian Succession Act.

Before Mr. Justice L. S. Jackson and Mr. Justice Mitler.

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RAJIBLOCHAN (DEFENDANT) v BIMALAMANI DAS AND OTHERS
(PLAINTIFFS) AND OTHERS (DEFENDANTS,)*

Setting aside Sale—Refund of Purchase-money—Act VIII. of 1859, s. 258.

See Act. XIV of 1882, Secs. 313 and 315. Section 258, Act VIII. of 1859, only applies to cases where a sale of im- movable property has been set aside under circumstances which would, under Act VIII. of 1859 authorize such a proceeding. The fact that the party whose right, title, and interest were sold, had no interest at all, or less than was supposed, is no ground for setting aside the sale.

This was a suit to set aside a sale, and to recover the purchase- money paid under the sale, which was of the rights and interests of one Radhamohan Das, in execution of a decree obtained against him by one Ramanand Rakhit, on the ground that the rights and interests of Radhamohan Das were not what they had been alleged to be.

The purchaser (the special appellant) and the decreeholder were both parties to this suit. The Principal Sudder Ameen

* Special Appeals, Nos. 1081 and 1077 of 1868, from a decree of the Officiating Judge of Midnapore, reversing a decree of the Principal Sudder Ameen of that district.

decreed that the sale should be set aside, and the purchaser should receive back his purchase-money. This decision was affirmed on appeal by the Zilla Judge.

But on the application of one of the decreeholders, the judgment on appeal was reviewed by the Judge, and he finally determined that the sale should not be set aside; and he ordered the suit to be dismissed with costs.

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Baboos Mahendra Lal Shome and Bhabani Charan Dutt for appellant.

Baboo Ashutosh Dhur for respondents.

Jackson, J. (After stating the facts.)—It appears to us quite clear, that under the circumstances of the case, the sale could not be set aside. Section 258 provides for the refund of the purchase-money when a sale of immovable property has been set aside under circumstances which, under the provisions of the Procedure Code, authorize such a proceeding; but I am not aware of any authority of law for setting aside a sale on the ground that the party whose right, title, and interest were sold had no interest at all, or had a less interest than was supposed.

We are referred to a decision in the case of *Grish Chandra Poddar v. Sukhada Moyi Debi* (1), in which a different doctrine has, no doubt, been held; and if it were necessary, we should have been obliged to refer the question to the decision of a Full Bench. But such reference is not necessary in the present case. It is sufficient to say that, whereas in the case referred to, the sale had been rightly or wrongly set aside, and it was held that, in consequence, the purchaser was entitled to a refund of his purchase-money; in this case, on the contrary, the sale has not been, and, in my opinion, could not be, set aside. Consequently, the purchaser is not entitled, under section 258, to a refund.

The special appeal must, therefore, be dismissed with costs. Special appeal No. 1077, between the same parties, is governed by the same decision.

(1) 1 W. R., 55.

HIGH COURT OF JUDICATURE, CALCUTTA. [B. L. R.]

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Nov. 19.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter

BHAGAWANI KUNWAR (DEFENDANT) v. LALA BAIJNATH
PRASAD (PLAINTIFF)*

Set-off—Act VIII. of 1859, s. 121.

A, by deed of zurpeshgi, let certain lands to B, to secure a sum advanced by him to her and interest thereon. B covenanted to pay certain dues annually to A. On failure by B, A obtained a decree against him for the amount. In execution of a decree against B, C purchased his interest in the sum secured by the deed of zurpeshgi, and sued A to recover the same. *Held*, A was entitled in such suit to set off the amount of the decree obtained by her against B.

THE defendant, Bhagawani Kunwar, was owner of a share in Mauza Jehangirpore, zilla Patna. By a deed of zurpeshgi she let $2\frac{1}{2}$ -annas of her share to Ramnath Sahu, Biku Sahu, and Jatoni Sahu, from 1265 F. S. to 1273 F. S. (1859 to 1867), in consideration of 15,000 rupees received from them, on which she was to pay interest at the rate of $8\frac{1}{2}$ annas per 100 rupees, and in which sum and interest it was thereby declared, they were interested in equal third. The lessees covenanted to pay to the lessor annually Rupees 629-12, and Government revenue Rupees 1,414. Ramnath Sahu failed to pay any dues to the lessor, or public revenue, from 1266 to 1268 F. S. (1860-1862) and Bhagawani Kunwar obtained a decree against him for a sum on those accounts amounting in all to Rs. 5,957-11-1.

On the 27th May 1865, the plaintiff purchased Ramnath Sahu's interest in the lease, which was sold in execution of a decree obtained against him, in the Court of the Principal Sudder Ameen, and thus he became the assignee of the debt due from Bhagawani Kunwar to Ramnath, in respect of his one-third share, in the 15,000 rupees and interest. The plaintiff now sued for this amount, with interest at 1 per cent. per mensem. The defendant sought to set off against the claim the debt due to her from Ramnath, under the decree which she had obtained against him.

On 29th August 1867, the Principal Sudder Ameen made the following decree :

* Regular Appeal, No. 61 of 1868, from a decree of the Principal Sudder Ameen of Patna.

“That rupees 5,000, with interest at $8\frac{1}{2}$ annas per cent. per mensem, be decreed against Bhagawani Kunwar only; that interest up to yesterday be charged at that rate; that interest on the whole amount decreed, including costs of the suit, which are hereby decreed, be charged from this date at 12 per cent. per annum, up to the time of realization.”

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NATH PRASAD

The defendant appealed to the High Court.

Mr. R. E. Twidale and Moulvi Mohammed Yusuf for appellant.

Baboos Annada Prasad Banerjee and Hem Chandra Banerjee for respondents.

The judgment of the Court was delivered by

PEACOCK, C. J.—The plaintiff purchased a debt due from the defendant to Ramnath, but the defendant had received a decree against Ramnath for a certain amount arising out of the same transaction. According to the English law, the plaintiff, as the assignee of Ramnath's interest in the debt, would have had to sue the defendant in the name of Ramnath, as plaintiff. If that had been done in the present case, it is clear that the defendant might have set off the debt due from Ramnath to her. According to the equity and good conscience administered in the mofussil, the plaintiff was entitled to sue the defendant in his own name for the debt due from the defendant to Ramnath, which he purchased; but the same equity and good conscience, which allows the plaintiff to sue for the debt due to Ramnath entitles the defendant to set off, as against the plaintiff, the debt which was due from Ramnath to her at the time of the plaintiff's purchase, and of which the plaintiff had notice. Under these circumstances the defendant is entitled to set off the amount of the decree recovered by the defendant against Ramnath, with interest from the date of the decree to the date of the judgment in the lower Court in this case, that is to say the 29th August 1869. The amount of the interest will be calculated by the Officer of the Court at 12 per cent., the rate given by the decree; the principal and interest due on the decree will be deducted

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from the amount awarded to the plaintiff; and the decree of the lower Court amended by giving a decree to the plaintiff for the balance.

The costs of this appeal and the costs in the lower Court will be borne by the parties in proportion to the amounts decreed and disallowed.

Before Sir Barnes Peacock, Kt., Chief Justice and Mr. Justice Mitter.

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MUSST. ZAHURAN (PLAINTIFF) v. W. TAYLER AND

ANOTHER (DEFENDANTS)*

Sale after Attachment—Caveat Emptor—Fraud.

T sold a mauza, of which he was owner, to Z. At the time of sale, the mauza was under attachment in execution of a decree obtained against T. by R. Z. paid the amount of the decree to prevent the property, which she had purchased being sold in execution. Z. was under no obligation otherwise to pay the amount of the decree. *Held*, Z. was entitled to recover against T. the amount so paid.

This suit was brought in the Court of the Principal Sudder Ameen of Patna, under the following circumstances:

It appeared that the defendant, Mr. Tayler, through his agent H. Kelly, the other defendant, by a deed of sale, dated 11th October 1866, sold to the plaintiff his mauza Dergaun, for the sum of Rs. 55,000.

The plaintiff alleged that at the time of the sale, Mr. Tayler concealed, or did not make known to her, the fact that at that time the mauza was under attachment in execution of a decree against him, held by Rani Asmedh Koer; that in order to preserve her property, the plaintiff was obliged to pay the amount of the decree. She now sued for the amount so paid, *viz.*, Rupees 11,381-13-6 principal, and Rupees 1,024-9½ interest. It was contended, for the defendant, that the plaintiff was bound to inform herself of all the circumstances advantageous or disadvantageous connected with the property; and that if she voluntarily, and without consulting the defendant, chose to pay off the decree, she could not recover the money so paid by her; that the plaintiff had full knowledge of the attachment when she bought the pro-

* Regular Appeal, No. 67, from a decree of the Principal Sudder Ameen of Patna.