

We have been referred to the case of *Miller v. Ram Runjun Chuckerbutty* (1), and although we may say that we do not altogether agree in the general terms of that decision, we find that it is not in point, as it affects the right of a party to proceed against a receiver without permission of the Court appointing him. We accordingly dismiss this appeal with costs.

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Appeal dismissed.

J. V. W.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

KABILASO KOER (PLAINTIFF) v. RAGHU NATH SAKAN
 SINGH AND OTHERS (DEFENDANTS).*

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 May 28.

*Bengal Tenancy Act (VIII of 1885), s. 174—Jurisdiction—Civil
 Procedure Code (Act XIV of 1882), s. 11—Sale for arrears of
 rent—Deposit in Court.*

No suit is maintainable to set aside a sale under the provisions of section 174 of the Bengal Tenancy Act.

The right under the section to have a sale set aside is not an abstract right which can be enforced by suit against any particular person, but is a right to call upon a Judge to set aside a sale, and on his refusal, to proceed in revision.

Surr to set aside a sale held under the Bengal Tenancy Act.

One Chowdhry Tribeni Pershad Singh having obtained a rent decree against one Kabilaso Koer, in execution of such decree caused the holding of the judgment-debtor to be sold. At such sale, which was held on the 15th March 1888, Raghu Nath Saran Singh and Sabhlaik Sing became the purchasers of the holding. Within 30 days from the date of such sale, Kabilaso Koer, on the 3rd April 1888, applied to the Munsif in whose Court the sale had been held to have the sale set aside under the provisions of section 174 of the Bengal Tenancy Act; but instead of depositing in Court the amount recoverable under the decree with costs, and

* Appeal from Appellate Decree No. 402 of 1890, against the decree of Baboo Dwarka Nath Mitter, Subordinate Judge of Shahabad, dated the 31st of December 1889, reversing the decree of Baboo Nogendro Nath Roy, Munsif of Arrah, dated the 15th of April 1889.

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a sum equal to 5 per cent. on the purchase-money, she paid the decretal amount out of Court to the decree-holder, and on the 9th April 1888 deposited in Court a sum equal to 5 per cent. on the purchase-money. The decree-holder certified to the Court that his decree had been satisfied. The Munsif dismissed the application and confirmed the sale, holding that the provisions of section 174 had not been complied with, inasmuch as the decretal amount and costs had not been deposited in Court. Kabilaso Koer thereupon brought a suit to set aside this sale against the decree-holder, the purchasers, and one Bhirug Singh (whom she alleged had, in collusion with the purchasers, fraudulently paid over to the decree-holder the decretal amount and the sum due to the purchasers as damages, instead of paying the same into Court in accordance with the provisions of section 174 of the Rent Act).

The defendants in their several written statements submitted that no regular suit would lie for the purpose of setting aside the sale, and denied the fraud alleged.

The Munsif held that section 174 of the Rent Act did not expressly prohibit a regular suit being brought; and that under section 11 of the Code of Civil Procedure the suit was maintainable, and concluded his judgment as follows:—"Considering the novelty of the provisions of section 174 of the Tenancy Act, the status of the petitioner, a purda female, and the mistake that has been committed by a third party, viz., the decree-holder, in not depositing the amount paid to him by the petitioner for such purpose which has been alleged to be fraud, I hold that the relief prayed should be granted to the petitioner."

The defendants appealed. The District Judge held that even conceding, for the sake of argument, there to be no express provision in the Bengal Tenancy Act similar to that contained in section 312 of the Code preventing a regular suit, it did not follow that section 174 should be construed less strictly in a regular suit than in an execution case, and that relief which could be granted only under the provisions of section 174, and which the Munsif could not grant in the miscellaneous department, because the provision of the section had not been complied with, could be granted in a regular suit. He further held that, having regard to the terms and objects of section 174, the Legislature meant proceedings thereunder

to be final, and not subject to be re-opened in a regular suit; he therefore reversed the judgment of the Munsif.

The petitioner appealed to the High Court.

Baboo *Abinash Chunder Banerjee* for the appellant.—Proceedings under section 174 are not final, and such a suit as this is maintainable; further, the provisions of section 174 were sufficiently complied with.

Baboo *Devendra Nath Sen* (with him Baboo *Taruck Nath Palit*), for the respondent, contended that the suit would not lie; that to enable a judgment-debtor to claim the benefit of section 174, he must strictly comply with the provisions of the section—*Rahim Buksh v. Nundo Lal Gossami* (1); the section had not been complied with; and even if such suit would lie, it would lie only subject to the provisions of section 174 having been complied with.

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by—

PETHERAM, C.J.—This is a suit brought by the plaintiff against the defendant to set aside a sale on the ground that she is entitled to have it set aside under the provisions of section 174 of the Bengal Tenancy Act, she having made the necessary deposit within the meaning of that section.

The Subordinate Judge dismissed the suit on two grounds, and we think that he was right in both. He, first of all, has considered that such a suit would not lie, and in that view we think he was right. Section 174 provides a particular means by which sales can be got rid of after they have been concluded and by which the purchaser at the sale can be compensated for loss, but it must be got rid of by order of the Court which made the sale. There is no doubt that if all the provisions of the law have been complied with, and the Court which made the sale refuses to set it aside, that order can be brought up to this Court in revision, but that is a different thing from saying that an independent suit will lie for that purpose, and we agree with the Subordinate Judge in thinking that such a suit will not lie. The right to have a sale set aside is not an abstract right which can be enforced by action against one person alone, but it is a right to call upon the Judge to set aside a sale, and if he does not do it, to bring his failure to do so to the

(1) I. L. R., 14 Calc, 321.

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notice of the Court, and therefore we think that upon that ground the Subordinate Judge was right, and the appeal upon that ground fails.

The Subordinate Judge also thinks that the provisions of section 174 have not been sufficiently complied with so as to entitle the plaintiff to this relief in whatever form it is sought for. In that also we agree with him; section 174 provides that before a sale is set aside, the whole of the debt and the expenses and the damage which the purchaser has sustained shall be deposited in Court: the debt for payment to the decree-holder, the damage for payment to the purchaser. In this case the only thing which has been deposited in Court is the damage which is payable to the purchaser. *The amount of the debt has not been deposited; but some person comes who says that he is the decree-holder, and admits that he has received the money. We think that that is not a compliance with the Act. We think that before a claim can be made for the protection of section 174, the Court must have the money deposited in the Court itself, so that the Court may know, of its own knowledge, that the provisions of the section have been complied with, and may not be driven to rely upon the evidence of other persons who may or may not be interested in the matter.*

For both reasons then we think that the Subordinate Judge was right in the view he took of this case, and that this appeal must be dismissed with costs.

Appeal dismissed.

T. A. P.

FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Pigot, Mr. Justice O'Kinealy, Mr. Justice Macpherson and Mr. Justice Ghose.

QUEEN-EMPRESS v. NAYAMUDDIN AND OTHERS.*

1891
 May 19.

Penal Code, Section 300, clause 5, and Sections 149 and 307—Murder, attempt to commit—Rioting armed with deadly weapons—Pre-arranged fight.

In a case in which it was found that all the accused were guilty of rioting armed with deadly weapons, that the fight was premeditated and

* Full Bench reference on Criminal Appeal No. 773 of 1890 against the order of the Sessions Judge of Furriddpur dated the 6th September 1890.