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The final order of the Judge on that application was made on 20th December 1877, when Act VIII of 1871 had been repealed. It was entitled as a review of judgment in suit No. 1 of 1872. By s. 2 of Act III of 1877, which came into force on the 21st April 1877, Act VIII of 1871 was repealed; but by the provisions of the General Clauses Act (Act I of 1868, s. 6), the repeal of that Act does not affect any proceedings commenced before the repealing Act shall have come into operation. The consequence is, that these proceedings having commenced before Act III of 1877 came into operation, must be governed by the provisions of the Act in force at the time when they were instituted,—namely, Act VIII of 1871. Section 76 of Act VIII of 1871 contains instructions for proceedings of the Court on a petition of a person whose application for registration has been refused, and concludes with these words, that no appeal lies from any order under this section. The procedure under the present Registration Act is altogether different from that under the Act of 1871, and we have no doubt that the case must be governed by the former Act. Therefore, the appeal cannot be entertained.

Appeal rejected.

Before Mr. Justice Markby and Mr. Justice Prinsep.

IN THE MATTER OF HARASATOOLLAH AND OTHERS (PETITIONERS) *v.* BROJONATH GHOSE (OPPOSITE PARTY).*

1878
April 1.

Immoveable Property—Sale in Execution of Decree—Dispossession of Third Person—Obstruction to Purchaser—Act VIII of 1859, *s.* 269—*Civil Procedure Code* (*Act X of* 1877), *ss.* 318, 319, 334, 335—*Limitation Act* (*XV of* 1877), *Sched. II, art.* 165.

There is no provision in the Civil Procedure Code, similar to that contained in s. 269 of Act VIII of 1859, which enabled the Court executing a decree to enquire into a complaint made by a person other than the defendant, on the ground of dispossession in the delivery of possession to the purchaser of

* Small Cause Court Reference, No. 393 of 1878, from the order of Baboo Sreenath Roy, Bahadoor, Subordinate Judge, and Judge of Small Cause Court of Hooghly, dated the 23rd February 1878.

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immoveable property sold in execution of a decree; and, therefore, the only remedy of a person so dispossessed is by regular suit.

A, a decree-holder, purchased certain property belonging to *B*, his judgment-debtor, at a sale in execution of his decree, and delivery of possession to him was ordered. A stranger to the suit, thereupon, presented a petition to the Court executing the decree, setting up a title to a moiety of the property in question, and prayed for an investigation into his right, and for recovery of possession on the ground that he had been dispossessed by *A*. *Held*, that the application could not be maintained.

THE following was the referring order in this case:—

"In execution of a decree obtained by one Brojo Nath Ghose against one Sumeruddin, the property, which is the subject of the present dispute, was sold as the property of the judgment-debtor, and purchased by the decree-holder himself. The purchaser, as usual, asked the assistance of the Court to be put in possession of the property purchased by him, and delivery of possession was ordered under the due course of law. The applicant thereupon presented a petition setting up a title to a moiety of the property, for an investigation into his rights, and for recovery of possession on the ground of having been dispossessed by the said purchaser. It is contended on behalf of the purchaser that there is no provision in the Civil Procedure Code under which an application like this can be maintained. I think this contention is valid. Under s. 269 of Act VIII of 1859 a complaint made by the purchaser on account of resistance in obtaining delivery of possession of the purchased property, as well as a complaint made by a party other than the defendant on the ground of dispossession in the delivery of possession to the purchaser, could be maintained and enquired into. But, under the new Act of 1877, the former is maintainable under ss. 334 and 335; but the Act is silent with reference to the latter. There is, therefore, no provision in the new Code giving a right to a person dispossessed in delivering possession to the purchaser of the purchased property, for an enquiry into his rights. His remedy is by a regular suit.

"It is contended on behalf of the applicant, that if a party other than the defendant, dispossessed in delivering possession to a decree-holder of the decretal property, can have a summary

remedy, it is anomalous to think that a party other than the defendant can have no such remedy when he is dispossessed by a purchaser at an execution-sale. I think this plea is quite fallacious. In the first place, there is an express provision with regard to the first-mentioned point, s. 332, but there is none with reference to the last-mentioned one. In the next place, in the former case, the dispute is between the decree-holder, a party to a pending case, and another, which, if not adjudicated upon, justice cannot be attained; while in the latter case, the dispute is between two strangers, quite unconnected with the case in which the decree was passed or with the execution thereof. It is reasonable, therefore, that such parties should be left to settle their dispute in a case between themselves, and that the Court executing the decree should not be encumbered to try a point foreign to the execution proceedings and without a case to that effect.

"The applicant's pleader then pointed out to me art. 167 of Sched. ii, div. 3, of the Limitation Act, and argued that, unless an application of the present nature was maintainable, the limitation for such an application would not have been provided for in the Limitation Act. The article under notice runs thus: "Complaining of resistance, &c., to delivery of possession of immoveable property decreed or sold in execution of a decree, or of dispossession in the delivery of possession to the decree-holder or the purchaser of such property." I must confess I do not find my way clear to reconcile this provision with the provisions of the Civil Procedure Code. My query, therefore, is whether the present application is maintainable in the execution department, or the applicant should be told to seek remedy in regular course of law. I reserve judgment in the matter until receipt of the Court's decision on the points."

The parties were unrepresented.

MARKBY, J.—The Subordinate Judge seems to have correctly explained the present state of the law. If the purchaser at a sale in execution of a decree be resisted or obstructed when being put in possession by the Court, as provided for by s. 318 or s. 319 of the Code of Civil Procedure of 1877, the Court can now act only under s. 334 or s. 335.

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Section 318 provides for the giving of what is usually termed khas possession to an execution purchaser, and the Court is empowered to "order delivery to be made by putting the purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same. If resistance or obstruction is made by the judgment-debtor or any one on his behalf, the provisions of chap. xix of the Code relating to resistance or obstruction to a decree-holder are applicable to s. 334. If, on the other hand, the property sold was not in the khas possession of the judgment-debtor, but is in the occupancy of a tenant or other person entitled to occupy the same, possession by publication of his title is given to the execution-purchaser. And s. 334 provides for a summary enquiry on "resistance or obstruction caused by any person other than the judgment-debtor *not* in possession of the property sold, but claiming a right thereto as proprietor, mortgagee, lessee, or under any other title," if such resistance or obstruction be made the subject of complaint by the purchaser.

No provision is, however, now made if the obstruction or resistance to the possession of an auction-purchaser is caused by a third party, a stranger, claiming to be in actual possession on a title altogether independent of the judgment-debtor.

Section 331 provides for such a case, but only when possession is being given to a decree-holder in execution of a decree; and this does not apply to an execution-purchaser.

Section 269 of the Code of 1859 provided for this case, and we do not understand why it has been omitted from the present Code of 1877, and this omission is the more remarkable because the Law of Limitation, passed almost simultaneously with the present Code, in Sched. II, art. 165, seems to contemplate a summary enquiry by the Courts on the application by a person dispossessed of immoveable property and disputing the right of the purchaser at a sale in execution of a decree to be put in possession, since it provides a term within which suit or application by such a person for redress should be made.

In such a state of the law it seems obviously unfair for the Courts, which cannot now summarily determine the relative

rights of the parties, to insist on putting an auction-purchaser into possession in spite of the resistance or obstruction of a third party having no connection with the judgment-debtor; and, therefore, it seems to us that, ordinarily, officers should be directed to abstain from any act of dispossession in such a case, leaving the execution-purchaser to his remedy by suit.

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IN THE MATTER OF HARASAT OOLLAH v. BROJONATH GHOSE.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice.

IN THE GOODS OF GASPER MALCOLM GASPER (DECEASED).

1878 *June* 1 & 18.

Ad valorem Duty—Act VII of 1870, *sched. i, cl.* 11—*Act XIII of* 1875, *s.* 6 (19*c*)—*Notification No.* 2623 *of* 24*th April* 1874.*

Executors obtaining a second grant of probate subsequent to the enactment of the Court Fees Act of 1870 (the first grant having been taken out previously to that enactment) are not exempted from the payment of the *ad valorem* duty chargeable under that Act, although the full fee then chargeable by law had already been paid at the time when the first probate was taken out.

THIS was a reference under s. 5 of Act VII of 1870, made by Mr. Belchambers, the Taxing Master of the Court.

It appeared that one Gasper Malcolm Gasper died on the 5th August 1862, appointing by will one Johannes George Bagram his executor, and directing that each of his sons who attained the age of 21 years should also be joined with him as executors. Johannes George Bagram, in August 1862, applied for and obtained probate of the testator's will and paid the only fee

* Financial Notification, No. 2623, *Gazette of India*, 26*th April* 1874, Part I, p. 264.

In exercise of the power conferred by s. 35 of the Court Fees Act of 1870, the Governor-General in Council is pleased to make the following reduction and remission :—

(*a*) Whenever a grant of probate or letters of administration shall have been made in respect of any property forming part of an estate, the amount of fees then actually paid under the said Act shall be deducted when a like grant is made in respect of property belonging to the same estate identical with or including the property to which the former grant relates.

(*b*) Whenever a grant of probate or letters of administration shall have been made in respect of any property belonging to an estate, no fees shall be chargeable under the said Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate.

(*c*) This notification applies to the whole of British India.