

Before Mr. Justice Rampini and Mr. Justice Sale.

SONARAM DASS (1ST DEFENDANT) *v.* MOHIRAM DASS AND OTHERS
(PLAINTIFFS).^o

1900
Nov. 28.

Decree—Sale in execution of—Saleable interest of the judgment-debtor—Small Cause Court—Jurisdiction of, in suits to set aside sale—Provincial Small Cause Courts' Act (IX of 1887), Sch. II, Art. 21—Rights of a purchaser at an execution sale.

A suit to set aside a sale either in whole or in part is not a suit of a Small Cause Court nature, but is one excluded from the jurisdiction of the Small Cause Court by Art. 21 of Sch. II of Act IX of 1887.

Prasanna Kumar Khan v. Uma Churn Hazra (1) distinguished.

When the judgment-debtor has a saleable interest, however small, the purchaser at an execution sale purchases at his own risk and there being no warranty that the property will answer to the description given of it, the purchaser is entitled to no relief, if the property does not correspond to the description.

Sundara Gopalan v. Venkatavaradar Ayyangar (2) followed.

ONE Kali Charan Sen obtained a decree for a sum of money against the father of the defendant No. 2, and sold the decree to the defendant No. 1. In execution of that decree some land was attached and sold by the Court which was purchased by the plaintiff for Rs. 215. The defendant No. 3 brought a suit claiming some of the land that had been sold, and obtained a decree declaring that only 13½ lessas out of the 4 kattas and 1 lessa, which was put up for sale and purchased by the plaintiff, belonged to the father of the defendant No. 2, and that was all that the plaintiff had purchased at the execution sale. The plaintiff then brought a suit to have the sale set aside and the purchase-money returned to him. The first Court held that as the judgment-debtor had a saleable interest in the property sold, however small, the plaintiff could get no relief. On appeal the Judge reversed the

^o Appeal from Appellate Decree No. 1089 of 1898 against the decree of H. Maxwell, Esq., District Judge of Assam Valley Districts, dated the 19th of March 1898, reversing the decree of Babu Krishna Chandra Chowdhry, Extra Assistant Commissioner and Munsif of Gauhati, dated the 21st of September 1897.

(1) (1896) 1 C. W. N., 140.

(2) (1893) L. L. R., 17 Mad., 228.

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decision of the first Court and remanded the case "to calculate what sum should be deducted from the sum of Rs. 215 as the value of the 13½ lessas sold to the plaintiff, and to issue a decree accordingly without interest." The defendant No. 1 appealed to the High Court.

Babu Hem Chunder Mitter for the appellant.

Babu Amarendro Nath Chatterji and *Babu Brojolal Chakrabarti* for the respondent.

1900, Nov. 28. The judgment of the High Court (RAMPINI and SALE, JJ.) is as follows :—

This is a suit brought by the plaintiff to recover a sum of Rs. 215 which he paid for the purchase of a certain parcel of land, or, in the alternative for the return of such portion of this sum as may be proportionate to the extent to which he alleges the consideration had failed. It appears that there was one Kali Charan Sen, who obtained a decree against the father of the defendant No. 2. This decree was sold to the defendant No. 1, who applied for execution, and a certain property was sold in execution of that decree, which the plaintiff purchased for Rs. 215. The property was advertized as being 4 kattas and 1 lessa in extent, whereas in the course of a suit subsequently brought by a third person, it was established that only 13½ lessas belonged to the judgment-debtor and that was all that the plaintiff had purchased at the execution sale.

The plaintiff now sues to have the sale set aside and the purchase-money returned to him.

The first Court held that as there had not been a total failure of consideration, the plaintiff was not entitled to any relief, holding that there was no warranty of title, that the sale passed to the plaintiff the right, title and interest of the judgment-debtor, and that, although the right, title and interest of the judgment-debtor was less than what the plaintiff thought he was purchasing, still as the judgment-debtor had a saleable interest in the property, however small, the plaintiff could get no relief.

On appeal to the Judge of the Assam Valley Districts, that officer reversed the decision of the First Court and remanded the case to the Munsif "to calculate what sum should be deducted

from the sum of Rs. 215 as the value of the 13½ lessas sold to the plaintiff, and to issue a decree accordingly without interest."

An appeal has now been preferred to us by the principal defendant in this suit, and it is contended that the view of the Judge of the Assam Valley Districts is incorrect and that that of the Munsif is right.

A preliminary objection has been taken that no second appeal lies, inasmuch as the suit is one of a Small Cause Court nature and for an amount less than Rs. 500, and our attention has been directed to the case of *Prasanna Kumar Khan v. Uma Churn Hazra* (1). That case might, at first sight, appear in favour of the preliminary objection raised before us. But we are of opinion that this suit is not of a Small Cause Court nature, but is one excluded from the jurisdiction of the Small Cause Court by Art. 21 of Sch. II of Act IX of 1887, being a suit to set aside a sale either in whole or in part. The above case seems to be clearly distinguishable from the present one, as that was a case in which there had been a total failure of consideration, the judgment-debtor having been found to have no saleable interest therein. That was a case, therefore, in which it might be said that there was no sale at all, and in which the sale was a nullity and for that reason the plaintiff in that case was probably held entitled to recover the purchase-money. That case is not on all fours with the present, in which it is clear that the judgment-debtor had a saleable interest in the property. Therefore, the preliminary objection must fail.

Coming now to the merits of the case we think that there is no question that the view of the Judge is incorrect, and that the view of the Munsif is right. It appears to us that the rulings, as they go, point to the conclusion that when there is a total failure of consideration and the judgment-debtor has no saleable interest whatever in the property, the sale can be set aside and the purchaser can get a refund of his purchase-money. But when the judgment-debtor has a saleable interest, however small, the purchaser purchases at his own risk and there is no warranty that the property will answer to the description given of

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it. Therefore, it appears to us that the plaintiff is entitled to no relief in this case. That is the rule of law laid down in the case of *Sundura Gopalan v. Venkatarada Ayyangar* (1); and, so far as we can see, there is no ruling to the contrary effect.

For these reasons we must decree this appeal, and setting aside the decree of the lower Appellate Court we must restore that of the Munsif, which we accordingly do with costs in all the Courts.

S. C. B.

Before Mr. Justice Prinsep and Mr. Justice Hill.

1900
Dec. 5.

JAHAR (JUDGMENT-DEBTOR) v. KAMINI DEBI (WIFE OF NANDA KUMAR JHA) (DECREE-HOLDER).²

Decree—Execution of—Transfer of decree for execution—Court which passes the decree—Transfer of local jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 223 and s. 649—Limitation Act (XV of 1877), s. 14—Bona-fide proceeding.

The provisions of s. 649 of the Civil Procedure Code are permissive, and after a Court has passed a decree, the local jurisdiction in respect of the subject matter of the suit is transferred by an order of the Local Government to some other Court, the application for execution of the decree may be made either to the Court which passed the decree or to the Court to which the local jurisdiction has been transferred.

Lutchman Pandeh v. Madan Mohan Shye (2) followed. *Kutip Mukerjee v. Din Nath Mukerjee* (3) distinguished.

A proceeding to enforce a decree taken in a Court which was erroneously believed by the decree-holder to have jurisdiction is a *bona-fide* proceeding within the terms of s. 14 of the Limitation Act (XV of 1877).

Hiralal v. Budri Dass (4) followed.

A MORTGAGE DECREE was passed on the 10th of January 1899 in respect of certain immoveable property which at the date of the decree was situated in Thana Kuliachulk within the limits of the District of Malda.

Appeal from Order No. 119 of 1900, against the order of Alfred F. Steinberg, Esquire, District Judge of Malda, dated the 15th of December 1899, affirming the order of Babu Judub Chunder Bhattacharjee, Munsif of that District, dated the 3rd of July 1899.

(1) (1893) I. L. R., 17 Mad., 228.

(2) (1880) I. L. R., 6 Cal., 513.

(3) (1897) I. L. R., 25 Cal., 315.

(4) (1880) I. L. R., 2 All., 792; I. L. R., 7 I. A., 167.