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Special Appeal No. 343 *of* 1870.

NA'THA' HARI.....*Appellant.*
JAMNI, widow of Válya .....*Respondent.*

Hindú Law—Hindú Widow's Right as Representative of her Husband —Civ. Proc. Code, Secs. 104, 203, 210, 249, *and* 259—*Rights of a* bonâ fide *Purchaser without notice at an Execution-Sale—Liability of a Legal Representative.*

Where a Hindú died leaving a childless widow and a separated brother:

It was held that, until a legal representative is appointed to the deceased's estate, his widow is the only person who can defend a suit as his representative; and that while a decree obtained against the widow will enable a creditor to attach and sell, not only the widow's life-estate in the immoveable property, but also the reversionary estate of the remainderman, yet a decree obtained against the remainderman will not enable the creditor to touch the estate in the hands of the widow.

When a decree has been obtained against A in his life-time, and A dies before execution, A's estate is properly described in the proceedings in execution as the estate of A (Sec. 210, Code of Civil Procedure); and in the certificate of sale the purchaser is properly declared to have purchased the right, title, and interest of A in the property sold; but this procedure is improper in cases in which the debtor dies before or pending the suit, and the suit is brought or continued against his representative. In such cases the representative, and not the deceased person, is the defendant (Secs. 104 and 203); and in the notification of sale (Sec. 249) and in the certificate of sale (Sec. 259) it ought to be set forth that what is sold is the right, title, and interest of the representative on the record.

A *bonâ fide* purchaser without notice for valuable consideration at an auction-sale is, as a general rule, entitled to protection, notwithstanding any irregularity or defect in the proceedings or decree in the suit. But when the decree is against the representative of a deceased person, the purchaser is bound to satisfy himself that the party sued as the representative of the deceased is his legal representative.

The legal representative of a deceased person, though not a party to the suit, will be bound by the execution-sale, if he either knowingly allowed the suit to be defended by another person claiming to be the legal representative, or if, knowing of the sale, he stood by and allowed the purchaser to pay in the belief that he acquired a good title.

Edalji Hormasji et al. v. *Máhábu Begum,* Special Appeal No. 266 of 1869, considered.

THIS was a special appeal from the decision of C. G. Kemball, Judge of the District of Súrat, in Appeal Suit No. 10 of 1870, confirming the decree of Davlatrái Samptrái, Subordinate Judge of Balsád.

The special appeal was heard before GIBBS and MELVILL, JJ.

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Nánábhái Haridás, for the special appellant:—The appellant is a purchaser at a court's sale, and cannot be ousted by any irregularities of the suit under the decree of which the sale took place: *Edalji Hormasji and Lakhmidás* v. *Máhábu Begum*, Special Appeal 266 of 1869, decided on the 21st of September 1869; *Jugal Kishor Banerjee* v. *Abhaya Charan Sarma* (*a*), *Jan Ali* v. *Jan Ali Chowdhry* (*b*), and *Fyazooddeen Bhooya* v. *Shumsunissa Beebee* (*c*).

Dhirajlál Mathurádás, Government Pleader, for the special respondent, cited and relied upon *Abdool Hye* v. *Nawab Ráj* (*d*), *Shurfun Beebee* v. *Collector of Sarun* (*e*), *Ráyasangji Mádhavasangji et al.* v. *The Executors of Dáyábhái* (*f*), and Dart's Vendors and Purchasers, pp. 1092 and 1094.

The following authorities were also referred to: *Gopey mohun Thakoor* v. *Sebin Cower* (*g*), *Chunder Kant Surmah and another* v. *Bissesur Surmah Chuckerbutty* (*h*), and Story's Eq. Jur., para. 385.

Cur. adv. vult.

April 5. MELVILL, J.:—The plaintiff in this suit is a purchaser at an execution-sale under a decree obtained against the estate of Vályá, deceased, who was represented in the suit by his brother Lakhmá. The defendant is the widow of Vályá, and she resists the delivery of possession, on the ground that she, and not Lakhmá, is the legal representative of the deceased, and should have been a party to the suit.

The District Court has found that Vályá and Lakhmá were separated brothers, from which it follows that Vályá's widow is his heir. As such it must be held that (a certificate of administration not having been granted to any one else) she is the sole legal representative of the deceased, notwithstanding that the brother, as reversioner, may be equally interested in the administration of the deceased's estate, and

(*a*) 1 Beng. L. Rep., A. C. J. 84. (*b*) 10 Calc. W. Rep., Civ. R. 154.
(*c*) 12 *Ibid.* 508.
(*d*) 9 Calc. W. Rep., Civ. R. 196. (*e*) 10 *Ibid.* 199.
(*f*) 3 Bom. H. C. Rep., A. C. J. 196.
(*g*) 2 Mor. Dig. 105.
(*h*) 7 Calc. W. Rep., Civ. R. 312.

especially in resisting the claims of creditors. "In the case of Hindús," says Sir Edward Hyde East (Notes of Decided Cases, Morley's Digest, Vol. II., p. 111), "the real and personal estate going to the same person, there is no occasion for the mortgage-creditor (or other creditor, according to the nature of the debt) to look to different representatives of his deceased debtor: and if there be no reason for doing so, from the different funds, real and personal, being in different hands, general convenience will be better consulted by preserving the unity of responsibility. Now, not only are the real and personal funds in the same hands, namely, of the widow, in case there be no son, but by the same law she may be sued for any debt of her deceased husband, and, after judgment recovered, execution would go equally against his lands in her hands, as against his personal property. It is, moreover, her duty to pay off the mortgage-debt, as well as all other debts of her husband, provided there are assets, either real or personal: and if she alone may sell, why may not she alone be sued?"

We must hold that, so long as no legal administrator has been appointed, the childless widow of a separated Hindú is the only person who can defend a suit as his representative; and that, while a decree obtained against the widow will enable a creditor to attach and sell not only the widow's life-estate in the immoveable property, but also the reversionary estate of the remainderman, yet a decree obtained against the remainderman will not enable the creditor to touch the estate in the hands of the widow.

But it is contended for the plaintiff that, inasmuch as no fraud or collusion is alleged, either in respect of the suit or the sale under the decree, the plaintiff, as a *bonâ fide* purchaser without notice for valuable consideration, is entitled to protection, notwithstanding any irregularity or defect in the proceedings or decree in the suit. The decision in Special Appeal No. 266 of 1869 is relied on in support of this contention. That was a suit between the purchaser at a sale in execution of a decree obtained against the widow of a Muhammadan, as her husband's representative, and another

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sharer or residuary, who sought to recover his share from the purchaser, on the ground that he had not been made a party to the suit. It is scarcely necessary to observe that the widow of a Muhammadan, when there are other sharers and residuaries, occupies a very different position from that of the childless widow of a separated Hindú, and it would be difficult to hold that the Muhammadan widow, not having taken out a certificate of administration, would, under such circumstances, be the sole legal representative of her husband. That question was not gone into in the case referred to; but it was decided that, whether or not the widow was the sole legal representative of the deceased, the purchaser had acquired a good title by virtue of the certificate granted under Sec. 259 of Act VIII. of 1859.

In that appeal the point was not argued; and, though there was an application for review of judgment, the general correctness of the view adopted by the court was not questioned. But, after hearing the arguments in the present case, we are of opinion that the former decision of the court cannot be supported to its full extent. It is undoubtedly desirable that innocent purchasers at court-sales should be protected, and that they should not be required to go behind the decree in order to satisfy themselves of the regularity of the proceedings in the suit. In *Jan Ali* v. *Jan Ali Chowdry* (*i*) it was held that the sale to A under a decree obtained against B was binding against B, notwithstanding that the decree was obtained *ex parte*, notwithstanding that B had never had any knowledge of the *ex parte* proceedings taken out against him until after the sale, and notwithstanding that the decree had been set aside in review. Several authorities bearing on the point are referred to by Sir Barnes Peacock in that case, and by Mr. Justice Norman in *Chunder Kant Surmah and another* v. *Bissesur Surmah Chuckerbutty* (*j*). It may undoubtedly be laid down as a general rule that a *bonâ fide* purchaser shall not lose the benefit of his purchase by any irregularity of the proceedings in a cause;

(i) 1 Beng L. Rep., A. C. J. 56; S. C. 10 Calc. W. R., Civ. R. 154.
(j) 7 Calc. W. Rep., Civ. R. 312.

Lloyd v. *Johnes* (*k*) ; *Curtis* v. *Price* (*l*). But though this rule applies when the person whose property is sold has been a party to the suit (even though he may have been ignorant of the existence of the suit until after the sale), yet we do not find any sufficient authority for holding that a purchaser is not bound to satisfy himself that the party sued as the representative of a deceased person was really his legal representative, or that, if it turn out to be otherwise, the purchaser is entitled to be protected.

It is quite true that in the present case (and this appears to be the ordinary practice of the Mofussil courts) the property was advertised and sold as the property of the deceased Vályá; and the certificate of sale sets forth that the plaintiff has purchased the right, title, and interest of Vályá in the property sold. At first sight it would appear that, under the provisions of Sec. 259 of Act VIII. of 1859, such certificate must be taken and deemed to be a valid transfer of Vályá's right, title, and interest. But it seems to us that although, when a decree has been obtained against A in his lifetime, and A dies before execution, A's estate is properly described in the proceedings in execution as the estate of A (Sec. 210), and in the certificate of sale the purchaser is properly declared to have purchased the right, title, and interest of A in the property sold, this procedure is improper in cases in which the debtor dies before or pending the suit, and the suit is brought or continued against his representative. In such cases the representative, and not the deceased person, is the defendant (Secs. 104 and 203), and in the notification of sale (Sec. 249) and in the certificate of sale (Sec. 259) it ought to be set forth that what is sold is the right, title, and interest of the representative on the record, and not that of the deceased person. As the whole estate of the deceased vests in his legal representative, the purchaser would be safe (notwithstanding any irregularities in the suit) if the representative on the record were really the legal representative; but on this point he would be bound

(*k*) 9 Ves. 37.
(*l*) 12 Ves. 89.

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to satisfy himself, and must take the consequences if it turned out to be otherwise.

Are we then at once to set aside this sale, and without any compensation to the plaintiff? We are very unwilling to do so in the absence of all allegation of fraud or collusion by the plaintiff. It is clear that, in cases of this kind, there is great room for fraud on the part of those who are, or claim to be, the representatives of a deceased person. Among Hindús the right of inheritance depends not only upon degrees of relationship (a matter in regard to which a creditor or intending purchaser might easily satisfy himself), but also upon circumstances of union or partition. Whether a family is in a state of union or partition is a question which our courts often find it very difficult to determine, even though the parties to the inquiry are members of the family, who have all the evidence at their disposal, and whose interest it is to bring all the evidence before the court. How difficult must it be for a creditor to ascertain who is the representative of a deceased Hindú, especially if the members of the family are in league to deceive him. How much more difficult must it be for an intending purchaser, who may be supposed to have even less acquaintance with the circumstances of the family than the creditor who has had dealings with them. What is to prevent the brother of a deceased Hindú from defending a suit, as being an undivided brother and representative of the deceased, and then, if judgment go against him, from combining with the widow to prove that there has been a separation, and that the sale under the decree is void, although the estate of the deceased has had the benefit of it by the payment of the debt due to the judgment-creditor? We do not say that it is so in the present case; but, before we set aside the sale, we are bound to satisfy ourselves that it is not so. And, even if there be no fraud, there still remains the question whether, if the debt for which the property was sold be really due, the widow is in equity entitled both to hold the property free from the sale, and to have the benefit of the sale which has discharged the debt.

We are not in sufficient possession of the facts to enable us to decide these questions, and we must remand the case in order that they may be determined. We think that Lakhmá, who acted as Vályá's representative in the former suit, must be made a defendant in this action; and as to the law bearing on the case, we make the following observations, which, together with what has been already said, may help to guide the lower courts to the issues which should be laid down, and the principles on which they should be determined.

If Lakhmá intermeddled in the suit with the defendant Jamni's knowledge and consent (and it is difficult to understand why he should have intermeddled in such a matter without her knowledge and consent), then we think that in equity she will be bound by the decree and the sale. Or, again, if Jamni knew of the attachment and sale of the property (and it is difficult to believe that she could have been ignorant of it), and took none of the measures which the law provides for raising an attachment and preventing a sale, then we think that she cannot now dispute the sale. Mr. Justice Story says (Equity Jurisprudence, Vol. I., § 385): "If a man, having a title to an estate which is offered for sale, and, knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, under the supposition that the title is good, the former, so standing by, and being silent, will be bound by the sale, and neither he nor his privies will be at liberty to dispute the validity of the purchase." If it be found that Jamni did not put forward Lakhmá to defend the suit, and did not know of the attachment and sale, then we think that the plaintiff should be allowed an opportunity of proving, as against Jamni, that the debt for which the decree was passed was really due. If the debt was really due by Vályá, it was Jamni's duty, as Vályá's representative, to pay it, and Vályá's estate in her hands was liable to be sold for it. She has had the benefit of the sale by the payment of the debt, and cannot in equity avoid the sale and at the same time retain the benefit of it.

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Under the circumstances last supposed, the sale should only be set aside on condition that Jamni pay to the plaintiff within a limited time, if not the entire purchase-money, at least the amount which she ought to have paid to her husband's creditor, the decree-holder.

Decree reversed and case remanded.

April 17.

Miscellaneous Special Appeal No. 36 *of* 1870.

KESHAVRA'M valad HIRA'CHAND *et al.* ...*Appellants.*
RA'MCHANDRA TRIMBAK *et al.* .....*Respondents.*

Ex parte *Judgment—Setting aside* ex parte *Judgment—Time for making Application—Process for enforcing Judgment—Appeal—Civ. Proc. Code, Sec.* 119.

A Judge has no jurisdiction to grant an application, made by a defendant against whom an *ex parte* judgment has been passed, to set aside the judgment after the expiration of the thirty days allowed, by Sec. 119 of the Code of Civil Procedure, for making such applications.

Such an application must be made within thirty days after the *first* process for enforcing the judgment against such defendant has been executed.

Though an order passed for setting aside a judgment is, on the merits of the application, final, yet where a Civil Court makes an order setting aside an *ex parte* judgment on an application presented after the period allowed by law has elapsed, an appeal against that order will lie, on the ground that it has been made without jurisdiction.

THIS was a special appeal from the decision of A. Bosanquet, Acting District Judge at Ahmednagar, in Appeal Suit No. 145 of 1870, confirming the decision of the Subordinate Judge of Nivásá.

The plaintiffs, Keshavrám and Maganrám, on the 22nd of June 1868, obtained, in the Court of the Subordinate Judge of Karád, a decree against the defendants, Rámchandra and Náráyaṇ, directing that the land the subject-matter of the suit (which had been mortgaged to the plaintiffs) should be delivered into their possession, and that the defendants should be at liberty to redeem it within a year from the date of the decree, on payment of Rs. 1,600 with interest.