1872.
May 23.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 42 of 1870.

KA'LU bin VISA'JI .....*Appellant.*

DA'MODHAR GOVIND .....*Respondent.*

Execution—Sale in Execution of decree—Property wrongfully sold—Refund of purchase money by execution creditor—Execution creditor liable in damages to true owner for wrongful sale—Civ. Pro. Code. Secs. 256—258.

Notwithstanding the *dicta* in the case of the *Bank of Hindustan* v. *Premchand Ráichand* (*a*), it must now be considered as settled law that a purchaser at a Court's sale (except in cases in which such sale is set aside for irregularity under Section 257 of the Code of Civil Procedure) is not entitled to a refund of his purchase money from the execution creditor in cases in which it turns out that the judgment debtor had no right, title or interest in the property sold as his.

Cases which decide that a person whose property has been wrongfully seized by the Court, or wrongfully seized and sold at a Court's sale, as that of the judgment debtor, is entitled to recover damages from the execution creditor, at whose instigation the property has been so seized or so seized and sold, reviewed.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Sátára, in Appeal No. 260 of 1865, affirming the decree of Krishnaráv Vithal Vinchurkar, First Class Subordinate Judge in that district.

Kálu bin Visáji, who had obtained a decree against one Ganesh Gopál, attached and sold in execution of his decree five out of seven *khans* (compartments) of a house, as the property of his judgment debtor. Hiráchand purchased the five *khans* at the Court's sale, and the same were by the Court given into his possession. Dámodhar Govind then brought a suit against Kálu and Hiráchand to recover possession of $2\frac{1}{2}$ of these 5 *khans*, so purchased by Hiráchand, alleging that he (Dámodhar) had been a joint owner of the property with Ganesh Gopál. The plaint did not contain an express claim for damages against either of the defendants. The Subordinate Judge, at first, threw out the plaintiff's claim, considering that he had failed to prove his title. On appeal, the District Judge reversed that decree, and remanded the

(*a*) 5 Bom. H. C. Rep. O.C.J. 83, 92 and 93.

case for the Court of first instance to try whether the whole house or only a part of it had belonged to Kálu's judgment debtor, Ganesh Gopál. The Court on remand found that Dámodhar was entitled to the 2½ *khans* as claimed by him, and gave Dámodhar a decree for Rs. 195, being half of the amount for which the said five *khans* had been sold. The decree was given against Kálu, but the suit against Hirá-chand was dismissed. On appeal, the District Court confirmed the decree passed by the Subordinate Judge.

The District Judge, after raising the issue whether a decree had properly been given against Kálu, said:—"In the former minute in this case, I was of opinion that Kálu, who caused all the property to be sold as his debtor's, was liable for so doing, and I am still of the same opinion. I am now referred to Special Appeal No. 46 of 1867, as an authority for holding that the purchaser at the sale took on himself any risk as to the title of the judgment debtor, and that if a man bought property at auction as that of a certain person, he had no remedy against the execution creditor, if it turned out that the property sold and bought was *not* the debtor's. But this is not the point here. The person who purchased the property is not here the plaintiff, seeking for compensation for loss on account of wrongful representation as to the ownership of the property sold, but the person whose property was sold under a false intimation that it was the property of a judgment debtor. In the judgment of the High Court in this case, No. 46 of 1867 (High Court Reports, Vol. IV page 118), Mr. Justice Tucker says: 'It has been held in Special Appeal No. 417 of 1861, and cases 2 and 3 of 1866, that a person, whose property has been wrongfully sold in execution of a decree passed against some other person, can recover damages against the execution creditor for any loss which he may have suffered in consequence of the act of the latter in attaching and selling property which did not belong to his judgment debtor, and, I think, there can be no question of the soundness of these decisions.' The present case is just such a one as that set up in these remarks of Mr. Justice

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Tucker. Kálu sold the property as Ganesh's which, in reality, was Dámodhar's, and of course, Dámodhar can claim damages from Kálu for putting up for sale what was not his debtor's. * * * The attachment by Kálu was most reckless and he should be made responsible. The cost of the half house sold has been fixed by the Subordinate Judge as Rs. 195, or half the sum realized at auction for the whole house. This award under the circumstances seems fair and its amount is not objected to. So on the whole question, I must decide to confirm the decree of the Subordinate Judge with all costs."

The appeal was argued before Westropp, C.J., and West, J., on the 18th August 1871.

Bhairavnáth Mangesh for the appellant.

Shántárám Náráyan, contra.

Cur. adv. vult.

WESTROPP, C.J.:—This suit, filed in 1863 in the Court of first instance by the plaintiff, Dámodhar Govindbhat, and in which there have been two appeals to the District Judge, comes before this Court on special appeal under unsatisfactory circumstances. The plaint expressly seeks to recover a house alleged to have consisted originally of seven *khans*, or more properly to recover the plaintiff's share in it. Of that house, he avers five *khans* to have been sold at the instance of the first defendant, Kálu Visáji, in a suit brought by him against his debtor, Ganesh Gopál, who had only a limited interest therein (not exceeding apparently one third, whereas upwards of two thirds had, under the sale in Kálu's suit, passed into the possession of the second defendant, Hiráchand, who became the purchaser at that sale). Both of the lower Courts considered the plaintiff to have established his title as a joint owner of the house. And on the second trial the Principal Ṣadr Ámín made a decree against Hiráchand, the purchaser, but in favour of Kálu Visáji, the execution creditor.

The District Judge, being of opinion that Hiráchand was not liable to this suit, and that Kálu was liable, remanded the

cause in 1868 a second time for retrial. So far as regards Hiráchand, if he were in possession of the premises at the time of filing this suit, the ruling of the District Judge was erroneous. As owner of a share in the house, the plaintiff was certainly entitled to pursue it into the hands of a purchaser albeit for valuable consideration, and if Hari Ghátak, *after the institution of this suit*, purchased and took over the house from Hiráchand, his (Hari Ghátak's) claim to possession was not entitled to be treated with any ceremony: Sec. 223, Civil Procedure Code. The decree which bound Hiráchand would bind him also: *Trye* v. *Earl of Aldborough* (*b*).

It may be that if the plaintiff had obtained a decree (as he ought to have, if Hiráchand had not parted with his interest before the commencement of this suit) against Hiráchand, and recovered the share in the house to which he (the plaintiff) was entitled, he might also have recovered damages against Kálu in respect of any detriment occasioned to the house by the attachment and sale thereof. As to this point, however, I do not purpose, on the present occasion, to give any positive opinion.

If Hiráchand, or Hari Ghátak, had pulled down the house (as has been alleged of the latter), either of them, so acting, would have rendered himself subject to an action for damages, which, in England, would be in form an action of trespass.

On the retrial which took place after the second remand, the Subordinate Judge found that the plaintiff was owner of one half of the house of which the whole had been sold, (by this I understand that he found the plaintiff to be owner of $2\frac{1}{2}$ of the five *khans* sold as the property of Ganesh Gopál). He valued the plaintiff's share at Rs. 195, and made a decree for that amount with costs against Kálu Visáji, and dismissed the suit as against Hiráchand with costs as against the plaintiff.

In so doing, the Subordinate Judge acted in conformity with the opinion of the District Judge, but erroneously, so far at least as regarded Hiráchand.

(*b*) 1 Irish Chan. Rep. 666.

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The plaintiff, being probably satisfied with a decree against Kálu Visáji, has not appealed against the dismissal of suit so far as it concerned Hiráchand.

Kálu alone appealed against the decree to the District Judge, who affirmed it with costs, referring to a passage in the judgment of Tucker J., in *Dhondu* v. *Rámji* (*c*).

Kálu has specially appealed to this Court. The special appeal was heard by West J. and myself. Before judgment could be given, my learned colleague had retired from the Bench. I regret extremely that I have not now his able assistance in disposing of the case.

As to the first and second objections made by the defendant, Kálu, to the decree, it is to be observed that he did not make either of those objections (although the ground for them both then existed) in his appeal to the District Judge; they also are formal objections which, having been once passed over by the appellant, the Court now declines to entertain. Moreover as to the first of them, although it is the fact that the plaintiff did not, *in totidem verbis*, ask by his plaint for damages against Kálu, in the event of the plaintiff's failing as against Hiráchand, or of his recovering the mortgaged premises from Hiráchand in an injured state, and so being entitled to proceed against Kálu in respect of that injury, yet it is difficult to say for what purpose he made Kálu a party, defendant, to the suit, if it were not to make him responsible for damages. He was not holding the land nor claiming any interest in it; there, therefore, was not any necessity for making him a party in order to recover the land itself.

The remaining points amount to this, that an action will not lie against an execution creditor, when property not that of the judgment debtor has been seized or sold in execution of the decree against the latter—a point of some nicety, and as to which a good deal may be said on both sides.

Notwithstanding what is said in 5 Bom. H. C. Rep. O. C. J., 83, 92, 96, as to the propriety of making the execu-

(*c*) 4 Bom. H. C. Rep. A.C.J. 118.

tion creditor a party to a suit brought by the owner against the purchaser of property at a judicial sale, and as to the scope of Sec. 258 of the Civil Procedure Code, it must now be considered as settled that, except where the sale has been set aside for irregularity under Sec. 257, the purchaser would not be entitled to a refund of his purchase money, although it might turn out that the judgment debtor had no right, title or interest in the property, and consequently that the purchaser had not taken anything by his purchase: *Dhondu* v. *Rámji* (*d*); *Krishnápá* v. *Panchápá* (*e*); *Sowdamini* v. *Krishna* (*f*); *Sheikh Mahomed* v. *Sheikh Abdulla* (*g*); *Mohanund* v. *Akial Mehaldar* (*h*). Those decisions rest upon the rule *caveat emptor*.

It does not, however, thence follow that a person whose property has been wrongfully seized and sold, or seized alone, has not a remedy against the execution creditor, who put the Court and its process in motion to effect such seizure or sale. In England and in the Island of Bombay, no doubt the usual course is for the injured person to sue the Sheriff, but in the Mofussil I have never heard of such a suit being brought against the Názir or other Court officer. There are two unreported cases in this Court, Special Appeal No. 417 of 1861, *Gosái Náná* v. *Lálbhái Náranji*, decided by Hebbert and Newton JJ. in 1863, and Special Appeal No. 3 of 1866, *Káshináth Ballál* v. *Jetu bin Kálu*, decided by TUCKER and GIBBS, JJ., in 1866, in which the execution creditors were held liable.* There are some cases unfavourable to the liability of the execution creditor:—*Rajbullub Gope* v. *Issan Chunder Hujrah* (*i*) [see also *Walker* v. *Olding* (*j*); *Woollen* v. *Wright* (*k*); *Cranshaw* v. *Chapman* (*l*); *Wilson* v. *Tumman* (*m*);] *Jan-*

* [*Note.*—A later decision to the same effect is that in *Dámodhar Tuljárám* v. *Lallá Khusáldás* 8 Bom. H. C. Rep. A. C. J. 177.—Ed.]

(*d*) 4 Bom. H. C. Rep. A. C. J. 114. (*e*) 6 *Ibid* 258, 262.
(*f*) 4 Beng. L. R. F. B., 11. (*g*) *Ibid* Appx. 35.
(*h*) 9 Calc. W. Rep. Civ. R. 118. (*i*) 7 Calc. W. Rep. Civ. R. 355.
(*j*) 1 H. & C. 621, S. C. 32 L.J. Exch. 142.
(*k*) 1 H. & C. 554 S.C. 31 L.J. Exch. 513.
(*l*) 10 W. Rep. 323 Exch. (*m*) 6 M. & Gr. 236.

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nanddin v. *Nyanatalla* (*n*). But it has twice lately been held in Calcutta that an action will lie against the execution creditor: *Mt. Subjan Bibi* v. *Sheikh Sariatulla* (*o*) by NORMAN and E. JACKSON JJ., and *Kanai Prasad Bose* v. *Hirachand Manu* (*p*). I am not prepared to say that those cases have been wrongly decided, although it is true that all that is sold is the right, title and interest of the judgment debtor, and, even if I had some misgivings with respect to them, I should hesitate, when sitting alone, to overrule those decisions. They derive much support from *Jarmain* v. *Hooper* (*q*). I may also mention *Walley* v. *M'Connell* (*r*) as involving the same principle, and *Humphrys* v. *Pratt* (*s*) where a Sheriff, upon the representation of the plaintiff in a suit, having seized goods under a *fiere facia* as belonging to the defendant, and damages having been recovered against the Sheriff by a third person claiming the goods, it was held that an action lies at the suit of the Sheriff for a false representation. In *Mohundass* v. *Gokuldass* (*t*) the execution creditor was held liable, but the process sued out by him was irregular.

The decree of the District Judge must be affirmed with costs.

(*n*) 5 Beng. L. Rep. Appx. p. 73, *in notis*.
(*o*) 3 Beng. L. Rep. A.J. 413. (*p*) 5 Beng. L. Rep. Appx. 71.
(*q*) 6 M. & Gr. 827. (*r*) 13 Q. B. 903.
(*s*) 5 Bligh N.S. 154. (*t*) Calc. W. Rep. P.C. 91.