

does not render him liable to an additional punishment for it. Such a case seems to be contemplated by Section 454 of the Criminal Procedure Code, paragraph II. It is a general rule that when, in the same penal statute, there are two clauses applicable to the same act of an accused, the punishments are not to be regarded as cumulative, unless it be so expressly provided. The rule of only a single penalty for a single offence under the same law was distinctly recognised by the Roman Law (Pothier Pand Lib. XLVIII. Tit. XIX. 59, Dig. fr. 41) and has been followed in many cases under the English law (a). The observation of LUSH, J., in *Berry v. Henderson* (b), implies that separate penal provisions in the same enactment are not to be understood as cumulative, unless it be so provided. While, therefore, we sustain the conviction on the graver of the two charges—the one under Section 436—we must reverse the conviction and sentence on the minor one under Section 435.

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[APPELLATE CIVIL JURISDICTION.]

*Miscellaneous Regular Appeal No. 3 of 1873.*January 9.

KRISHNARA'V VENKATESHAppellant.

VA'SUDEV ANANT..... Respondent.

Act VIII. of 1859, Section 256—Meaning of term "Applicant"—Jurisdiction—Attaching creditor—Appeal to High Court—Amount.

A puisne attaching judgment-creditor for a sum under Rs. 5,000 applied to a Subordinate Judge, under Sec. 256 of the Civil Procedure Code, to have a sale, made in a suit brought in his Court by a senior attaching judgment-creditor, for a sum above Rs. 5,000, set aside. The application was refused on the ground of want of jurisdiction, as the applicant was not a party to the suit; and the sale was accordingly confirmed.

On regular appeal to the High Court:—

Held that the term "applicant" in Sec. 256 is not confined to the parties to the suit, but also includes any person who has sustained substantial injury by reason of any material irregularity in publishing or conducting the sale.

(a) As in *Reg. v. Moodie*, 1 M. & R. 128. (b) L. R. 5 Q. B. 203.

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Held also that, although the applicant was creditor for a sum less than Rs. 5,000, still, as the sale took place in a suit for a sum above Rs. 5,000, an appeal lay to the High Court.

Some of the dicta in *Joge Naráin Singh v. Bhugbano* (2 Calc. W. R. Mis. Rul. 13); *Luchmeput Singh Doorgur v. Mooktakashee Debia* (9. Ibid, Civ. Rul. 388) and *Rae Sitaram v. Balkrishna Tewaree* (1 S. D. A. Rep. 377, N. W. P.) referred to and dissented from.

THIS was a miscellaneous regular appeal from the order, in an execution matter, of Dayarám Mayarám, First Class Subordinate Judge of Belgaum.

Krishnaráv Venkatesh was a puisne attaching creditor, and applied to the Subordinate Civil Court of Belgaum, under Sec. 256 of Act VIII. of 1859, that a sale, made in execution of a decree held by the senior attaching creditor, Vásudev Anant, might be set aside. The Subordinate Judge framed the issue, whether the applicant was entitled to apply under the abovenamed section; he found it against Krishnaráv and rejected his application. He observed—

“I am unable to find any precedent governing this question, and I consider that the applicant is not entitled to make this application. I think the judgment-debtor and the decree-holder are the persons who can come under the category of persons who may sustain loss under a sale which can be disputed under Sec. 256. The applicant is another judgment-creditor of the defendant, and he must be considered a third party. The pleader for the plaintiff, who is the auction purchaser, asks the Court to refer to the notes of Mr. Nelson in his commentaries on the Civil Procedure Code, and I find that that author has expressed the same views (see page 548).”

The appeal was argued before WESTROPP, C.J., and NA'NA'-BHÁ'I HARIDA'S, J., on the 9th January 1874.

Dhirajlal Mathurádás (Government Pleader) for the appellant.

Bhairávnáth Mangesh for the respondent.

WESTROPP, C.J. :—An application was made to the Subordinate Judge by a puisne attaching judgment-creditor for Rs. 3,340 of the judgment-debtor, to have a sale, made in the suit of the senior attaching judgment-creditor for Rs. 5,031-14-0, set aside, under Sec. 256 of Civil Procedure Code, on the ground of serious irregularities: such as conducting the sale at the house of the judgment-debtor instead of at the place at which it was ordered to be made, and excluding intending bidders from the auction; and the sale of the property, alleged to be worth Rs. 2,000 per annum, under those circumstances of irregularity, to the senior attaching judgment-creditor himself for Rs. 1,200 only, a gross undervalue.

The Subordinate Judge held that Sec. 256 only applied to the immediate parties to the suit, in which the sale took place, and, therefore, that he had not jurisdiction. He accordingly refused to enter into a consideration of the merits of the case. The puisne attaching judgment-creditor has appealed to this Court. The respondent's pleader contends: *1stly*, that the appeal lay to the District Judge and not here, the appellant's decree being for a sum under Rs. 5,000; and *2ndly*, that Sec. 256 does not apply to a puisne attaching creditor, he being a third party. As to the first of these objections, we think that it cannot be sustained, inasmuch as the sale, sought to be set aside, took place in a suit for a sum exceeding Rs. 5,000, and as to the second objection, we see nothing in Sec. 256 which does exclude a third party who can show that he has sustained substantial injury, by reason of a material irregularity in publishing or conducting the sale. The word used in that Sec. is the "applicant," not the plaintiff or defendant, or the purchaser. The term "applicant" is a large one. The reason given by LOCH, J., in *Joge Narain Singh v. Bhugbano* (a), for holding that Secs. 256 and 257 apply "not to a third party, but to the judgment-debtor," viz., that he "alone is affected by any irregularity in publishing or con-

(a) 2 Calc. W. R. Misc. Apps. 13.

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ducting the sale," is unsustainable. If that dictum be right, even the judgment-creditor could not complain of an irregularity whereby the property may have been sold for half its value, and he himself left to a great extent unpaid. If there be several puisne attaching judgment-creditors, their claims may be sufficient wholly to exhaust any surplus which may be left after payment of the senior attaching judgment-creditor. In that case, the puisne attaching creditors would be the persons principally interested in an irregularity in conducting the sale. In the Calcutta case, the applicant was a purchaser, and SETON-KARR, J., dissented from the opinion of LOCH, J., and NORMAN, Officiating C.J. The facts in *Lachmeeput Singh Doogur v. Mooktakashee Debia* (b), are inapplicable to such a case as the present, and the dictum of the Court that Sec. 256 applies only to the judgment-debtor, went beyond the actual necessity of the case. The same remark seems to be applicable to the like dictum in *Raj Sita-Ram v. Balkrishna Tewari* 1 S. D. A. Rep. 377, N. W. P. In none of those cases was the right of the puisne attaching judgment-creditors to apply under Sec. 256 so much as mooted. They are (as already observed) often as much as, if not more, interested in the surplus proceeds of the sale (see Sec. 271, Civil Procedure Code) than the judgment-debtor. We see nothing in Sec. 256 or 257 to exclude them. The word "party" in Sec. 257 does not appear to us to be necessarily confined to a party in the suit. It means, as indeed the Sec. in substance says, the person against whom the order has been made. It is quite unnecessary for us to go so far as to say that the two Calcutta cases and the Agra case, which we have mentioned, were incorrectly decided, and we do not express any opinion on that point, but we do not concur in some of the dicta, which accompanied those decisions. We reverse the order of the Subordinate Judge, and direct him to entertain the application of the appellant upon its merits. Costs to follow the final result.