[ORIGINAL CIVIL.]

Before Mr. Justice Green.

FRA'MJI BESANJI DUSTUR (PLAINTIFF) *v.* HORMASJI PESTANJI FRA'MJI (DEFENDANT).

(JAITHA' DEVJI, PURCHASER AND APPLICANT.*)

1877. August 10.

Execution sale of moveable property—Sheriff—Execution-creditor—Warranty—Title—Act VIII. of 1859, *ss.* 212, 249, 252, 256 *to* 258—*Indian Contract Act* (*IX. of* 1872), *s.* 109.

A purchaser of property, whether immoveable or moveable, at a sale in execution of a decree under the Code of Civil Procedure, 1859, held in accordance with the provisions of that Code, has no right to recover his purchase-money, though it may turn out that the right, title, and interest of the execution-debtor was nothing at all, unless the sale itself be set aside, and the sale will not be set aside by reason merely of the defect or absence of title in the thing sold on the part of the execution-debtor; but, if there is an express assertion that the goods sold are the property of the execution-debtor, the Sheriff and the execution-creditor are bound by such warranty, to the extent, at least, that that one of them, in whose hands the purchase-money is, is bound to restore it to the purchaser, if the purchaser has not got that for which he paid.

Section 258 of Act VIII. of 1859 applies wherever a sale is set aside, whether for irregularity in publishing or conducting a sale, or for other grounds; and, though the right of the purchaser to recover back his purchase-money, in case of the sale being set aside, is, by that Act, given expressly only where the sale is of immoveable property, yet the same consequence would follow where a sale of moveable property in execution has been set aside.

Where, therefore, certain shares were attached by the execution-creditor, as the property of the execution-debtor, and were afterwards sold in execution by the sheriff, and the execution orders and warrants and the Sheriff's proclamation of sale contained assertions of interest of the execution-debtor in these shares, whereas he had no such interest,

Held that the purchaser at the execution sale was entitled to have the sale set aside, and his purchase-money returned to him; but the Sheriff's liability to the purchaser in such a case ceases so soon as he has paid over the proceeds of the sale to the execution-creditor, and the purchaser's remedy thereafter is against the execution-creditor only.

Bank of Hindustan v. *Premchand Raichand* (5 Bom. H. C. Rep. 83 O. C. J.) commented upon.

Sheikh Mahomed v. *Sheikh Abdulla* (4 Beng. L. R. Appx. 35) distinguished.

THE applicant, one Jaitha Devji, the purchaser at an execution-sale, obtained a summons in chambers, calling on the execution-creditor at such sale to show cause why the sale should not be set aside and the purchase-money be returned.

* Suit No. 540 of 1876.

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Macpherson, for the applicant.

Inverarity, for the plaintiff.

The facts and arguments are stated, and the authorities cited fully considered, in the following judgment by—

GREEN, J.:—This matter arises on a summons, dated 19th July 1877, issued at the instance of one Jaitha Devji, calling on the plaintiff to show cause why a certain sale by the Sheriff of Bombay on 13th June last to the said Jaitha Devji as purchaser of three shares Nos. 2022, 2096, and 3005, of the New Colaba Company, Limited, should not be set aside and cancelled, and why the sum of Rs. 2,300, paid by the said purchaser to the Sheriff on the said 13th June as purchase-money of the said shares, should not be returned to the purchaser, and why the plaintiff should not pay the said purchaser the costs incurred by him concerning the said sale together with the costs of the application. In the meantime, the Sheriff was directed to retain the said sum of Rs. 2,300 till further order. Though the Sheriff is not a party to that summons, yet the Deputy Sheriff informed me he was aware of the same, but had no intention of showing any cause, and submitted to any order the Court might make.

On 14th November 1876, the plaintiff obtained a decree in this suit against the defendant for Rs. 6,272, with costs when taxed, and further interest. Previously to 15th February 1877 a sum of Rs. 480 was recovered in satisfaction, leaving a balance of Rs. 5,792, with costs and interest, unsatisfied. On the last-mentioned date an order was made, on the plaintiff's application, that the said decree should be executed to the extent of the said balance of Rs. 5,792, with further interest and costs, by the attachment of the shares held by the defendant above named in the New Colaba Company, Limited. In the schedule or application for execution on which this order was made, the mode in which the assistance of the Court was required was thus described—"by attachment of the shares held by the defendant in the New Colaba Company, Limited, in the name of Hormasji Pestanji." Under this order a warrant of the same date was issued for

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attachment under sec. 212 of the Civil Procedure Code, [1] in which the property to be attached is described as "the shares held by the defendant in the New Colaba Company, Limited, in the name of the said Hormasji Pestanji." In this warrant, it will be observed, is introduced the word "*said*" before the name of Hormasji Pestanji, thus indicating the identity of Hormasji Pestanji with the defendant, whereas, for all that appeared in the application for execution and order thereon, the said Hormasji Pestanji, in whose name the shares were, might have been a different person from the defendant. This warrant of attachment was executed on the same 15th February 1877 by the Sheriff in the ordinary way, by delivering a copy to the Secretary of the New Colaba Company and another to the defendant. Then on 6th April 1877 the plaintiff obtained an order for the issue of a warrant of sale of the property mentioned in four several certificates, three of the Prothonotary and one of the Sheriff, certifying that the property therein respectively mentioned had been attached in execution of the decree. One of those certificates related to "the shares held by the defendant in the New Colaba Company, Limited, in the name of the said Hormasji Pestanji." In the affidavit filed by the plaintiff on behalf of his application for issue of warrant of sale is contained this passage: "that the shares in the New Colaba Company, Limited, attached herein, under the warrant of attachment dated 15th February last, are, as I have ascertained, three in number, and are, respectively, numbered 2022, 2095, and 3005 in the said books of the said Company." The order for issue of warrant of sale of the several premises attached was accordingly made on the said 6th April 1877, and, *inter alia*, contained these words: "and that as regards the shares held by the defendant in the New Colaba Company, Limited, the respective numbers of the same as appearing in the said affidavit be specified in the warrant of sale. Then, by the warrant of sale issued under the last-mentioned order, and dated 7th April, the Sheriff was commanded to sell, in manner therein mentioned, "all the defendant's right, title, and interest only in the lands and premises aforesaid," which consisted of certain immoveable property of the defendant at Mahim,

(1) Act VIII. of 1859.

which had been also attached "and the defendant's said moveable property." Among the moveable property, besides the said shares of the New Colaba Company, were a share No. 89 in the Frámji Cowasji Patent Press Company, now in liquidation, and certain household furniture and effects. The description in the warrant of sale of the shares in the New Colaba Company is as follows:—"The shares Nos. 2022, 2095, and 3005, held by the defendant in the New Colaba Company, Limited, in the name of the said Hormasji Pestanji." The said Colaba shares, together with the share No. 89 in the Frámji Cowasji Patent Press Company, and the said immoveable property of the defendant at Mahim, were, on 13th June 1877, put up for sale by public auction by the Sheriff. The household furniture and effects were not, on this occasion, put up for sale. At this sale, the applicant Jaitha Devji was declared the purchaser of the three shares of the New Colaba Company, Limited, Nos. 2022, 2095, and 3005, at the price of Rs. 2,300, which sum he, on the same day, paid to the Sheriff. In the advertisement or proclamation of this sale, after reciting the decree and the orders for execution thereof, the said shares had been described as "the shares Nos. 2022, 2095, and 3005, held by the defendant in the New Colaba Company, Limited, in the name of the said Hormasji Pestanji." The advertisement further announced that "the Sheriff will sell the defendant's right, title and interest only in the lands and premises aforesaid," referring to the said immoveable property of the defendant, and "the defendant's said moveable property," referring to the shares before mentioned, as there is nothing else the words can refer to. It was also provided that the shares were to be paid for at the time of sale. The receipt given by the Sheriff for the purchase-money paid by Jaitha Devji, the purchaser, dated 13th June 1877, is as follows: "Received from Jaitha Devji the sum of Rs. 2,300 only, being the price of three shares No. 2022, No. 2095, and No. 3005, in the New Colaba Company, sold to him this day in the above suit."

I have thought it desirable to set out at length the whole proceedings in execution in this case, in order to show not only the precise state of circumstances in which the question for deci-

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sion has arisen, but also to show that the plaintiff here is ultimately responsible for every word of the description under which the Colaba shares were sold by the Sheriff.

By the certificate of the Sheriff, dated 16th June 1877, he certified that he had, on 13th June, sold to the said Jaitha Devji "the right, title, and interest of the defendant above named, of, in, and to the shares Nos. 2022, 2095, and 3005, held by the defendant in the New Colaba Company, Limited, in the name of the said Hormasji Pestanji."

Shortly afterwards, under an order of 19th June 1877, transfers of the said three shares to Jaitha Devji were executed by the Prothonotary in the name of Hormasji Pestanji *Frámji*, the defendant. The purchaser then took steps to have his name entered in the register of the New Colaba Company, in respect of the said shares, but the secretary of the company declined to do this without further inquiry, having regard to the fact that Jaitha Devji was not in possession of the certificates of the shares, and that the name in which the shares stood in the register was Hormasji Pestanji only; whereas the name of the defendant was Hormasji Pestanji Frámji, and the secretary required evidence of identity of these persons to be given. Inquiries being made, it turned out that the Hormasji Pestanji, in whose name the shares were registered, was not the defendant, but was one Hormasji Pestanji, surnamed Montwalla, who had died some time ago, and that the shares then belonged to Awábái, his widow and executrix, though not registered in her name. It was stated orally at the hearing of the summons, but without contradiction, that the name as appearing on the register was Hormasji Pestanji, residing at Girgaum, the then residence of the defendant Hormasji Pestanji Framji being also, curiously enough, Girgaum. The fact that these shares did, at the time of attachment and sale, belong to the estate of Hormasji Pestanji Montwalla, and not to the defendant Hormasji Pestanji Frámji, and that the latter did not hold them, and had no right, title, or interest over or in them, or any of them, seems to be undisputed between the parties to this summons, and is, at any rate, to be deemed to be established.

The argument on the summons had two branches, (1) as to the general law as to warranty of title on sale of personal property, and in particular on execution-sales by the Sheriff under English law, and (2) on the effect of the provisions of the Civil Procedure Code with regard to sales in execution of decrees of Indian Courts. On the first branch of the argument, so far as it was concerned with the general law, as to warranty of title on sales of goods and chattels, were cited the cases of *Morley* v. *Attenborough* [1] and *Chapman* v. *Speller*, [2] to which may be added a case very similar to the one last named, viz., *Bagueley* v. *Hawley*. [3]

The rule, or alleged rule, of English law, that there is no implied warranty of title on the sale of a chattel, has been, however, limited by so many exceptions, that, as Lord Campbell in *Sims* v. *Marryatt* [4] observed, the exceptions "well nigh eat it up." The last or one of the last cases in which the rule was discussed, was *Eichholz* v. *Bannister*.[5] In this case it was held that in the case of goods sold in an open shop or warehouse there is an implied warranty on the part of the seller that he is the owner of the goods, and the purchaser, in case he has had to give up the goods to the true owner, is entitled to recover the price as money paid upon a consideration which has failed. In fact, after the judgment in this last case, the alleged rule or doctrine must be considered to have a very precarious, or, at least, limited, existence. Under Act IX. of 1872 (the Indian Contract Act), however, the application of the English legal maxim of *caveat emptor* to a sale of goods seems, so far, at least, as concerns *title*, to be excluded. For, by section 109 of this Act, which was not referred to in argument, it is provided: "If the buyer or any person claiming under him is by reason of the invalidity of the seller's title deprived of the thing sold, the seller is responsible to the buyer or the person claiming under him for loss caused thereby, unless a contrary intention appears by the contract."

But, however the case may be with an ordinary bargain and sale of goods, and when the circumstance that it is a sale in execution of a decree does not come into consideration, it seems

(1) 3 Exch. 500. (2) 14 Q. B. 621. (3) L. R. 2 C. P. 625.
(4) 17 Q. B. 281; see p. 291. (5) 17 C. B. N. S. 708.

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pretty clear that, in the case of a sale by a Sheriff in execution in ordinary course, there is nothing from which, according to English law, any intention to warrant the title of the execution-debtor can be inferred; or, in other words, that a purchaser of goods, seized and sold in execution in ordinary course by the Sheriff, cannot recover the purchase-money he has paid, by reason that it turns out that the goods did not belong to the execution-debtor. The reason for this is thus put by Erle, C. J., in *Eichholz* v. *Bannister* [(1)]: "The fact of the sale taking place under such circumstances" (*i. e.,* the case of the sale, by the Sheriff, of goods seized under a *fi. fa.*) "is notice to buyers that the Sheriff has no knowledge of the title to the goods, and the buyers, consequently, buy at their own peril. Many contracts of sale tacitly express the same sort of disclaimer of warranty." But if in a sale by the Sheriff there is not only no disclaimer of warranty of title, but even an express assertion that the goods are the property of the execution-debtor, I cannot see why the Sheriff and the execution-creditor (if responsible for such assertion) should not be held bound by such warranty, to this extent at least, that the Sheriff (if he has still in his hands the purchase-money) or the execution-creditor (if the money has been paid over to him) is bound to restore it to the purchaser, in case it has turned out that the purchaser has not got that for which he paid.

If, on the other hand, a sale in execution of a decree under the Code of Civil Procedure be held in accordance with the provisions of that Code, the question as to warranty by the Sheriff cannot arise, and this for the reason that, if the provisions of the Code and the ordinary practice be observed, the terms and conditions of sale will exclude the existence of any intention on the part of the Sheriff or the execution-creditor to undertake such responsibility.

The more important point, therefore, to be determined, is the application of the provisions of the Code of Civil Procedure to the peculiar circumstances of the present case. On this branch of the argument, the cases cited were *Dhondu Naik* v. *Ramji Kakda*, [(2)]

(1) 17 C. B. N. S. 708. (2) 4 Bom. H. C. Rep. 114 A.C. J.

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The Bank of Hindustan v. *Premchand Raichand*,(1) *Krishnapa Santu* v. *Panchapa Gurpadapa*,(2) *Sowdamini Chowdrain* v. *Krishna Kishor Poddar*,(3) *Sheikh Mahomed Basirulla* v. *Sheikh Abdulla*,(4) *Kalu Visaji* v. *Damodar Govind*,(5) and *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*.(6) In all these cases, except the last, the question arose with respect to the sale of an interest in immoveable property. In the last case, the sale was of the interest of the judgment-debtor in the proceeds of a revenue execution-sale of certain lands of his after satisfying revenue claims. With the exception of *The Bank of Hindustan* v. *Premchand Raichand*,(7) as to which I shall remark more at length, all these cases tend in the same direction, and the principle may be considered to be established, that a purchaser of immoveable or moveable property, at a sale in execution of a decree under the provisions of the Civil Procedure Code (1859), has no right to recover his purchase-money, though it may turn out that the right, title, and interest of the execution-debtor was nothing at all, unless the sale itself be set aside, and, further, that the sale will not be set aside by reason merely of the defect or absence of title in the thing sold on the part of the execution-debtor.(8) Section 258 of the Code provides that "whenever a sale of immoveable property is set aside, the purchaser shall be entitled to receive back his purchase-money, with or without interest, in such manner as it may appear proper to the Court to direct in each instance." The two previous sections had provided a summary procedure for setting aside a sale on the ground of material irregularity, causing substantial damages in *publishing* or *conducting* the sale. But I apprehend that section 258 applies wherever a sale is set aside, whether for irregularity in publishing or conducting a sale, or for other grounds. But, as I think the authorities show, the mere fact

(1) 5 Bom. H. C. Rep. 83 O. C. J.
(2) 4 Beng. L. R. 11 F. B.
(3) 9 Bom. H. C. Rep. 92.
(4) 6 Bom. H. C. Rep. 258 A. C. J.
(5) 4 Beng. L. R. 35 Appx.
(6) L. R. 2 Ind. Ap. 131.
(7) 5 Bom. H. C. Rep. 83 O. C. J.
(8) *Note.*—By section 313 of the present Civil Procedure Code (Act X. of 1877) the purchaser at a sale of *immoveable* property is entitled to have the sale set aside on the ground that the person whose property purported to be sold, had no saleable interest in it, but there is no such provision among the sections relating to the sale in execution of *moveable* property.

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that an execution-debtor whose interest, or supposed interest, in land has been sold in execution has no interest, or no absolute interest, in such land, so that the purchaser cannot get possession of what he may have supposed himself to have bought, or has been evicted from it by reason of some title paramount to that of the execution-debtor, does not warrant the setting aside of the sale either for irregularity or otherwise, and there is no consequent right to recover back the purchase-money. Though the right of the purchaser to recover back his purchase-money in case of a sale being set aside is by the Code given expressly only where the sale is of immoveable property, yet there can, I apprehend, be no room for doubt on general principles that the same consequence would follow where a sale of moveable property in execution has been set aside. There is no provision in the Code that sales of moveable property shall in no case be set aside, but only (section 252) that no irregularity in the sale of moveable property under an execution shall vitiate the sale. In the case of moveable property, the sale on payment of the purchase-money becomes absolute at once, whereas in the case of immoveable property it becomes absolute only on confirmation by the Court after 30 days. But in neither case is the sale absolute in the sense that it cannot be set aside by regular suit if brought within a year : Act IX. of 1871, schedule II., art. 14.

The case of the *Bank of Hindustan* v. *Premchand Raichand* (1) is by no means irreconcilable with the other authorities above cited, if we consider what was, in fact, decided, though, no doubt, the language of the Court in giving judgment is hardly to be reconciled with the principles recognized in the other cases. As this decision was one of this Court sitting in appeal, it is desirable, in order properly to appreciate it, to consider somewhat closely what, in fact, the suit was, and what were the issues before the Court whose judgment was under appeal. In execution of a decree for Rs. 1,12,003-15-11 which the Bank of Hindustan, who were defendants below, had recovered against one Candás Narrondás, the right, title, and interest of Candás Narrondás in certain immoveable

(1) 5 Bom. H. C. Rep. 83 O. C. J.

property, the subject of the suit, and called the Telwady property, were on 22nd November 1866 sold by the Sheriff to one Ahmedbhai Habibhai, also a defendant below, for Rs. 56,300. The plaintiffs in the suit, Premchand Raichand and Tulsidás Rámdáss, alleged by their plaint that, in pursuance of certain directions contained in the will of one Bái Javervahu, deceased, and out of her estate, the said Candás Narrondás had, in June 1857, purchased the Telwady property, and in further pursuance of the said directions had executed in December 1863 a certain Gujerathi deed of trust, whereby he conveyed the Telwady property to the plaintiffs for the religious and charitable purposes therein mentioned. The suit is by the plaint expressed to be under section 246 of the Civil Procedure Code to establish the plaintiffs' title to the Telwady property, and the prayer of the plaint is that the plaintiffs may be declared, as against the defendant, Ahmedbhai Habibhai, to be absolutely entitled to the same. The defendant Ahmedbhai Habibhai, by his written statement, contended that the alleged conveyance of December 1863 was illusory and not *boná fide*, or, at any rate, was void, as being, in the circumstances there stated, voluntary and without consideration, that the property, when attached and sold in execution of the decree, was, in fact, the property of Candás Narrondás himself, and claimed that he (the said defendant) might be declared absolutely entitled to the said property. By the decree of the Court on the original hearing, dated 20th March 1868, it was declared that the plaintiffs were absolutely entitled, as trustees, under the trust-deed, dated 16th December 1863, to the said Telwady property as against the defendant Ahmedbhai Habibhai. On 6th August 1868 the decree of 20th March 1868 was confirmed by the Appellate Court, and on this occasion was delivered the judgment reported in 5 Bom. H. C. Rep. 83 O. C. J. Now, the plaint, though, no doubt, purporting to be instituted under section 246 of the Civil Procedure Code, did not ask that the sale be set aside, and in none of the issues raised on the respective parts of the defendants, the Hindustan Bank and Ahmedbhai Habibhai, nor in the separate memoranda of appeal filed by them respectively, nor in the arguments on appeal, so far as reported, is there a trace of the plaintiffs, or the defendant Ahmedbhai Habibhai, as purchaser,

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having insisted that the sale to the latter of the property in execution of the decree against Candás Narrondás ought to be set aside and the purchase-money returned. On the contrary, the case throughout of the defendant Ahmedbhai Habibhai, the execution-purchaser at least, was that the sale was a good one, and that, at the time of the attachment and sale, Candás Narrondás was the real owner of the property. In considering, however, the contention of one of the appellants, the *Hindustan Bank*, that they had been improperly made parties to the suit, the then Chief Justice expressed himself as follows [1] : " If that is the nature of the right (*i.e.*, under s. 246) and of the suit that is to be brought, the suit is practically one to set aside the sale already made, and to restore the parties to the position which they originally occupied. And if the right of the plaintiffs is established, the proper decree to be made is that the sale should be set aside. It is, therefore, impossible to say that the bank is not a proper party. It is not now necessary to determine what is the proper course to be pursued by the purchaser in order to recover back the purchase-money. It may be that under section 258 in a properly-constituted suit the Court ought to direct the money to be restored. I give no opinion upon that; but it is quite clear that the object of the suit being to set aside the sale, the bank is interested, and was properly made a party to the suit, and that on that point the learned Judge came to a correct conclusion." The other learned Judge who heard this appeal went somewhat further than this. He says[2] : " As to the second point, I think that a suit under section 246 was intended to restore all parties to their former state. The section says the suit is to establish the plaintiff's right, and that right is clearly to have it declared that the property belongs to the plaintiff, and should not have been sold, and to have the sale, consequently, set aside. If so, all parties interested in the proceedings in execution must be affected by the judgment, and on this ground the bank is a proper party to the suit. But I think the bank was also properly made a party, to avoid multiplicity of suits. A question must arise between the execution-creditor and the purchaser. There must be an equity on the part of the latter to recover back his purchase-money, as the considera-

(1) 5 Bom. H. C. Rep. 93 O. C. J.

(2) 5 Bom. H. C. Rep. 96 O. C. J.

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tion for it has failed. This depends on the general principles of equity, and it also appears that it is so under section 258 of the Code of Civil Procedure. That section, in my opinion, being general in its terms, applies to all cases in which a sale is set aside, and not merely when it is set aside by reason of some irregularity in the proceedings: and so it would appear to have been decided by the High Court in Calcutta."

It was, perhaps, scarcely necessary for the determination of any point in the case to express any opinion on the question whether, even supposing the suit to be one for the purpose, in effect, of setting aside the sale, there would be any right, in the circumstances of the case, on the part of the purchaser to recover back his purchase-money. Nor, with all respect for the opinion of the learned Judges who delivered judgments, can I see that the suit was practically, and it certainly was not in form, a suit to set aside the sale. No doubt *in effect* the success of the plaintiffs would render that which the defendant Ahmedbhai had bought, or supposed himself to buy, at the sale, of no value to him, but would not otherwise affect the sale itself. In the ordinary case of one who takes a conveyance from another who has not, as against some title paramount, right to convey, being evicted under such title paramount, the eviction under such title paramount, no doubt, renders the conveyance to the person evicted of no effect. But by the eviction the conveyance is not set aside. It subsists for all purposes consistent with the title paramount, and in particular, for instance, for any remedy the person evicted may have on covenants for title. So that when it is considered what was really decided in the case, it does not appear to me to conflict with the other cases, though, as I have said, the language of the Court in giving judgment can in some respects hardly be reconciled with those other cases.

If, however, the provisions of the Code as to executions be observed, the present question cannot arise. If the orders for attachment and sale, and the warrants issued thereunder, purport to be merely for attachment and sale of certain property, describing it by, in the case of immoveable property, its area, boundaries, occupants, and the Collector's or municipal number; or, in the case

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of moveables, by nature, number, situation, or other means of identification; and if then the advertisement or proclamation, following section 249, announces that the sale extends only to the right, title, and interest of the defendant in the property specified therein, the sale in itself cannot, it seems to me, be impeached, nor can any claim on the part of the purchaser to have the purchase-money returned be maintained on the ground that the execution-debtor had no interest in the property, or not such an interest as the purchaser supposed. In the present case, had the property attached, ordered to be sold, and advertised to be sold, been described simply "three shares, Nos. 2022, 2095, and 3005, of the New Colaba Company, Limited, in the name of Hormasji Pestanji," and the advertisement contained the limiting words as provided in section 249 of the Code, the purchaser here would not, in my opinion, have had any ground to ask to have the sale set aside and his purchase-money returned. But where, as in the present case, the execution-creditor has caused, or allowed to be introduced into the order for attachment, the warrant of attachment, the order for sale, the warrant of sale, and, above all, in the advertisement or proclamation (and in all these documents the words were, as we have seen, introduced at his instance), words containing a statement that the property attached and sold in execution is the property of the defendant, or that the latter is, in fact, interested in the same, then it appears to me that the Sheriff (who acts as vendor, under the order of the Court indeed, but at the instance and promotion of the execution-creditor), as well as the *execution-creditor* himself, is bound by such statement or assertion of title contained in the very terms of sale, just as any ordinary vendor, even apart from sec. 109 of the Indian Contract Act, would be. I do not, of course, mean that there would be any personal liability of the Sheriff, who merely executes orders and process of the Court which contain such assertions of title. But I apprehend that so long as the Sheriff has in his hands the purchase-money, the proceeds of a sale, which a purchaser, by reason of the assertion of the execution-debtor's title contained in the warrants and advertisement of sale being untrue, is entitled to have set aside, the purchaser may require the Sheriff to restore such proceeds. If, however, the proceeds

have been paid over to the execution-creditor, I apprehend the Sheriff would be no longer liable for them to the purchaser, as he (the Sheriff) has only acted in obedience to the orders of the Court; and the only remedy, if any, of the purchaser would be against the execution-creditor. The question as to the rights and remedies of the true owner of property which has been taken in execution and sold under decree passed against some person other than such true owner, does not here arise, as the executrix of Hormasji Pestanji, the true owner of these three shares, is not a party to this summons. That question, however, I may observe, is fully discussed in *Vana Jagannathji* v. *Hata Dipaji*.[1] There is, however, a passage in the judgment in that case by which one part of the present decision receives support. "His (*i.e.*, the judgment-creditor's) liability must depend upon the circumstances of the case, *i.e.*, upon the fact whether the wrongful seizure or the injury is the result of his own conduct: for instance, if the judgment-creditor personally or by his authorized agent (*e.g.*, his pleader) apply under sec. 214 of the Civil Procedure Code for the attachment of property which is specially designated in that application, and if the Court grant its warrant for the seizure of that particular property, and the officer of the Court execute that warrant, and the property be not that of the judgment-debtor, the judgment-creditor would certainly be liable for that wrongful seizure, and the officer of the Court, on the other hand, could justify under the warrant of the Court, and would not be liable so long as he kept within the duty expressly prescribed for him by that warrant." The point on which it appears to me this judgment affords support to the present decision, is that, on the one hand, the judgment-creditor is liable for the consequences of the process (if wrongful) of the Court put in motion by him; and that for the Sheriff, who merely executes it according to its tenor, no personal liability arises.

There are in the present case, in the advertisement or proclamation (which contains the conditions on which the purchaser bought), two assertions of title which are, in fact, false,—one that the shares were "held by the defendant," and the other that they

(1) 11 Bom. H. C. Rep. 46.

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were "in the name of the *said* Hormasji Pestanji" (*i.e.*, of the defendant); the fact being that the shares in question were not held by the defendant, and were not in the name of the *said* Hormasji Pestanji (*i.e.*, the defendant), but of another Hormasji Pestanji who had died some time before. It would lead to very injurious results if execution-creditors were to be allowed to have statements introduced into the advertisement or proclamation of sale as to the title and extent of the interest of the execution-debtor, and then, having secured the money realized by the sale on such terms, should be allowed to say to the purchaser: "You only bought the right, title, and interest of the defendant, and cannot complain that you get nothing, though I had caused you to be assured, in solemn form when you bought, that he had something." The assertion of title in the execution-debtor in the property attached altogether gets rid of the effect of other provisions in section 249 of the Code, that the sale is to be announced as being only of the right, title, and interest of the defendant for the purposes for which those provisions were intended to operate; and the execution-creditor in the present case, in fact, makes the Sheriff say: "I only sell the right, title, and interest of the defendant, but at the same time I tell you he has an interest." For the reason, therefore, that the execution orders and warrants and the advertisement contain assertions of interest of the execution-debtor in the property sold, whereas the execution-debtor had no such interest, I am of opinion that the purchaser is entitled to have the sale set aside and his purchase-money returned to him. I have not omitted to notice that in one of the cases cited, viz., that in 4 Beng. L. R. Appx. 35, there was the same circumstance as exists here, viz., an assertion on the part of the execution-creditor that the property sold was the property of the judgment-debtor. But that case differs from the present in the all-important particular that the execution-creditor there had himself become the purchaser under the execution, and had set off the purchase-money against his decree, so that if there was any warranty of title the warranty consisted in his own assertion made to himself. His application to have further execution of the decree without taking into account what had been ordered to be set off against his decree, viz., the purchase-money, was very properly refused.

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The order on this summons will be that the sale mentioned in the summons be set aside, and that the Sheriff do repay to the applicant Jaitha Devji the sum of Rs. 2,300 mentioned in the said summons, less any deductions which the Sheriff may be entitled to retain for poundage expenses or otherwise, and that the plaintiff do pay to the applicant his costs of and incident to this summons, together with the amount of the deductions, if any, which the Sheriff may have made in respect of poundage expenses, or otherwise. As to the costs suggested to have been incurred by the applicant concerning the said sale, and also asked for by the summons, he has given no evidence what they were, and they are not of a nature, so far as appears, that they might be referred for taxation: so as to this part of the summons I make no order. Nor do I make any order as to interest, for the reasons that the power of giving interest in such a case exists under the Code only where a sale of immoveable property is set aside, and also that by the summons no interest is asked for.

Order accordingly.

[ORIGINAL CIVIL.]

Before Mr. Justice Green.

RA'JU BA'LU (PLAINTIFF) *v.* KRISHNA'R'AV RA'MCHANDRA' AND ANOTHER (DEFENDANTS).*

July 30.

Registration—Act III. of 1877—Evidence—Covenant—Patent ambiguity—Title—Estoppel—Cause of action—Damages—Consideration—Limitation.

S. L., by a deed of gift of 16th February 1847, granted and assured to S., his daughter, certain immoveable property. By a subsequent unregistered deed of gift of 15th July 1865, S. L. purported, in consideration of natural love and affection, to grant and convey the same property, the value of which exceeded Rs. 100, to B. R., the husband of S., his heirs, executors, administrators, and assigns. The last-mentioned deed contained covenants, on the part of S. L., his heirs, executors, and administrators, with B. R., his heirs, executors, administrators, and assigns, for title to "the hereditaments and premises hereinbefore expressed to be hereby granted and assured unto and to the use of the said B. R., his heirs, executors, administrators, and assigns." S. died in the lifetime of B. R., who, in 1867, mortgaged the premises comprised in the deed of 15th July 1865, and died in 1868. In 1870 the mortgagee sold the premises by auction, under the power of sale contained in the

* Suit No. 258 of 1877.