

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kemball.

PURSHOTTAM VITHAL (APPLICANT) *v.* PURSHOTTAM ISWAR,
(DECREE-HOLDER).*

1884
June 19.

Practice—Decree, impeachment of, by a stranger as fraudulent—Civil Procedure Code (Act XIV of 1882), Sec. 287.

In the execution of a decree ordering the sale of immoveable property it is not competent for the Court to refuse to sell it, because a stranger to the suit in which such decree was obtained, who is in possession of such property, impeaches the decree as having been obtained by fraud; the course open to him, if he wishes stay of execution, being to file a suit and obtain an injunction for that purpose.

UNDER section 617 of the Civil Procedure Code (Act XIV of 1882) this case was submitted for the opinion of the High Court by Rāv Sāheb Ranchhodlal K. Desái, Second Class Subordinate Judge of Umreth.

One Parashram brought a suit in the Court of the Subordinate Judge of Broach against one Mathur Trikan on a *sen*-mortgage-bond, dated 20th December, 1873, to recover Rs. 136 by the sale of the mortgaged property (a shop), and from the defendant personally, and obtained an *ex parte* decree on 2nd October, 1877, as prayed for. The decree-holder having died without obtaining satisfaction of the decree, it was transferred for execution to the Subordinate Judge's Court at Umreth at his heir's instance. An application was accordingly made for the execution of the said decree on the 17th November, 1883, by the sale of the mortgaged property, but the original judgment-debtor having died before this application for execution was made, a notice was issued, under section 248 of the Code of Civil Procedure (XIV of 1882) to his son Kuber Mathur to show cause why the decree should not be executed; and he having failed to show sufficient cause against the execution of the said decree, a proclamation for the sale of the said property was ordered to be issued. On the 1st February, 1884, the applicant presented the application now under reference, opposing the execution of the said decree on the ground that the original judgment-debtor having by a registered deed of release, dated the 7th January, 1874, assigned to him all

* Civil Reference, No. 17 of 1884.

his rights to the shop in dispute, he had, at the time of the institution of the suit, in which the decree now sought to be executed was passed, no right to, or interest in, the said shop; that he (the applicant) was in possession of the said shop at the time of the institution of the said suit, and was, therefore, a necessary party to the said suit; that the *san*-mortgage-bond, the subject-matter of the above-mentioned suit, was a forgery; and that the decree thereon was collusively obtained. That application was opposed, on behalf of the minor decree-holder, on the grounds that there was no provision in the Code of Civil Procedure which authorized such an application; that the *san*-mortgage-bond being prior in point of time to the applicant's deed of release, he (the decree-holder) had a superior right to the said property; that the applicant having taken the property from the judgment-debtor subject to his mortgage charge, he was not a necessary party to the suit on the mortgage bond; and that the *san*-mortgage-bond was executed by the original judgment-debtor before he passed the deed of release in favour of the applicant and his brother.

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The point referred for decision was :—

Whether in the execution of a decree, ordering the sale of immoveable property, it was competent for the Court to inquire into an application by a person who obtained possession of that property before the date of the institution of the suit in which the decree sought to be executed was passed, but who was not a party thereto, objecting to the sale of that property on the grounds that the *san*-mortgage-bond on which the decree was passed was a forgery, and that he had a superior right to the said property.

The opinion of the Subordinate Judge of Umreth was in the affirmative.

There was no appearance of parties in the High Court.

SARGENT, C. J.—The Court is of opinion that it is not competent to the Subordinate Judge to refuse to sell the property as ordered by the decree of 2nd October, 1877, on the ground that a stranger impeaches the decree as having been fraudulently obtained. If the stranger wishes to stay the execution of the decree he should file a suit and obtain an injunction for that purpose.