

1887.

SAWABA
KHANDAPA
v.
ABAJI
JOTIRAV.

having failed—see *Balaji v. Daji* ⁽¹⁾—it became at once recoverable by the plaintiff, the action for which, however, would be barred in three years, as the registered mortgage contains no undertaking by the mortgagor to pay the loan.

(1) Printed Judgments for 1884, p. 59.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

LALLU TRIKAM, APPLICANT, v. BHA'VLA MITHIA' AND

ANOTHER, OPPONENTS.*

1887.

February 24.

Execution of a decree—Decree transferred to the Collector for execution—Collector's duties and powers in execution—Civil Court's jurisdiction to revise Collector's proceedings in execution—Civil Procedure Code (Act XIV of 1882), Secs. 320-325.

A decree was transferred to the Collector for execution. The Mamlatdar, under the orders of the Collector, put up for sale certain immoveable property belonging to the judgment-debtors. The sale was confirmed by the Mamlatdar with the sanction of the Collector.

Some time afterwards the auction-purchaser applied to the Collector for a certificate of sale, but the Collector refused the certificate, and set aside the sale, on the ground that the purchaser was a relative of the decree-holder, and had really purchased the property on his behalf without the permission of the Court.

Against this proceeding of the Collector the purchaser made an application, first to the Subordinate Judge who had transferred the decree to the Collector for execution, and then to the District Court. But both Courts declined to entertain his application, on the ground of want of jurisdiction.

Held, on an application to the High Court, that the Subordinate Judge had jurisdiction to deal with the application, and to revise the Collector's proceedings in execution.

Held, also, that the Collector having through his subordinate put up for sale the judgment-debtor's property, and confirmed the sale, had in that way completely executed the decree so far as he could, and was so far *functus officio*. His duty was to make a return to the Court of what he had done. After confirmation of the sale he could not set it aside.

Per WEST, J. :—The Collector, like the Názir in India, is a ministerial officer when he executes a decree. He, like the Názir, must carry out the decree of a Civil Court in general subjection to the judicial direction of the Court on whose authority the coercive power exercised by him rests, and which alone can deal judicially with the questions that arise in execution. His proceedings and orders

* Application under Extraordinary Jurisdiction, No. 192 of 1886.

are subject, accordingly, to revision and correction on the application of a party aggrieved, whenever he misconceives the decree or acts illegally in giving effect to it. He is limited strictly to the precise line of activity laid down for him in the Code and the orders under it; and in cases of error or doubt it is the Court that must determine whether he, as its ministerial officer, has or has not transgressed his powers.

1887.

LALLU
TRIKAM
v.
BHÁVLA
MITHIÁ.

Per BIRDWOOD, J.—A sale made by a Collector under Chapter XIX of the Civil Procedure Code is subject to confirmation by the Civil Court under section 312. As soon as the Collector has exercised or performed the powers or duties conferred or imposed upon him by sections 321 to 325 of the Code, he is *functus officio*. If he has sold the property or re-sold it under the power given by clause (c) of section 325, he has completed the execution of the decree so far as he can legally complete it, and it is then his duty to re-transmit the decree to the Court, under rules prescribed in that behalf by Government under the second paragraph of section 320. Where the property has been sold or re-sold, the sale or re-sale cannot be set aside by the Collector. Any application for setting it aside must be made to the Civil Court under section 311, and dealt with by it under section 312; and if no application is made to the Court, the sale must be confirmed by it under that section.

THIS was an application to the High Court under section 622 of the Civil Procedure Code (Act XIV of 1882).

One Vishnurám Ambáji obtained a decree for money against Bhuliá Mithiá and Hariá Kidiá in the Court of the Second Class Subordinate Judge at Bulsár. This decree was transferred for execution to the Collector, who directed the Mámlatdár of Bulsár to execute the decree. The Mámlatdár put up certain immovable property belonging to the judgment-debtors to auction, and the applicant, Lallu Trikam, purchased it for Rs. 380. The sale was confirmed under the orders of the Collector on the 7th August, 1886.

Thereupon the auction-purchaser applied for a certificate of sale first to the Mámlatdár, and then to the Collector; but the certificate was refused, and the sale was set aside on the 23rd September, 1886, by order of the Collector, on the ground that the purchaser was related to the decree-holder, and had really purchased the property on his behalf.

Against this order of the Collector setting aside the sale, the purchaser appealed to the Subordinate Judge at Bulsár, who, however, refused to interfere for want of jurisdiction. The purchaser

1887.

LALLU
TRIKAM
v.
BHÁVLA
MITRÁ.

then applied to the District Judge; but he, too, declined to interfere.

The purchaser then applied to the High Court under its extraordinary jurisdiction.

Motilál M. Munshi for the applicant in support of the rule. He contended, on the authority of *Mahádaji V. Karandikar v. Hari D. Ohikne*⁽¹⁾, that the Collector in executing a decree was acting as a ministerial officer of the Court, and, as such, his orders in execution were subject to the revisional and controlling authority of the Court which transferred the decree for execution. The Subordinate Judge had, therefore, jurisdiction to set aside the Collector's order if it was illegal or *ultra vires*. In the present case it was clearly *ultra vires*. After confirming the sale, he could not set it aside.

There was no appearance for the opponents.

WEST, J.:—In the present case a decree for money was sent for execution to the Collector of Surat. The Collector directed the *Mámlatdár* of Bulsár to execute the decree. The *Mámlatdár* sold immoveable property of the judgment-debtor and applied to the Collector for confirmation of the sale. The Collector authorized the *Mámlatdár* to confirm the sale, and after certain inquiries the *Mámlatdár* did confirm it on the 7th August, 1886.

On the 27th August, 1886, the purchaser at the sale, who is the present applicant, asked the *Mámlatdár* for a certificate of sale, but the stamped paper which he presented for engrossment of the certificate was returned to him. On the 1st September, 1886, he applied to the Collector, who, however, refused the certificate, and set aside the sale on the 23rd September, 1886, on the ground that the applicant being a relation of the judgment-creditor had really purchased on his behalf.

The applicant then went to the Subordinate Judge's Court and to the District Court with applications that the Collector's order annulling or affecting to annul the sale might be set aside; These applications were rejected, on the ground of defect of jurisdiction. The applicant now seeks to have these orders of rejec-

tion set aside, or the Collector's order setting aside the sale declared void as *ultra vires*.

1897.

LALLU
TRIKAM
v.
BHAYLA
MITHIA.

The execution of a decree is primarily a ministerial act—*Andrews v. Marris*⁽¹⁾, and, as such, subject to the control of the Court from which the order for execution emanates, as every Court may guard against abuse of its own process—*Rameshuri Dasse v. Durgádass Chatterjee*⁽²⁾. In the case of *Mahádji V. Karandikar v. Hari D. Chikne*⁽³⁾ it was held that the Collector is a ministerial officer when he is executing a decree, and the rules made by the Government under section 320 of the Code of Civil Procedure for the Presidency of Bombay do not confer on the Collector, in clear terms, any judicial power as to the various questions that may arise in execution. It may be doubted whether they could confer such power, seeing that the execution proceeds always under the chapter of the Code relating to execution (see section 325), and in such cases as those under section 322 B, he has, after making an inquiry, to refer the questions that may have arisen for decision to the Court seized of the cause or to the District Court. It is the Civil Court, and not the Collector that is to dispose of the sometimes difficult and complicated legal questions that arise in execution. Provision is made for an appeal against these decisions, but not for appeals against the Collector's orders, which, however, if to be regarded as of a judicial character, would need the safeguard of appeal more than those of the Civil Courts. The degree of latitude allowed to the Collector in giving alternative effect to the decree by execution, does not make his proceedings any the less ministerial or administrative: if each of the several modes by which he may obtain payment or satisfaction is ministerial, it is none the less so by being alternative to another operation of the same character. The Názir in India usually carries out the decrees of the Civil Courts. His functions have never been regarded as of a judicial character, and the essential nature of the function is not changed by its being assigned to an officer of

(1) See *per* Lord Denman, C.J., L. R. 1 Ad. & El. at 14: see Vinnius Ad. Inst., Lib. IV, Tit. XVII.

(2) I. L. R., 6 Calc., 103.

(3) I. L. R., 7 Bom., 332.

1887.

LALLU
TRIKAM
v.
BHÁVLA
MITHIÁ.

higher rank, such as the Collector. He, like the Názir, must carry out the decree of a Civil Court, whether he has or has not discretionary powers in doing so, in general subjection to the judicial direction of the Courts on whose authority the coercive power exercised by him rests, and which alone, it seems, can deal judicially with the questions that arise in execution. This is the view taken in *Mahádíji V. Karandikar v. Hari D. Chikne*⁽¹⁾, and it has been followed in other cases, of which I may instance Appeal from Order No. 32 of 1886, decided on the 6th September, 1886. At Allahabad—*Madho Prásád v. Hansa Kuar* ⁽²⁾—a different view seems to have been taken, but it is not so obviously correct that we ought to abandon our own for it. If the Legislature intended the Courts to lose all control over their decrees from the moment that they transferred execution to the Collector, it seems impossible but that provision should have been made for correcting the Collector's inevitable judicial errors.

In the present case the Collector executed the decree of the Civil Court by selling the property of the judgment-debtor. The sale was made through the Collector's subordinate, the Mámlatdár, and through the same officer he confirmed it. Having in that way completely executed the decree so far as he could, the Collector was so far *functus officio*. His duty was to make a return to the Civil Court of what he had done. Even as a Judge he could not, after having confirmed the sale, set it aside, except for special reasons, and after due notice and inquiry. If his order, therefore, was a judicial one, it would apparently be the duty of this Court, in the exercise of its power of superintendence, to set the order aside under the provisions of section 622 of the Code of Civil Procedure. But the preferable view, and that which best accords with principle, seems to be that the Collector, a ministerial officer carrying out the command of a Court, acts always subject to the orders of the Court, except in so far as authority or discretion is expressly conferred on him. His proceedings and orders are subject, accordingly, to revision and correction on the application of a party aggrieved whenever he misconceives the decree or acts illegally in giving effect to it. He is

(1) I. L. R., 7 Bom., 332.

(2) I. L. R., 5 AR., 314.

limited strictly to the precise line of activity laid down for him in the Code and the orders under it; and in cases of error or doubt it is the Court that must determine whether he, as its ministerial officer, has or has not transgressed his powers. The Court will not and cannot interfere gratuitously, but it must dispose of questions arising in the execution of the decree. The order of the Subordinate Judge declining jurisdiction and the similar order of the District Judge must be reversed, and the Subordinate Judge must dispose of the application made to him by the present applicant.

1887.

LALLU
TRIKAM
v.
BHÁVLA
MITHLÁ.

BIRDWOOD, J.:—I entirely concur in the judgment pronounced by Mr. Justice West; and wish only to remark, as regards the recent case referred to in it, (Appeal from Order No. 32 of 1886, decided by Sir Charles Sargent and myself on the 6th September last, which has not been reported, and in which no written judgment was recorded), that the Court, following *Mahádáji V. Karandikar v. Hari D. Ohikne* ⁽¹⁾, held that, in conducting a sale under rules prescribed by Government under section 320 of the Code of Civil Procedure, a Collector acted ministerially as an officer of the Court. It also held that such a sale was conducted under Chapter XIX of the Code. Indeed, in section 325 the Collector is described as selling property “under this chapter.” That being so, we held that an application could be made to a Civil Court by which a decree had been transferred to the Collector under section 320, for setting aside, under section 311, a sale made by the Collector under rules prescribed for his guidance under section 320; for no such rules could deprive any person entitled to make an application under section 311 of any right given by that section. In the case referred to, the High Court was asked to set aside an order of the Civil Court, refusing, on the ground of want of jurisdiction, to set aside a sale by a Mámlatdár. The appeal to this Court was rejected, and the order of the lower Court was confirmed, on the ground that no material irregularity in publishing or conducting the sale was proved, by reason of which substantial injury had been sustained by the appellant. But we had no

(1) L. L. R., 7 Bom., 332.

1887.

LALLU
TRIKAM
v.
BHÁVLA
MITHÁ.

doubt on the question of the Civil Court's jurisdiction to deal with an application properly made, in such a case, under section 311. If that view be correct, it would seem to follow, in the absence of any express provision to the contrary, that a sale made by a Collector under Chapter XIX is subject to confirmation by the Civil Court under section 312. As soon as the Collector has exercised or performed the powers or duties conferred or imposed upon him by sections 321 to 325 of the Code, he is *functus officio*. If he has sold the property or resold it under the power given by clause (c) of section 325, he has completed the execution of the decree so far as he can legally complete it, and it is then his duty to retransmit the decree to the Court, under rules prescribed in that behalf by Government under the second paragraph of section 320. Where the property has been sold or resold, the sale or resale cannot be set aside by the Collector. Any application for setting it aside must be made to the Civil Court under section 311, and dealt with by it under section 312; and, if no application is made to the Court, the sale must be confirmed by it under that section. The Courts below, therefore, wrongly held in the present case that they had no jurisdiction to deal with the application made to them. The Subordinate Judge could have called for his own record, which had been transmitted to the Collector, as was ruled in *Mahádáji V. Karandikar v. Hari D. Chikne* ⁽¹⁾; and he could have called on the Collector to report whether the property had been sold; and if the property had been sold, the Court would thenceforward alone have had jurisdiction to make any order in the execution proceedings. Having jurisdiction to receive a proper application from the purchaser, it could examine any application made to it, and return it, if necessary, for amendment, if the prayer contained in it required to be amended, and it could finally make a proper order thereon. It was not competent to the Courts below to refuse to deal with the application at all.

Orders reversed and case remanded.

(1) L. L. R., 7 Bom., 332.