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Mamlatdar's Court under Bombay Act III of 1876. The Mamlatdar had found some difficulty in executing the decree in the manner contemplated in the Act, as the village officers had reported that there was no land corresponding to the boundaries specified in the plaint, and that the parties were joint owners and in joint occupation of the land in a suit. The decree-holder had sued for a certain specific portion of land, not for partition. Indeed, he could not have brought a suit for partition in the Mamlatdar's Court, nor could the Mamlatdar have decreed partition. In the difficulty in which the Mamlatdar found himself, he asked for advice and instructions from the Collector, who sent for the papers in the case and issued an order to the surveyor to execute the decree. That order was one which the Collector had no authority to issue. He was not asked by the Mamlatdar to execute his decree. Indeed, the Mamlatdar would not legally have asked him to do so. The surveyor acting under the Collector's orders was not, therefore, discharging a public function, and the act of the accused could not have been an offence against s. 186 of the Penal Code. It is argued by the Government Pleader that the surveyor was protected by the first paragraph of s. 99 of the Code, and that there was no right of private defence against any act done by him in good faith under colour of his office. But that was not so; for the protection given by that section to a public officer, who, acting in good faith under [171] colour of his office, does an act not causing the apprehension of death or grievous hurt which may not be strictly justifiable in law, does not extend to an officer whose act is altogether illegal. Nor was the surveyor protected by the second paragraph of s. 99; for though he was acting by the direction of the Collector, still the Collector's order was so entirely *ultra vires* as to leave no room for the operation of the section. We must, therefore, reverse the conviction and sentence recorded against the accused, and direct that the fine to which he has been sentenced be refunded.

Conviction and sentence reversed.

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ORIGINAL CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice
and Mr. Justice Scott.*

MUNMOHANDAS JAIKISONDAS (*Appellant*) v. VIZBAI (*Respondent*).*

[14th September, 1888.]

Civil Procedure Code (Act XIV of 1882), s. 295—Purchaser of decree against estate of a deceased person by the legal representative of such deceased person—Right of such purchaser to participate in proceeds realized in execution of decree.

Hurgovandas Kuber was the holder of a decree in suit No. 657 of 1869 for Rs. 69,467 against the firm of Hirji, Bhimji & Co., and in execution thereof he attached a certain house belonging to the estate of one Hirji Dossa, deceased, who had been a partner in that firm. Vizbai, (the respondent), was the legal representative of Hirji Dossa. On the 9th November, 1886, Vizbai purchased the decree from Hurgovindas Kuber for Rs. 18,000, which sum she obtained for the purpose as a loan from Canji Parbut & Co. As a security for this loan she gave Canji Parbut & Co., a letter, dated the 9th November, 1886, whereby she agreed to repay the loan out of the proceeds of the sale of the house which had been attached in execution of the decree which she had purchased. In the meantime

* Suit No. 8 of 1870 and Suit No. 657 of 1869.

another decree, *viz.*, in suit No. 8 of 1870, had been obtained against the firm of Hirji, Bhimji & Co., and had been, prior to the 9th November, 1886, purchased by the appellant Munmohandas, who had also, prior to the 9th November, 1886, applied for execution. On the 6th April, 1887, the attached house was sold by the Sheriff, and realized Rs. 45,000. On the 5th September, 1887, an order was made in chambers that the Sheriff should divide rateably the moneys in his hands in suit No. 657 of 1869 between Munmohandas and Vizbai. Munmohandas appealed, and contended that by the transaction between Vizbai and Hurgovandas Kuber the decree in suit No. 657 of 1869 had been extinguished as against the estate of Hirji Dossa, and that the said transaction amounted, in law and fact, [172] to a purchase, on behalf of the estate of Hirji Dossa, of the properties attached in the said suit, or the proceeds thereof.

Held, confirming the order appealed from, that Vizbai was entitled to a rateable proportion of the moneys in question. She was only liable under the decree held by the appellant Munmohandas as the representative of Hirji Dossa. So far as she might have had property of her own, not derived from Hirji Dossa's estate, available for the purchase of Hurgovandas' decree she stood in the same position as a third party who might have purchased Hurgovandas' share of the proceeds before they were realized. The purchase of Hurgovandas' share with her own money could not prejudice Munmohandas any more than if an entire stranger had purchased. The fact that she borrowed the money and gave the share as a security to the lender, did not affect the question. If the money did not come from Hirji Dossa's estate it could not matter whether it came directly from Vizbai's pocket or from another person at her request. If the money was derived from a source having no connection, directly or indirectly, with the estate indebted, there is no distinction, in principle, between the representative of the indebted estate and a stranger.

APPEAL from an order made in chambers by Bayley, J., dated the 5th September, 1887, directing that the Sheriff of Bombay should divide rateably the moneys in his hands in suit No. 657 of 1869 between the appellant and respondent.

One Hirji Dossa died in April, 1869, leaving a considerable amount of property. He was a partner in the firm of Hirji, Bhimji & Co., and was the only partner possessed of property. After his death one Makbai filed a suit (No. 657 of 1869) against the firm of Hirji, Bhimji & Co. (Hirji Dossa's executor being a party defendant), and on the 28th March, 1870, she obtained a decree for Rs. 69,467. One Hurgovandas Kuber subsequently bought the decree from Makbai, and in execution thereof he attached a certain house which had belonged to Hirji Dossa.

At that time the legal representative of Hirji Dossa was the respondent Vizbai, who was the widow of Ruttonsey Hirji, the adopted son of Hirji Dossa. Vizbai by agreement dated 9th November, 1886, purchased the decree from Hurgovandas Kuberdas; the agreement was as follows:—

"To Vizbai, widow of Ruttonsey Hirji, the son and legal representative of Hirji Dossa.

"In consideration of your having this day paid me Rs. 18,000, I hereby undertake, as assignee of the decree-holder herein, to recover from the Sheriff of Bombay or the High Court, as the [173] case may be, but on your behalf and for your benefit and at your cost, the share coming to me in respect of the decree, interest and costs herein of the proceeds of sale of the Chinch Bandar property or house (registered under Collector's Nos. 6496 and 767 and assessed under No. 265) attached in execution herein by me, which may be realized at the sale thereof by the Sheriff of Bombay, and which sale is advertised to take place on the 10th day of November, 1886. If you so desire I will give you, or your nominee, a full and irrevocable power of attorney for all or any of the above purposes

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and generally for fully carrying out this arrangement. The share coming to me under the sale of the said house under this decree is understood to be the whole of the sum payable to me in respect of the whole of the decree herein, interest and costs,—that is to say, the balance after first deducting the rateable proportion payable to the other decree-holders who have applied for execution of their decrees, and after deducting the costs of realization. The sum payable by me to you or recoverable by you as aforesaid will be paid immediately on the same being paid over to me or my attorneys. It is further understood between us that, save and except the said sum of Rs. 18,000 (eighteen thousand) paid by you to me as aforesaid, I am to have no right, title or interest or any claim or demand whatsoever against you or Ruttonsey Hirji or against you or his estate whatever or anywhere in respect of this decree or anything under it or by virtue thereof.

“It is further understood that you will hold me harmless in respect of any claim which may be made by Makbai or the other decree-holders who have applied for execution to the said sum of Rs. 18,000 (eighteen thousand) beyond that which may become due to her under the agreement executed by me to the said Makbai and dated the 1st day of May, 1886.

“This settlement with you is without prejudice to my right to recover the balance of the decree herein from the other defendants.

“I undertake to execute a formal document or documents embodying the above arrangement, and for the purpose of fully carrying out the same.”

[174] Vizbai was not possessed of Rs. 18,000 wherewith to purchase the said decree. She, however, obtained it from the firm of Canji Parbut & Co., and as security for the loan she gave the following document:—

“9th November, 1886.

“Suit No. 657 of 1869.

“To Messrs. CANJI PARBUT & Co.

“Gentlemen,—In consideration of your having advanced to me the sum of Rs. 18,000 (eighteen thousand) to enable me to purchase the plaintiff's assignee's right, title and interest in the realization so far as the same extends to Hirji Dossa's interest and a further sum of Rs. 3,000 received to meet some other payment, making in all Rs. 21,000, I agree to cause the sum that shall be received by me or Hurgovandas Kuberdas, the plaintiff's assignee, on my behalf, or a sufficient part thereof, to be paid to you out of the net realization of sale of the house at Chinch Bandar attached by the said Hurgovandas Kuberdas either direct from the said Hurgovandas Kuberdas or the Sheriff of Bombay. Interest is to run at the rate of 9 per cent. per annum.”

In the meantime another decree in suit No. 8 of 1870 had been obtained by one Thakersey Gokuldas against the firm of Hirji, Bhimji & Co. This decree had been, prior to the agreement of 9th November, 1886, purchased by the appellant Munmohandas, who, at the date of the said agreement, had also applied for execution.

The property attached, as above stated, was sold on the 6th April, 1887, by Hurgovandas Kuberdas on behalf of Vizbai as provided by the agreement of 9th March, 1886. The sale realized Rs. 45,000.

On the 4th August, 1887, notice was issued, by the Prothonotary of the High Court under s. 295 of the Civil Procedure Code (Act XIV of 1882), at the instance of the appellant Munmohandas Jaikisondas, stating that in

execution of a decree in suit No. 657 of 1869 the Sheriff had on the 6th April, 1887, realized assets to the amount of Rs. 45,000, and requiring all persons who prior to that date had applied to the Court for execution of decrees for money against the said judgment-debtor or who claimed to be [175] entitled to share in such assets under s. 295 of the Civil Procedure Code to attend before the Judge in chambers (Bayley, J.) in support of their claims.

On the 5th September, 1887, Bayley, J., made an order that the Sheriff should divide rateably the moneys in his hands in suit No. 657 of 1869 between the appellant Munmohandas and the respondent Vizbai. From that order Munmohandas Jaikisondas appealed. He contended that by the transaction between Vizbai and Hurgovandas Kuberdas the decree in suit No. 657 of 1869 had been extinguished as against the estate of Hirji Dossa, and that the said transaction amounted, in law and fact, to a purchase on behalf of the estate of Hirji Dossa of the properties attached in the said suit or the proceeds thereof.

Latham (Advocate-General) and *Starling*, for the appellant. They cited *Helmore v. Smith*(1).

Inverarity and *Telang*, for the respondent.

JUDGMENT.

SARGENT, C. J.—The question in this case arises upon the application of s. 295 of the Civil Procedure Code (Act XIV of 1882) to the following circumstances :—

Certain property of the late Hirji Dossa has been sold in execution of a decree; and the present claimants to share under the above section in the proceeds of the sale are the appellant, the decree-holder in suit No. 8 of 1870, and the respondent Vizbai, who is admittedly the legal representative of Hirji Dossa's estate, and who claims as the assignee from the decree-holder Hurgovandas in suit No. 657 of 1869 under an agreement dated the 9th November, 1886. (His Lordship read the agreement above set forth, and continued.) This agreement is virtually an adjustment of the decree. The effect of it, as a whole, is that the decree-holder ceased to have any beneficial interest in the decree; in other words, the decree is satisfied as between the decree-holder and Vizbai and is kept alive nominally for the purpose of securing to Vizbai Hurgovandas' share in the proceeds of the sale. In that case there would have been no real decree existent at the time of the distribution, and Vizbai's claim could clearly not have been allowed.

[176] But the agreement was not certified to the Court as required by s. 258 of the Civil Procedure Code (Act XIV of 1882), and is, therefore, not one which can be recognised as an adjustment of the decree. This, however, would not, we think, prevent the Court from taking notice of the payment of Rs. 18,000 and the past consideration for such payment, viz., the assignment of the share of the proceeds (see judgment in *Haji Abdul Rahiman v. Khoja Khaki Aruth* (2)), and the Judge in chambers could, therefore, we think properly order Hurgovandas to execute a power of attorney to Vizbai, to enable her to recover the share in the proceeds. But, however that may be, that order has not been appealed against.

The question for consideration, therefore, is whether Hurgovandas could assign his share to Vizbai to the prejudice of the rights of the other

1) 35. Ch. Div. 436.

(2) 11 B. 6 (16).

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attaching creditors to the proceeds of the sale. Assuming for a moment that the Rs. 18,000 had come out of Hirji Dossa's estate it is plain, we think, that Vizbai could not claim to withdraw any part of the proceeds required for the satisfaction of appellant's decree. Hurgovandas' share in such proceeds would, notwithstanding the assignment, remain part of the estate of Hirji Dossa, having been purchased with his estate, and it would be entirely opposed to what was the obvious intention of the Legislature in enacting s. 295 if Vizbai could, by claiming to be the assignee of Hurgovandas' share, withdraw a portion of the proceeds of the execution proceedings and so deprive the appellant of the fruits of his effort to obtain satisfaction of his decree.

However, in the present case it is alleged that Vizbai obtained the Rs. 18,000, as a loan, from one Canji Parbut on the security of Hurgovandas' share so assigned to Vizbai. The actual agreement between Vizbai and Canji Parbut has been produced for the first time at the hearing of this appeal; but as the correspondence shows that appellant knew that Vizbai said she had borrowed the Rs. 18,000 from Canji Parbut and he made no effort to obtain inspection of it, although told by Vizbai that he might apply to Canji Parbut for that purpose as far back as June, 1887, [177] and was not asked for it before the Judge in chambers, we do not think that any suspicion properly rests on the genuineness of the document. The Judge in chambers was not asked to examine Vizbai or Canji Parbut as to whether the Rs. 18,000 were raised solely on the security of Hurgovandas' share; and, lastly, Mr. Sayani stated that he was ready to swear that it was executed, as alleged, on the 9th November, 1886, the same day as that on which the agreement was passed to Vizbai by Hurgovandas. We think, therefore, that we must accept the contents of that document as showing the source from which the Rs. 18,000 were obtained and the nature of the security on which it was lent.

Now it is to be remarked, and this is important, that Vizbai was only liable for appellant's debt as the representative of Hirji Dossa, and that so far as she might have had property of her own available for the purpose—not derived from Hirji Dossa's estate—she stood in the same position as a third party who might have purchased Hurgovandas' share of the proceeds before they were realized. The purchase of Hurgovandas' share with her own money could not prejudice the appellant any more than if an entire stranger had purchased. It would be a matter of speculation in which she, as well as any one else, might engage. Can then, the circumstance of her having borrowed the money for the purpose and given the share in the proceeds as a security to the lender alter the question? We think not. If the money did not come from Hirji Dossa's estate it cannot matter whether it came directly from Vizbai's pocket, or from another person at her request. The Courts, no doubt, very properly look with great suspicion on an arrangement of this nature; but if it is satisfied that the money was derived from a source having no connection, directly or indirectly, with the estate indebted, we think there is no distinction, in principle, between the representative of the indebted estate and a stranger. We must, therefore, confirm the order with costs.

Appeal dismissed.

Attorneys for the appellant:—Messrs. *Tyabji and Dayabhai.*

Attorneys for the respondent:—Messrs. *Payne, Gilbert, and Sayani.*