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as such, entitled to the possession of the child. The Judge decided against her, and his decision was a determination as to her right, and, therefore, a judgment within the definitions that have been referred to. It is clear that the judgment referred to in cl. 15 of the Letters Patent need not be a final judgment. Where a final judgment is meant, those words are used as, *e.g.*, in cl. 39. Section 491, cl. (*a*) of the Criminal Procedure Code provides only for the minor being, "brought up before the Court to be dealt with according to law." The practice here has always been that the rule issued after the petition has been filed should raise the question of possession.

JUDGMENT.

SARGENT, C. J.—The petitioner seeks to appeal from an order discharging the rule which she obtained on the 2nd April. That rule calls upon Dossa Jewan to show couse why the minor Narrondas Dhanji should not be delivered to the petitioner. The question raised by it, therefore, as between the parties is as to the right to the possession of the child. That question was discussed at the argument of the rule, and the Judge decided it against the petitioner, holding that she was not entitled to the child, and he discharged the rule which she had obtained.

[558] We think that this order of discharge was a judgment within the meaning of the words in cl. 15 of the Letters Patent, 1865. The judgment there mentioned is not necessarily a final judgment. That is clear from the express use of these words in cl. 39. But the order of the 2nd May was certainly "a decision or determination affecting the rights" of the petitioner, and is a judgment within the definition of that term which we adopted in *Sonabai* v. *Ahmedbhai Habibhai* (1), and we think, therefore, that under cl. 15 of the Letters Patent, 1865, the petitioner has a right to appeal. The memorandum of appeal must be admitted.

Attorneys for petitioner: Messrs. *Thakurdas, Dharamsi and Cama.*

Attorneys for Dossa Jewan: Messrs. *Payne, Gilbert and Sayani.*

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

GURUPADAPA AND OTHERS (*Original Defendants Nos.* 1, 2, 4 *and* 5), *Appellants v.* IRAPA (*Original Plaintiff*), *Respondent.**
[22nd January, 1890.]

Decree—Execution—Estoppel—Omission to assert a claim in execution proceedings—Practice.

Defendants Nos. 1 and 2 were sued by a creditor of their undivided grand-uncle D. as his legal representatives, and a decree was obtained against them as such. In execution of that decree the house in dispute was put up for sale and purchased by the plaintiff. After satisfying the decree the surplus of the sale-proceeds was paid to the defendants, who received it and divided it between themselves. Plaintiff having been obstructed by the defendants in obtaining possession of the house, brought the present suit to recover possession. The

* Second Appeal No. 639 of 1888.

(1) 9 B. H. C. R. 398 (405).

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Court of first instance rejected the plaintiff's claim, on the ground that the house was the undivided family property of the defendants and that the plaintiff should bring a partition suit. The plaintiff appealed to the Assistant Judge, who was of opinion that the defendants' omission to set up their title to the property in question at the execution sale and the acceptance of the surplus of the proceeds of sale [559] estopped them from impeaching the sale and setting up their title. He, therefore, reversed the lower Court's decree and awarded the house to the plaintiff. On appeal by the defendants to the High Court,

Held, reversing the decree of the lower appellate Court, that the defendants were not estopped from setting up their title. Proceedings in execution are *in invitum* as regards the judgment-debtor, and he is in no way called upon to notice them. It was not suggested that the defendants took any part in the execution proceedings, or stood by so as to induce bidders to suppose that they claimed no interest other than as representatives of the original judgment-debtor, or that their silence misled the bidders at the sale. As to the reception of the residue of the purchase-money after satisfaction of the judgment-debt, it took place after the sale was completed.

[R., 28 B. 125=5 Bom. L.R. 799; 6 Bom. L.R. 864; D., U.B.R. (1892—1896) 379.]

THIS was a second appeal from a decision of T. Hart-Davies, Assistant Judge at Bijapur.

Suit by a purchaser at an execution sale to recover possession of a house.

Gurubasappa and Dundappa were brothers and members of an undivided family. Gurubasappa had two sons—Nagappa, the father of defendants No. 4, and Sangappa, the father of defendants No. 1 and No. 5.

Gurubasappa died, and after his death Dundappa and his nephew Sangappa (Gurubasappa's son) executed a joint mortgage of the house in dispute to defendant No. 3.

Dundappa died, and after his death one of his creditors obtained a decree against defendants Nos. 1 and 2 *as his representatives*, and in execution thereof caused the said house to be sold. At the execution sale the plaintiff bought it, subject to the mortgage to defendant No. 3.

The plaintiff in due course took possession, but was obstructed by the defendants. He accordingly filed the present suit and prayed for possession, offering to pay off the mortgage-debt to defendant No. 3.

Defendants Nos. 1, 2, 4 and 5 contended that Gurubasappa and Dundappa were undivided in interest, and that the sale to the plaintiff in execution of the decree obtained against defendants Nos. 1 and 2, as legal representatives of Dundappa, could not affect their interest in the house, which they alleged was their undivided property.

[560] It appeared that at the execution sale at which the plaintiff bought the house, the surplus of the sale-proceeds after satisfying the judgment-debt was paid to defendants 1 and 2.

The Subordinate Judge held that the house in dispute was the undivided family property of defendants Nos. 1, 2, 4 and 5, and that the plaintiff should bring a partition suit. He, therefore, dismissed the plaintiff's suit.

The plaintiff appealed to the Assistant Judge, who reversed the lower Court's decree.

The following is a portion of his judgment :—

"* * * No doubt had they (the defendants) objected at the time of sale, or if they had given the buyer notice that he was buying subject to a further claim on their part, their position would have been unassailable. But they did and said nothing, and when the sum realized was found to be more than the sum due, they took the surplus and divided it. Now the question

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of estoppel comes in. Have they by their action or rather omission in keeping silence and taking the surplus money, estopped themselves from now raising a claim to the property in their capacity as their grand-uncle's representatives * * * * ? They actually took the surplus money derived from the sale and divided it. I consider that they cannot now turn round and say that the sale was invalid; by the fact of their taking the surplus money they have certainly estopped themselves from pleading the invalidity of the sale * * * *."

The defendants 1, 2, 4 and 5 preferred a second appeal to the High Court.

Inverarity (*Ghanasham Nilkanth* with him), for the appellants.—The lower appellate Court was wrong in holding that the appellants were estopped from setting up their title. The plaintiff was a purchaser at a Court-sale, and must be held to have bought whatever interest the decree awarded. The maxim *caveat emptor* applies to execution sales. In execution proceedings a judgment-debtor is not bound to come forward —*Vasanji Haribhai* v. *Lallu Akhu* (1). A purchaser at such a sale is only entitled to [561] have the sale set aside if it is found that the judgment-debtor has no title to the property sold. Mere silence or omission to come forward does not amount to an estoppel. There was no misleading on the part of the defendants so as to estop them from asserting their title—s. 115 of Act I of 1872.

Macpherson (*Shamrao Vithal* with him).—Estoppel is to be inferred from surrounding circumstances and the conduct of the defendants after the sale, *viz.*, they receive and divide the surplus of the sale-proceeds. Had the defendants come forward in execution proceedings, the plaintiff would not have purchased the property. Here the defendants' conduct was such as to mislead the plaintiff, and comes within the conditions of s. 115 of the Evidence Act so as to estop them. They induce the plaintiff not to apply to set aside the sale under s. 313 of the Civil Procedure Code (Act XIV of 1882). They must not now be allowed to say that the property was undivided property. The lower appellate Court's decree must, therefore, be upheld.

JUDGMENT.

SARGENT, C. J.—We think the Assistant Judge was wrong in holding that the defendants were estopped by their conduct from setting up their title to the property in question. Proceedings in execution are *in invitum* as regards the judgment-debtor, and he is in no way called upon to notice them—*Vasanji Haribhai* v. *Lallu Akhu* (1). Here it is not suggested that the defendants took any part in them, or stood by so as to induce bidders to suppose they claimed no interest other than as representatives of the original judgment-debtor, or that their silence misled the bidders at the sale; and as to the defendants having received the residue of the purchase-money from the Nazir after satisfaction of the judgment-debt, that was after the purchase was completed, and, moreover, there is no evidence to show that plaintiff ever concerned himself with the appropriation of the purchase-money or knew what was done with it.

We must, therefore, reverse the decree of the Assistant Judge, F. P., and restore that of the Subordinate Judge, with all costs on respondent.

Decree reversed.

(1) 9 B. 285 (288).