

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

VISHVANATH CHARDU NAIK (*Original Plaintiff*), Appellant
v. SUBRAYA SHIVAPA SHETTI AND ANOTHER (*Original Defendants*),
Respondents. * [29th September, 1890.]

1890
SEP. 29.
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APPEL-
LATE
CIVIL.
—
15 B. 290.

Civil Procedure Code (Act XIV of 1882), s. 244—"Party"—"Representative of a party"—Auction-purchaser—Order in summary inquiry not binding on auction-purchaser.

A purchaser at a Court sale is not a party, or the representative of a party, within the meaning of s. 244 of the Code of Civil Procedure (Act XIV of 1882). He is, therefore, not bound by any order in the miscellaneous inquiry under ss. 280, 281 or 282 of the Code. Nor is he bound by the specifications contained in the proclamation of sale of the claims of intervenors.

Certain property was attached in execution of a decree. The defendants intervened, and objected to the attachment, on the ground that they held the property on permanent tenancy. Their objection was allowed, and the Court made an order, directing the property to be sold, subject to the defendants' rights. In the proclamation of sale, however, it was stated that the Court did not guarantee the title of the intervenors. The plaintiff purchased the property at the Court-sale. He then sued to eject the defendants. The defendants pleaded that the plaintiff had purchased, subject to their rights as permanent tenants. Both the lower Courts rejected the plaintiff's claim, on the ground that he was bound by the order in the miscellaneous inquiry, which had become conclusive by reason of his having omitted to sue within one year from the date of the order.

Held, reversing the lower Court's decision, that the order in the miscellaneous inquiry was not binding on the plaintiff as an auction-purchaser.

[F., 35 B. 275=13 Bom. L. R. 307=10 Ind. Cas. 913; 14 A. W. N. 59; 4 Bur. L.T. 28=9 Ind. Cas. 472; R., 16 B. 1 (21); 12 Bom. L.R. 539.]

SECOND appeal from the decision of G. McCorkell, District Judge of Kanara, in appeal No. 52 of 1889.

The lands in dispute originally belonged to one Kazi Hazrat Saheb, who mortgaged them to Vithoba Anant Pai. Vithoba, [291] having obtained a decree upon the mortgage, proceeded to attach the lands, when the defendants intervened, and objected to the attachment, on the ground that they held the lands on *mulgeni* tenure or permanent lease. The Court allowed this objection, and ordered the property to be sold subject to the defendants' *mulgeni* right. This order was passed on 22nd July, 1886, in miscellaneous proceeding, No. 40 of 1885.

In the proclamation of sale, however, the Court set forth, as a condition of sale in accordance with Rule 35 framed by the High Court under s. 287 of the Code of Civil Procedure (Act XIV of 1882), that the claims of intervenors were not guaranteed as true.

The plaintiff purchased the lands at the auction-sale, and filed the present suit to eject the defendants.

The defendants pleaded that they were permanent tenants, and that the plaintiff, having bought the property subject to their rights, was stopped from disputing their *mulgeni* tenure.

The Subordinate Judge held that the plaintiff was bound by the order in the summary inquiry and debarred from disputing the permanent tenancy set up by the defendants. The suit was, therefore, dismissed.

* Second, Appeal No. 945 of 1889.

1890
SEP. 29.

APPEL-
LATE
CIVIL.
15 B. 280.

This decision was upheld, on appeal, by the District Judge, who remarked as follows:—

“The order made in miscellaneous No. 40 of 1885, on the 22nd July, 1886, became final and binding on the expiry of one year. That order was primarily binding only on Vithoba and the defendants, and it is urged that the plaintiff cannot be bound by that order, because he was not a party to the miscellaneous proceedings. But I am of opinion that by purchasing the property in the execution sale he made himself an *ex post facto* party to the execution proceedings, and he must, I hold, be regarded as to a certain extent representing Vithoba Pai, and as he failed to bring any suit within one year from the date of the order, he must be bound by that order, and his right to dispute the permanent tenancy is barred by limitation.”

Against this decision the plaintiff appealed to the High Court.

[292] *Narayan Ganesh Chandavarkar*, for appellant.—The auction purchaser is not the representative of either the judgment-debtor or judgment-creditor. He is, therefore, not bound by the order in the summary inquiry—*Vasanji Haribhai v. Lallu Akhu* (1); *Lala Parbhu Lal v. J. Mylne* (2); *Gour Sundar Lahiri v. Hem Chunder Chowdhury* (3).

Shamrav Vithal, for respondent.—The plaintiff purchased with notice of the defendants' rights as permanent tenant. The certificate of sale distinctly states that the property is sold subject to those rights. That being so, plaintiff is estopped from disputing our rights.

JUDGMENT.

BIRDWOOD, J.—The plaintiff is the purchaser of the right, title and interest of Hazrat Kaji Saheb in certain lands sold in execution of a decree. When the lands were attached by the judgment-creditor, the defendants intervened, alleging that they held as permanent tenants under Hazrat Kaji. The Court, after making an enquiry, ordered the sale of the lands subject to the rights of the defendants. The District Judge has held that the plaintiff is bound by the order, as he must be taken to be an *ex post facto* party to the execution proceedings who failed to sue within a year from the date of the order. But in this view we cannot concur, as a purchaser at a Court sale is not a party or the representative of a party within the meaning of s. 244, Civil Procedure Code. (See *Hira Lal Chatterji v. Gourmoni Debi* (4); *Zauki Lal v. Jawahir Singh* (5); *Jagat Narain v. Jag Rup* (6); *Ramchhaibar Misr v. Bechu Bhagat* (7) and *Vasanji Haribhai v. Lallu Akhu* (1). The decision in the miscellaneous enquiry, cannot, therefore, be given a conclusive effect as against the plaintiff. Again, in the proclamation of sale it was expressly stated that the Court did not guarantee the title of the intervenors. There is no ground, therefore, for the argument that the plaintiff bought the lands subject to the ascertained rights of the defendants, and is estopped now from disputing those rights. He bought subject to the defendants' rights, if any. The claim ought to have been [293] heard on the merits. We must reverse the decree of the lower appellate Court and remand the case for a retrial on the merits. Costs to abide the result.

PARSONS, J.—The District Judge was clearly wrong in holding that the order made in miscellaneous No. 40 of 1885 on 22nd July, 1886,

(1) 9 B. 285.

(5) 5 A. 94.

(2) 14 C. 401.

(6) 5 A. 452.

(3) 16 C. 355.

(7) 7 A. 641.

(4) 13 C. 326.

became final and binding on the plaintiff on the expiry of one year. That order was made before the sale at which the plaintiff purchased. It was, moreover, an order in favour of the judgment-creditor, since it disallowed the claim to release the property from attachment. There was, it is true, a declaration added that the defendants (the intervenors) were permanent tenants of the land in question. Such a declaration, however, could not legally be made under either ss. 280, 281 or 282. It is contended by their pleader here that the declaration was made and inserted in the proclamation of sale after enquiry under s. 289. A purchaser, however, at a Court sale is not bound by the specifications in the proclamation of sale contained of the claims of intervenors. They are inserted for his benefit, and no binding effect as against him is anywhere given to them. On his purchase he steps into the place of the former owner of the property, and it is quite open to him to exercise and use, as against the intervenors, all the rights and remedies that that owner had. I concur, therefore, in reversing the decree and remanding the appeal for a hearing on the merits.

Decree reversed.

1890
SEP. 29.
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APPEL-
LATE
CIVIL.
—
15 B. 290.

15 B. 293.

APPELLATE CIVIL.

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

PEMRAJ CHANDRABHAU (*Original Plaintiff*), *Appellant v.*
SAVALYA GAJABA (*Original Defendant*), *Respondent.**
[30th September, 1890.]

Hindu law—Joint family—Family property—Mortgage—Mortgage of ancestral property by father of joint family—Decree on mortgage—Auction sale—Extent of the right, title and interest sold.

A. mortgaged his family property to C. Subsequently C. got a decree upon his mortgage, and purchased the property at an auction sale held in execution of the decree.

[294] In a suit brought by C.'s son against the heirs of A. to recover possession of the property,

Held, that, having regard to the language of the mortgage-deed, there could be no doubt that the entire family property was intended to be mortgaged. The auction-purchaser, therefore, took the whole interest in the property, and not merely the interest of A alone.

Simbhunath Pande v. Golap Singh (1) distinguished.

Bhagput Pershad v. Mussamut Girja Koer (2) followed.

THIS was a second appeal from the decision of J. W. Walker, District Judge of Ahmednagar.

Suit to recover property purchased at an auction-sale held in execution of a decree.

On the 26th June 1871, one Anaji mortgaged his ancestral property to one Chandrabhau Bapujishet Marwadi for Rs. 171 under a registered mortgage-deed. The mortgage recited that "In all Rs. 171 are due to you.

* Second Appeal, No. 666 of 1889.

(1) 14 C. 572.

(2) 15 I. A. 99 (101).