

ORDER OF REMAND.

PER CURIAM.—The Subordinate Judge has directed that the sum found due on taking the account of the original mortgage should be paid to the sub-mortgagee, and that the accounts as between the defendant-mortgagees *inter se* should be left for a separate suit.

The mortgagee objects to this direction, and claims, as was claimed in the written statement, that an account should be taken of the sub-mortgage. We think that this claim of the mortgagee is well founded, and that the case must be remanded for an account of the sub-mortgage to be taken. This is the course followed in England. In the case of a derivative mortgage or sub-mortgage the judgment directs an account of what is due to the original mortgagee or his assignee, and then of what is due to the derivative or sub-mortgagee, and that upon payment to the latter of the sum due to him, not exceeding the sum found due to the original mortgagee, and on payment of [694] the residue, if any, of what is due to the original mortgagee, both of them shall reconvey to the mortgagor (Coote on the Law of Mortgage, 5th ed., pp. 1178—9; Seton on Decrees, 4th ed., p. 1153).

Case remanded.

15 B. 694.

APPELLATE CIVIL.

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

BAI AMTHI *alias* RUKSHMANI (*Decree-holder*), *Petitioner v.*
MADHAV MANOR (*Auction-purchaser*), *Opponent.**
[19th March, 1891.]

Decree—Execution—Sale in execution—Collector, Power of, to set aside sale and to order a re-sale.

A sale of certain property by the Collector in execution of a decree was set aside by the Collector on the application of the decree-holder, and a re-sale took place at which the decree-holder purchased the property for Rs 650. The purchase-money was duly paid into Court. Subsequently a third party applied to the Collector to set aside this sale, and offered Rs. 800 for the property. The Collector made an order setting aside the sale and ordering a re-sale; the biddings at such re-sale to commence at Rs. 800. The re-sale accordingly took place. The decree-holder applied to the Subordinate Judge to set aside the re-sale and to confirm the previous sale to her. On reference to the High Court,

Held, that the re-sale by the Collector was a nullity, and that the question with regard to the confirmation of the previous sale should be dealt with by the Subordinate Judge as if the Collector had issued no orders on the subject.

Ganpatram Motiram v. Isakji Adamji (1) followed.

[R., 19 B. 216; 23 B. 531 (533).]

THIS was a reference made by Rao Sahab Tribhuvandas Lakshmidas, Subordinate Judge of Vagra in the Broach District, under s. 617 of the Civil Procedure Code (Act XIV of 1892).

* Civil Reference No. 15 of 1890.

(1) 15 B. 322.

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Bai Amthi, the plaintiff in suit No. 305 of 1887, having obtained a decree against Vardha Parabhu for Rs. 334-2-3, attached certain immoveable property of his on the 15th June 1889. Vardha Parabhu being an agriculturist, the decree was sent by the [695] Subordinate Judge's Court to the Collector for execution. The Collector sent the decree to the Mamlatdar of Vagra, who on the 9th June, 1888, put up the property for sale, and it was sold to one Muse Jiva for Rs. 115. On 12th June, 1888, the decree-holder made an application to the Collector to cancel the sale and to order a fresh sale of the property, on the ground that she had not received intimation of the date in due time and could not, therefore, apply for permission to bid at the sale; that the judgment-debtor's other creditors had received no notice of the sale, and that the property had been sold for an inadequate price. The decree-holder further asked for permission to bid at the sale. The Collector granted the application of the decree-holder, and the property was, after a fresh proclamation, put up again for sale on the 11th August, 1888, when it was purchased by the decree-holder for Rs. 650, one-fourth of which was duly paid by her into Court at the time of the sale. The former purchaser, Muse Jiva, did not object to the fresh sale of the property, and the remaining three-fourths of the purchase-money were duly paid into Court within fifteen days, as required by law.

On the 1st September, 1888, one Ise Vali Adam made an application to the Collector, offering to pay Rs. 800 for the property. The Collector thereupon wrote to the Mamlatdar to inquire whether the decree-holder was willing to give this sum. The decree-holder objected that her purchase was complete, that she had paid the full amount of the purchase-money, and had become the owner of the property, and that the sale to her could not be set aside, merely because a higher price had been subsequently offered by a third person.

On the 28th November, 1888, the Collector made an order that the decree-holder's sale should be set aside, and that a fresh sale should be held, the biddings to commence with Ise Vali's bid for Rs. 800. This order was transmitted by the Collector to the Mamlatdar of Vagra through the Court of the Subordinate Judge which had passed the original decree, and which had transmitted it for execution to the Collector, and then for the first time the Subordinate Judge learnt that the Collector had ordered a re-sale of the property. A correspondence then [696] took place between the Subordinate Judge and the Collector with respect to the legality and propriety of the order. While this correspondence was going on, the decree-holder repeatedly applied both to the Collector and to the Subordinate Judge to confirm the sale to her, but without effect.

On the 20th March 1890 the Collector informed the Subordinate Judge that as the two former sales were not legal, and as an adequate price had not been obtained for the property, it was within his authority to confirm the sale or not. The Subordinate Judge then on the 25th March 1890 wrote to the Collector to stay the re-sale, in order that a reference might be made to the High Court. The letter was duly received by the Mamlatdar on the 25th March, but he did not stop the re-sale, and the property was sold on the 26th March, 1890. On the 2nd April 1890 the decree-holder applied to the Subordinate Judge to set aside the re-sale of the 26th March and to confirm the sale to her. The Subordinate Judge issued notice to the auction-purchaser at the re-sale to show cause why the re-sale should not be set aside. The auction-purchaser appeared to show cause, and filed his objections.

At this stage of the proceedings the Subordinate Judge submitted the following questions for the decision of the High Court:—

“(1) Whether the Collector had authority to cancel the decree-holder's sale of the 11th August 1888, and to order a re-sale of the property?

“(2) Whether the decree-holder's sale should be confirmed or not?”

The opinion of the Subordinate Judge on the first question was in the negative and on the second in the affirmative.

Gokuldas Kahandas Parekh, for the decree-holder.—I rely upon the ruling in *Ganpatram Motiram v. Isakji Adamji* (1).

Chimanlal Hiralal Setalvad (*amicus curiæ*), for the auction-purchaser.

ORDER.

[697] SARGENT, C. J.—Following the decision in *Ganpatram Motiram v. Isakji Adamji* (1), we answer the first question referred by the Subordinate Judge in the negative. The re-sale by the Collector being a nullity, the Subordinate Judge will deal with the second question as if the Collector had issued no orders on the subject.

Order accordingly.

15 B. 697.

APPELLATE CIVIL.

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

MAGANLAL PURUSHOTTAM AND OTHERS (*Original Defendants*),
Appellants v. GOVINDLAL NAGINDAS (*Original Plaintiff*),
*Respondent.** [21st March, 1891.]

Declaratory decree—Section 42 of the Specific Relief Act (I of 1877)—Defence not raised in the lower Court—Objection taken for the first time in appeal.

Bai Javer, a Hindu widow, made a will disposing of property of which under an award she had only the use during her life and to which the plaintiff, her son, was entitled after her death. While she was still living the plaintiff filed this suit praying that the will might be declared invalid. The defendants were the testatrix and those who took under the will. While the suit was pending, the testatrix died. The Subordinate Judge passed a decree in plaintiff's favour and declared the will invalid.

The defendants appealed, and contended for the first time, in appeal, that the allegations in the plaint, *viz.*, that the will was in their favour and that they (the defendants) were interested in denying the plaintiff's title as reversioner, did not constitute a case in which, in the exercise of a sound judicial discretion, a declaratory decree ought to be made.

Held, that as the objection was taken for the first time in appeal, it would be unjust to allow the defendants to benefit after they had failed to resist G.'s claim on the merits.

Held, further, that the will of J. should be declared to be invalid so far as it operated to defeat the award.

[R., 26 A. 238 = 6 Bom. L.R. 495 = 8 C.W.N. 465 = 31 I.A. 67 = 14 M.L.J. 149 = 7 O.C. 239 = 8 Sar. P.C.J. 625.]

* Appeal No. 96 of 1890.

(1) 15 B. 322.

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