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[594] APPELLATE CIVIL.

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

VITHOBA (*Original Opponent and Decree-holder*), *Applicant v.* ESAT (*Original Petitioner and Auction-Purchaser*), *Opponent.**

[21st September, 1893.]

Civil Procedure Code (XIV of 1882), ss. 313, 315 and 622—Execution—Execution sale—Auction-purchaser—Return of purchase-money when judgment-debtor found to have no saleable interest in property sold—Fact how found—Judgment-creditor to have notice—Party—Procedure.

One Vithoba obtained a decree against Bapu, and in execution sold certain land which was purchased by Esat, who got a certificate of sale, and obtained possession. Subsequently the land was claimed by one Bhowani, who sued Bapu (the judgment-debtor) and Esat (the auction-purchaser) to set aside the sale and establish his title to the land. He succeeded in his suit, and in execution got possession of the land. Thereupon Esat (the auction-purchaser) applied under s. 315 of the Civil Procedure Code (XIV of 1882) for a refund of his purchase-money, and the Subordinate Judge made an order directing Vithoba, the decree-holder, to repay it. Vithoba contended that he ought not to have been ordered to refund the money without having an opportunity of proving that the property had been properly sold in execution of his decree against Bapu, and that as he had not been made a party to Bhowani's suit he had had no opportunity of doing this. On application to the High Court,

Held, that the order of the Subordinate Judge for the restitution of the purchase-money was wrong. Section 315 provides that the purchase-money paid at an execution sale is to be returned when it is found that the judgment-debtor has no saleable interest in the property sold. It does not prescribe how the fact is to be ascertained, but the conclusion from s. 313 as well as from general principles is that it must be a finding on some proceedings to which the judgment-creditor was a party or at any rate of which he had notice. In the present case there was no finding on which the Subordinate Judge could base his order for the restitution of the purchase-money.

THIS was an application under the extraordinary jurisdiction of the High Court (s. 622, Civil Procedure Code, XIV of 1882) against the order of Rao Saheb S. M. Kale, Subordinate Judge of Malegaon in the Khandesh District.

Vithoba obtained a decree against Bapu, and on 3rd May, 1887, in execution, sold certain land belonging to Bapu. Esat (the present opponent) was the purchaser at the execution sale, and he got a certificate of sale on the 6th July, 1887, and obtained possession of the land. Subsequently one Bhowani valad Mahipat claimed the land and filed a suit (No. 244 of 1890) against Esat and Bapu (the judgment-debtor) to set aside the sale and establish [595] his title, and on the 6th June, 1891, he obtained a decree. On the 4th September, 1891, in execution of that decree he obtained possession. Esat (the above-mentioned auction-purchaser) thereupon applied on the 9th September, 1892, under s. 315 of the Civil Procedure Code (XIV of 1882) for a refund of the purchase-money which he had paid to Vithoba for the property at the auction-sale. Vithoba resisted the application on the ground that he had not been a party to Bhowani's suit (No. 244 of 1890), and that if he had been made a party he could have proved that the land was Bapu's and was rightly sold. The Subordinate Judge, however, ordered Vithoba to repay the purchase-money to Esat.

Vithoba thereupon applied to the High Court in its extraordinary jurisdiction, and obtained a rule calling on Esat (the auction-purchaser)

* Application No. 34 of 1893 under the extraordinary jurisdiction.

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to show cause why the order of the Subordinate Judge should not be set aside.

Ganesh K. Deshmukh, for the applicant Vithoba, in support of the rule.—We sold the land in execution of our decree against Bapu and received the purchase-money. We are now ordered to refund the purchase-money under s. 315 of the Code, on the ground that Bapu, the judgment-debtor, had no interest in the property which we sold in execution of our decree against him. There is no evidence that he had no interest in it except the decree in Bhowani's suit (No. 244 of 1890). That decree is no evidence against us, as we were not a party to the suit. Further, we contend that, in all suits to set aside a sale held in execution of a decree, the decree-holder at whose instance the sale took place is a necessary party—*Bank of Hindustan, &c.* v. *Premchand* (1).

Mahadeo Chimnaji Apte appeared to show cause for Esat, the auction-purchaser.—The lower Court was right in ordering that the purchase-money we paid at the auction-sale should be refunded to us. The property we bought has been taken from us, the Court having declared, in Bhowani's suit, that it did not belong to Bapu. The auction-sale at which we bought was the act of the Court, and the Court should give back our money. The judgment-creditor Vithoba was not a necessary [596] party to Bhowani's suit—*Kishun Lal* v. *Muhammad Safdar Ali Khan* (2); *Sivarama* v. *Rama* (3); *Raghubar Dayal* v. *Bank of Upper India* (4).

The High Court cannot interfere with the order of refund made by the lower Court under s. 622 of the Civil Procedure Code, because there is no question of jurisdiction or material irregularity.

Ganesh Krishna Deshmukh in reply.—Under similar circumstances, the Court has interfered under s. 622—*Shri Vishvambhar Pandit* v. *Shri Vasudev Pandit* (5).

JUDGMENT.

SARGENT, C. J.—In this case a third person has established his right to the property as against the auction-purchaser, and the latter has taken execution proceedings against the judgment-creditor under s. 315 to recover his purchase-money. The question is, can he do so, the judgment-debtor having been found to have no saleable interest in the property in a suit to which he was not made a party, and of which he had no notice given him by the auction-purchaser.

Section 313, under which the purchaser at the auction sale moves in the matter for the purpose of setting aside the sale on the ground that the judgment-debtor has no saleable interest, read with s. 315, enables the auction-purchaser to get back his purchase-money; but s. 313 expressly provides that the judgment-creditor should have had an opportunity of being heard before the sale is set aside. Section 315 provides for the return of the purchase-money, not only when the sale is set aside under s. 312 or s. 313, but also whenever it is found that the judgment-debtor had no saleable interest. It does not say how the finding is to be arrived at; but the conclusion from the language of s. 313, as well as from general principles, is that it must be a finding in some proceedings to which the judgment-creditor was a party or, at any rate, of which he had notice.

(1) 5 B.H.C.R. O.C.J. 83 (92). (2) 13 A. 383. (3) 8 M. 99.
(4) 5 A. 364. (5) 16 B. 708.

There was, therefore, in the present case no finding before the Court on which the Subordinate Judge could base his order for [597] the restoration of the purchase-money, and a proper case has, therefore, we think, been made out for the intervention of the Court in the exercise of its extraordinary jurisdiction. We must, therefore, reverse the order of the Subordinate Judge and send back the case to be disposed of according to law. Costs to follow the result.

Order reversed.

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18 B. 597.

APPELLATE CIVIL.

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

GHELA ICHHARAM (*Original Defendant*), *Appellant v.* SANKALCHAND JETHA (*Original Plaintiff*), *Respondent.** [26th September, 1893.]

Res judicata—*Issue in previous suit—Unnecessary issue—Finding on an unnecessary issue inserted in decree—Appeal—Civil Procedure Code (XIV of 1882), s. 13.*

The plaintiff attached certain property in execution of a decree obtained by him against one Jamna, the widow of one Raichand. The defendant Ghela intervened and claimed the house as having been purchased by him from one Samal Nathu, to whom, he alleged, Jamna had sold it before the date of the decree against her. The plaintiff's attachment was removed, and the plaintiff thereupon brought a suit (No. 670 of 1886) to establish his right to sell the house in execution. The Court found that the house was not Jamna's, and dismissed the suit on that ground, but it also recorded a finding that the sales set up by the defendant were fraudulent and collusive. Subsequently the plaintiff obtained a decree against Mulji, the son of Raichand, and in execution again attached the house. The defendant again intervened, alleging that the house was his, and the attachment was removed. Thereupon the plaintiff filed this suit to establish his right to sell in execution. The defendant again pleaded that he was owner of the house by reason of the sales set up by him in the former suit. It was argued that these sales had been proved to be collusive and fraudulent in an issue raised in that suit, and that the defence in the present suit was, therefore, *res judicata*.

Held, that the defence was not *res judicata*. The former suit had been decided on the finding that the property in question was not Jamna's. The finding in that suit on the issue as to the sales to the defendant was not necessary for the determination of the suit.

Where an issue is not necessary for the decision of the suit in which it is raised, the decree couched in general terms does not cover the finding on that issue, nor can the insertion of such finding in the decree give it the force of *res judicata*. The Civil Procedure Code does not contemplate findings on issues being inserted in it (see ss. 2 and 6 and sch. IV) and there is no section in the Code which makes it necessary to appeal from the decree, because such finding has been inserted in it.

[**Appl.**, 35 B. 38 (40)=12 Bom. L.R. 766=7 Ind. Cas. 967; **R.**, 17 A. 174 (178)=15 A.W.N. 47; 22 B. 245 (250); 32 B. 315=10 Bom. L. R. 380 (384); 9 C.W.N. 60 (65); 9 Ind. Cas. 1030=120 P.L.R. 1911=101 P.W.R. 1911; 92 P.R. 1902 (F.B.)=16 P.L.R. 1903; **Expl.**, 25 B. 115 (124).]

[598] THIS was a second appeal from the decision of Gilmour McCorkell, District Judge of Ahmedabad.

Suit to establish the right to sell a house in execution of a decree.

One Raichand died, leaving behind him a widow Jamna and a son Mulji. After his death the plaintiff brought a suit (No. 1181 of 1880)

* Second Appeal No. 266 of 1892.