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right to go as near as they like to it. Moreover, in the dark, it is plain, that such an obstruction would be distinctly unsafe. We may also add that it is not the practice of the Court to interfere with corporate bodies "unless they are manifestly abusing their powers"—*Duke of Bedford v. Dawson*<sup>(1)</sup>.

The only question, therefore, remaining for decision was, whether the land in question formed part of a public street. As to this the lower Courts have found that it did not. It was, however, objected in the lower Court of appeal by the defendants, and that objection has been renewed before us, that they did not know that it was disputed that it was a public street as alleged in their written statement, and that they were taken by surprise. The second issue raised by the first Court certainly does not in the vernacular distinctly raise this question, and we think, therefore, that we ought not to accept the finding of the lower Courts without giving the defendants an opportunity of giving evidence. We must, therefore, send back the case to the lower appellate Court for a finding on the following issue:—

Whether the land in question forms part of a public street vested in the Municipality?

The finding to be sent to this Court in three months. Both parties to be allowed to give fresh evidence.

*Issue sent back.*

(1) L. R., 20 Eq., 353.

## APPELLATE CIVIL.

*Before Mr. Justice Jardine and Mr. Justice Ránade.*

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February 19.

MATHURA'DA'S (ORIGINAL DEFENDANT No. 1), APPELLANT, v.  
PANHA'LA'L (ORIGINAL PLAINTIFF), RESPONDENT.\*

*Civil Procedure Code (Act XIV of 1882), Secs. 312 and 320—Transfer of execution of a decree to Collector—Court sale—Collector's order setting aside the sale—Suit by auction-purchaser to set aside the Collector's order and to have his purchase confirmed.*

Certain property was sold in execution of a decree by the Collector, to whom the execution had been transferred under section 320 of the Code of Civil Procedure

\* Second Appeal, No. 678 of 1892.

(Act XIV of 1882). The Collector set aside the sale before the date of confirmation, on the sole ground that the judgment-debtor had, subsequent to the sale, made full payment of the sum decreed. Thereupon the auction-purchaser filed a suit for a declaration that the sale had been improperly set aside, and for a confirmation of the sale.

*Held*, that the suit would lie. Reading section 312 with section 311 of the Code of Civil Procedure, the suit was not barred under the last clause of section 312, nor under section 588, clause 16.

*Held*, also, that the rules framed by Government under section 320 of the Code only restricted the powers of the Court to interfere with the procedure of the execution of decrees transferred to the Collector. They did not come in the way of a party to bring a civil suit to establish his purchase.

*Held*, also, that the Collector had no power under section 311 of the Code to set aside the sale and receive payment from the judgment-debtor.

SECOND appeal from the decision of S. Hammick, District Judge of Ahmednagar, in Appeal No. 190 of 1891 confirming the decision of Ráo Bahádur Ganpatráo A. Mánkar, Subordinate Judge of the First Class, in Suit No. 294 of 1891.

On the 29th October, 1890, the property in dispute was sold in execution of a decree by the Collector to whom the execution had been transferred under section 320 of the Code of Civil Procedure (Act XIV of 1882).

On the 7th November, 1890, the judgment-debtor applied to the Collector not to confirm the sale, on the ground that he was ready to satisfy the decree.

The judgment-debtor paid up the amount of the decree, and on that ground the Collector set aside the decree and ordered the purchase-money to be restored to the auction-purchaser on the 14th December, 1890.

Thereupon the auction-purchaser filed the present suit to have the auction sale of the 29th October, 1890, confirmed, alleging that there was no irregularity in publishing or conducting the sale, and that the Collector had no authority to set aside the sale.

Defendant No. 1, the judgment-debtor, did not appear to contest the claim.

Defendant No. 2, the judgment-creditor at whose instance the property was put up to sale, pleaded that he was unnecessarily made a party to the suit, and that the sale was not set aside at his instance.

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The Court of first instance held that the judgment-debtor's paying the decretal amount after the auction sale was not a sufficient reason for setting aside the sale; that there was no irregularity in publishing or conducting the sale, and that, therefore, it could not be set aside under section 311 of the Code of Civil Procedure. The Court further held, on the authority of *Azim-ud-din v. Baldeo*<sup>(1)</sup> and *Bandi Bibi v. Kálka*<sup>(2)</sup>, that the suit was maintainable.

The Court, therefore, passed a decree confirming the auction sale at which the plaintiff had purchased the property in dispute.

This decree was affirmed, on appeal, by the District Judge.

From this decision the defendant No. 1 preferred a second appeal to the High Court.

*Dáji Abáji Khare* for appellant:—The suit is not maintainable. It is barred under the last clause of section 312 of the Code of Civil Procedure. The decree in execution of which the property was sold, was sent to the Collector for execution under section 320 of the Code. The rules framed by the Local Government under that section confer upon the Collector the powers of the Court under section 312. It is competent, therefore, for the Collector either to confirm or refuse to confirm an auction sale. The Court has no jurisdiction to interfere with his orders passed under section 312. If his order was wrong or illegal, it was open to the aggrieved party to appeal against that order under section 588, clause (16). It is not open to him to file a regular suit to set aside the order. Referring to sections 311, 312 and 313, they contemplate an application to be made to the Court, and not a suit, as the proper procedure to adopt in a case like this. Refers to *Mohendro Náráin v. Gopál*<sup>(3)</sup>, *Virarúghava v. Venkatácharyar*<sup>(4)</sup>, *Modun Mohun v. Boroda Soondari*<sup>(5)</sup>.

*Ganashám Nilkanth* for respondent:—Section 312 should be read with section 311 of the Code of Civil Procedure. When so read, they refer to applications either by a decree-holder

(1) I. L. R., 3 All., 554. (3) I. L. R., 17 Cal., 769.

(2) I. L. R., 9 All., 602. (4) I. L. R., 5 Mad., 217.

(5) 8 C. L. R., 261.

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or by a judgment-debtor to set aside a Court sale, and not to an application by an auction-purchaser. The last clause of section 312 does not, therefore, apply. And there is nothing in the Code which bars a suit like the present. That such a suit can lie, see *Azim-ud-din v. Baldeo*<sup>(1)</sup>; *Bandi Bibi v. Kálka*<sup>(2)</sup>. Nor is the suit barred by any of the rules framed by Government under section 320 of the Code of Civil Procedure. Those rules only restrict the jurisdiction of the Court to interfere with the procedure adopted by the Collector in executing the decree. They do not prevent the Court from entertaining a suit like the present.

RANA'DE, J.:—In this case plaintiff brought his suit to have it declared that the auction-sale at which he had bought certain property was improperly set aside by the Collector, to whom the execution had been transferred by the Civil Court under sections 320—326 of the Code, and to have his auction-purchase confirmed. The suit was brought against the original judgment-debtor, who did not appear to defend the suit, and the judgment-creditor who appeared, who urged that he had received the money due to him from the Collector. The Collector set aside the sale, before the date of confirmation, solely on the ground that the judgment-debtor had made full payment of the sum decreed.

It was contended on plaintiff's behalf that the Collector had no power under section 311 to set aside the sale, and to receive payment from the judgment-debtor. This contention was upheld by both the lower Courts. In second appeal, the appellant's pleader urged before us the objection that plaintiff's suit was not maintainable, and that plaintiff's remedy was by an application to the lower Court.

On a careful consideration of sections 311—316, and of the authorities cited on both sides, we feel satisfied that the suit was maintainable in the circumstances of the present case. Section 311 contemplates applications by the decree-holder or by a person whose property has been sold on the ground of irregularity, while section 313 only permits the purchaser so to apply when the judgment-debtor is found to have no saleable interest

(1) I. L. R., 3 All., 554.

(2) I. L. R., 9 All., 602.

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in the property sold. With section 311, section 312 must be read, and when so read the last clause of section 312 creates no bar to the suit, neither does section 588, clause 16. See *Azim-ud-din v. Baldeo*<sup>(1)</sup>.

It was further contended by Mr. Khare for the appellant that, as the execution in this case was transferred to the Collector, that officer had, under the rules framed by Government and section 320 of the Code, full powers, and the civil Court had no jurisdiction to interfere in the matter. This restriction obviously has reference to the powers of the Court to interfere with the procedure of the execution of decrees transferred to the Collector. It could not come in the way of the right of the party to bring a civil suit to establish his purchase. The Allahabad High Court has expressly held that such a right exists even in the case of irregularities in the conduct of sales ordered by civil Courts. See *Azim-ud-din v. Baldeo*<sup>(1)</sup> and *Bandi Bibi v. Kálka*<sup>(2)</sup>. This Court has also held in *Bái Amthi v. Mádhav Manor*<sup>(3)</sup> that the Collector's procedure in reselling property already sold by him should be treated as a nullity. Section 325 permits a resale when the Collector buys in the property, but not where there has been a formal sale. If the right exists, it is open under section 311, Civil Procedure Code, to the plaintiff to assert it in a civil suit, unless it can be shown that it has been expressly taken away.

We accordingly confirm the decree of the Courts below and dismiss the appeal with costs.

*Decree confirmed.*

(1) I. L. R., 3 All., 554.

(2) I. L. R., 9 All., 602.

(3) P. J. for 1891, p. 81; I. L. R., 15 Bom., 694.