

1900.
SHANKARBHAI
v.
SOMABHAI.

The suit was of such a character that no appeal from the Subordinate Judge's decision lay to the District Court. We must therefore make the rule absolute, and set aside the appellate decree of the District Court. No order as to costs.

Appellate decree set aside.

APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

1900.
December 7.

MURLIDHAR (ORIGINAL AUCTION-PURCHASER), APPELLANT, v. ANAND-
RAO AND OTHERS (ORIGINAL DEFENDANTS 1 TO 4 AND
ORIGINAL PLAINTIFF), RESPONDENTS.*

Execution—Decree—Sale in execution—Civil Procedure Code (Act XIV of 1882), section 310A and 244 (c)—Order refusing to set aside a sale—Appeal from such order.

An appeal lies from an order passed under section 310A of the Civil Procedure Code (Act XIV of 1882), refusing to set aside a sale, where the dispute relates to the execution, discharge or satisfaction of a decree and thus comes within section 244 (c) of the Code.

SECOND appeal from the decision of R. Knight, District Judge of Sâtára, reversing the decision of Ráo Sáheb N. V. Samant, Second Class Subordinate Judge of Rahimatpur.

The question in this appeal was whether an order refusing to set aside a sale under section 310A of the Civil Procedure Code (Act XIV of 1882) was appealable.

On 23rd November, 1893, the plaintiff Nawalram obtained a decree for Rs. 1,247-14-0, together with interest up to the date of recovery, against defendants' father Bhavanrao Anandrao.

On 7th January, 1893, plaintiff applied for execution of the decree and claimed Rs. 1,666-2-0, being the principal amount (Rs. 1,247-14-0) with interest up to date.

A warrant of attachment and sale was issued, but the defendants appeared and paid the amount of the claim and the warrant was returned as satisfied on the 27th August, 1893.

* Second Appeal No. 498 of 1900.

It was subsequently discovered that the Názir had made a mistake as to the amount of interest and that the defendants had paid Rs. 7-1-0 too much. The money however, which was realised in April from the defendants, was paid over to the plaintiff on the 22nd September, 1898, but on that day he applied to the Court stating that in his former application he had undercalculated the amount of interest due to him, and he asked for a fresh warrant for the further amount which he claimed to be due.

Thereupon the Subordinate Judge without giving any notice to the defendants issued a second warrant.

This warrant did not state the full amount to be paid and the interest was left to be calculated at the time of execution.

Two of the payments made by the defendants in satisfaction of this warrant were held not to be in time and a sale in execution was allowed to take place on 15th April, 1899; the plaintiff had applied for leave to bid at the sale, but was only allowed to do so in case the biddings reached Rs. 4,000.

At the sale the plaintiff's brother bought the property for Rs. 2.

The defendants subsequently heard of the sale and they at once paid into Court the amount due under the warrant with interest, costs, &c., and they applied under section 310A of the Civil Procedure Code that the sale should be set aside.

The Subordinate Judge refused the application and confirmed the sale.

In appeal the District Judge reversed the decision of the Subordinate Judge and set aside the sale on the grounds: (1) that there had been a mistake on the part of the plaintiff which led to all the subsequent irregularities; (2) that there had been reprehensible carelessness in the Názir's office; (3) that the proceedings had been held by the Subordinate Judge without notice to the defendants; (4) that an irregular warrant of sale had been issued; (5) that property, worth certainly not less than Rs. 4,000, had been sold for a sum of two rupees to the plaintiff's own brother; and (6) that the defendants had all along been ready and willing to pay the amount justly due from them.

He therefore directed that the total debt, including principal, interest and costs, should be computed up to the date of the

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second sale, *viz.* 15th April, 1899; that the plaintiff should recover that amount from the sums paid into Court by the judgment-debtors, allowance being made for what he had already received; that the balance should be restored to the judgment-debtors, and that all the proceedings of the lower Court subsequent to 10th September, 1898, should be set aside.

Against this decision the auction-purchaser preferred a second appeal to the High Court, contending that no appeal lay to the District Judge against an order of the Subordinate Judge made under section 310A of the Civil Procedure Code (XIV of 1882).

P. M. Mehta (with *B. A. Bhagwat*) for appellant:—The District Judge had no jurisdiction to hear an appeal from the Subordinate Judge's order in the present case. The order was made under section 310A of the Code of Civil Procedure (Act XIV of 1882). Such an order is not appealable, unless the matter in dispute is one which falls within section 244 (c) of the Code, and relates to the execution, discharge or satisfaction of a decree. *Pandurang v. Krishnabai*⁽¹⁾; *Bashir-ud-din v. Jhori Singh*⁽²⁾; *Hira Lal Ghose v. Chundra Kanto Ghose*.⁽³⁾ In the present case there is no question relating to execution, discharge or satisfaction of a decree. If there was any error, it was merely in the calculation of the amount due under the decree both in the *darhkāst* and in the proclamation of sale. Such an error is not one which falls under section 244 (c) of the Code.

Robertson (with *D. A. Khare*) for respondents Nos. 1 to 4:—The dispute between the parties relates to the satisfaction of the decree. The amount due under the decree was miscalculated and misstated both by the decree-holder and by the Názir of the Court. This vitiated the auction-sale. It is a matter essentially relating to the execution, discharge and satisfaction of a decree; and therefore falls under clause (c) of section 244 of the Code. If so, the order refusing to set aside the sale under section 310A is appealable.

(1) (1899) P. J. p. 51.

(2) (1896) 19 All. 140.

(3) (1899) 26 Cal. 539.

RANADE, J. :—The question of law raised in this case is whether the District Judge had jurisdiction to hear the appeal from the order passed by the Court of first instance under section 310A refusing to set aside the sale. In *Pandurang v. Krishnabai*,⁽¹⁾ it was held that in cases where the order under section 310A falls within the section 244 (c), an appeal lay to the District Court from the first Court's order. Where the dispute did not fall within the terms of section 244 (c), no appeal would lie.—*Prosunno v. Kuli Das*.⁽²⁾ Where the dispute relates to the execution, discharge, or satisfaction of a decree, section 244 applies even in cases where the question raised concerns the auction-purchaser.

The Allahabad High-Court has held that ordinarily no appeal lies from orders under section 310A except in cases where section 244 applies—*Bashir-ud-din v. Jhori Singh*.⁽³⁾ The Calcutta High Court has also held that an appeal would lie from an order refusing to set aside a sale if under the circumstances section 244 applied—*Hira Lal Ghose v. Chundra Kanto Ghose*.⁽⁴⁾ The application of the section did not turn upon the question whether the judgment-creditor or the auction-purchaser was the appellant. In a Madras case—*Mammud v. Locke*⁽⁵⁾—the same principle appears to have been accepted.

Following these authorities the only question we have to consider is whether section 244 (c) applied to the circumstances of this case. The District Judge has set out fully in his judgment the facts of the case, and it appears therefrom that, when the judgment-creditor gave his first "darkhást," he did not claim the full amount. The judgment-debtor satisfied the warrant by paying up more than was demanded. The judgment-creditor then found out his mistake and his application for a second warrant was granted by the Subordinate Judge, without allowing the judgment-debtor any opportunity to see how the account was made up. In the warrant itself the full amount to be paid was not mentioned and the interest additions had to be calculated at the time of the execution of the warrant. The judgment-

(1) (1899) P. J. p. 51.

(3) (1896) 19 All. 140.

(2) (1892) 19 I. A. 165; S. C. 19 Cal. 683.

(4) (1899) 26 Cal. 539.

(5) (1897) 20 Mad. 487.

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debtor paid up the balance of the principal within the time fixed by law. This amount was insufficient and he made up the deficiency by two further payments. These payments were held to be not made within time and the sale was allowed to take place. At this sale the brother of the administrator of the minor judgment-creditor bought the property for two rupees although the creditor himself had undertaken to make a bid of 4,000 rupees for the same property. The circumstances of the case were thus such as to justify the lower Appellate Court in holding that there had been great irregularities in the procedure followed by the Subordinate Judge.

Section 244 (c) is intended to govern cases such as these, and the District Judge had full jurisdiction to entertain the appeal. The purchaser was evidently a creature of the judgment-creditor, who only put him forward to escape from his own liabilities and get the property sold for two (2) rupees. We accordingly dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Candy, Mr. Justice Ranade and Mr. Justice Whitworth.

QUEEN-EMPRESS v. HUSSEIN HAJI.*

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December 7.

Criminal Procedure Code (Act V of 1898), sections 337 and 494—Withdrawal of prosecution—Discharge—Acquittal—Evidence—Discharged persons called as witnesses—Competent witness—Practice.

Where the Public Prosecutor with the consent of the Court withdrew from the prosecution of two out of several accused persons tried jointly for an offence under section 4 of the Gambling Act (Bombay Act IV of 1887), and the two accused were thereupon discharged under section 494 of the Criminal Procedure Code (Act V of 1898) and then examined as witnesses for the prosecution, *Held*, (WHITWORTH, J. dissenting) that the persons so discharged were competent witnesses.

* Criminal Appeal, No 436 of 1900.