

## APPELLATE CIVIL.

*Before Sir L. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.*

MAGANLAL MULJI (JUDGMENT-DEBTOR), APPLICANT, v. DOSHI MULJI  
BHAICHAND AND ANOTHER (AUCTION-PURCHASERS), OPPONENTS.\*

1901.  
March 29.

*Civil Procedure Code (Act XIV of 1882), section 310A and section 244—  
Property privately sold by judgment-debtor prior to Court sale—Application  
by judgment-debtor to set aside a Court sale—Application rejected—  
Application to High Court under section 622—Practice.*

In execution of a decree passed against a judgment-debtor, his property was sold by auction. Prior, however, to the execution sale, he effected a private sale to another person, and out of the proceeds he paid off the judgment-creditor, who duly certified that the decree was satisfied. Subsequently the judgment-debtor applied under section 310A to set aside the execution sale. His application was refused by the Judge on the ground that, at the date of the execution sale, he had no interest in the property, having disposed of it by private sale. He held, therefore, that he could not apply under section 310A. Against this order the judgment-debtor applied to the High Court under section 622 of the Civil Procedure Code (XIV of 1882). It was contended (1) that the order was one under section 244 of the Civil Procedure Code; that an appeal lay from an order under that section, and that therefore he had no right of application under section 622, and (2) that he having disposed of his property by private sale, section 310A did not apply.

*Held*, that section 244 did not apply, inasmuch as the auction-purchaser certainly could not be taken to be the representative of the decree-holder, and even assuming him to be a representative of the judgment-debtor, that section did not apply to a question between a party to the suit and his representative. Section 244 therefore did not apply to the order complained of, which was consequently not appealable, for an order under section 310A is only appealable so far as it comes under section 244 (c). There being no appeal, the judgment-debtor could therefore apply under section 622 of the Code.

(2) Notwithstanding the private sale, the judgment-debtor could apply under section 310A of the Code to set aside the execution sale.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, XIV of 1882) against the order of Ráo Sáheb Atmaram J. Kaji, Subordinate Judge of Umreth, in an execution proceeding.

The applicant, a judgment-debtor, applied to the Subordinate Judge of Umreth, under section 310A of the Civil Procedure Code

\* Application No. 40 of 1901 under the Extraordinary Jurisdiction.

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(XIV of 1882), to set aside the sale of his immoveable property which had been sold in execution of the decree passed against him.

It appeared that on the very day of the Court sale the applicant had effected a private sale of the property, and out of the proceeds had paid to the judgment-creditor the amount due under his decree, and that the latter had duly acknowledged the satisfaction of the decree.

The execution sale, however, had nevertheless taken place and the opponents had purchased the property.

The applicant (judgment-debtor) now applied under section 310A of the Civil Procedure Code (XIV of 1882) to set aside the execution sale.

The opponents (purchasers at the execution sale) opposed the application, contending that the applicant was not entitled to apply under the said section, inasmuch as at the time of the execution sale the property did not belong to the applicant, inasmuch as he had previously sold it.

The Subordinate Judge dismissed the application on the ground that at the time of the execution sale the applicant had no interest in the property, and that section 310A was intended for the benefit of the judgment-debtor himself and not for the benefit of a person who had previously purchased the property from him.

The applicant obtained a rule *nisi* from the High Court under section 622 of the Civil Procedure Code (XIV of 1882) calling upon the opponents (purchasers at the execution sale) to show cause why the above order of the Subordinate Judge should not be set aside.

The opponents contended (1) that this question was one under section 244 of the Civil Procedure Code, and that as from an order made under that section an appeal lay, the applicants were not entitled to apply to the Court under section 622 of this Code. (2) That the applicants had no *locus standi* under section 310A.

*Gokuldas K. Parekh* for the opponents showed cause:—We raise a preliminary objection to this application. It is an application under section 622 of the Civil Procedure Code. We submit that as an appeal lies against the order which the applicant seeks to set aside, he cannot apply under section 622.

The order of the lower Court was passed under section 244 (c) of the Civil Procedure Code. An appeal is given against such an order. Therefore the present application under section 622 cannot be entertained. The application to get the Court sale set aside raises a question between the parties to the suit in which the decree was passed or their representatives relating to the execution of the decree, and therefore the order of the lower Court is covered by section 244 (c). We rely upon *Pandurang v. Krishnabai*,<sup>(1)</sup> *Prosonno Coomar Sanyal v. Kasi Das Sanyal*.<sup>(2)</sup>

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Further, on the merits, the judgment-debtor having sold his interest in the property, he is not a party interested within the meaning of section 310A of the Civil Procedure Code and has no *locus standi* under the section to have the sale set aside. The case relied on by the Judge supports our view.

*Lallubhai A. Shah* for the applicant in support of the rule:— The order of the lower Court does not fall within the terms of section 244 (c) of the Code, and is therefore not appealable. In the case of *Pandurang v. Krishnabai*<sup>(3)</sup> there was a question between the auction-purchaser and the judgment-creditor. In the present case the judgment-creditor is not a party to the proceedings and an auction-purchaser is not in any way a representative of the judgment-creditor. Further, the question regarding the setting aside of the sale does not relate to the execution of the decree. The Privy Council ruling in *Prosonno Coomar Sanyal v. Kasi Das Sanyal*<sup>(4)</sup> does not touch the present point and is no authority for the proposition that the order in question is covered by the terms of section 244 (c).

On the merits the order of the Judge is clearly wrong. The judgment-debtor has certainly a *locus standi* to apply under section 310A in spite of his having effected a private sale of his property during the pendency of the attachment proceedings. The private sale would not become operative unless and until the auction sale is set aside. See sections 276 and 310A. The decision relied on by the Judge does not show that the judgment-debtor has no *locus standi* under the circumstances of the present

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

(2) (1892) 19 I. A. 166; 19 Cal. 683.

(3) (1899) P. J. p. 51.

(4) (1892) 19 I. A. 166.

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case. The *ratio decidendi* in *Ramchandra Dhondo v. Rakhmabai*<sup>(1)</sup> clearly supports our contention.

JENKINS, C.J. :—In execution of a decree immovable property has been sold, and the judgment-debtor has applied under section 310A of the Civil Procedure Code to have the sale set aside. The application has been rejected by the Second Class Subordinate Judge at Umreth, and the judgment-debtor now asks us to interfere under section 622 of the Civil Procedure Code.

Prior to his application the judgment-debtor sold his interest in the property to a third party, and with the purchase-money the decree-holder's claim was paid and satisfaction certified. Under these circumstances the auction-purchaser at the execution sale objects that no application under section 622 will lie as there is an appeal under section 244 of the Civil Procedure Code, and further, that the judgment-debtor has no *locus standi* under section 310A.

Does section 244(e) apply? It may be conceded that we have here a question "relating to the execution, discharge or satisfaction of the decree or the stay of execution thereof." That, however, is not enough: it must also be a question "arising between the parties to the suit in which the decree was passed or their representatives." But clearly no question here arises between the parties to the suit, so that we have to determine the force of the words "or their representatives."

The opponent, in support of his objection, relies on the judgment of the Privy Council in *Prosonno Coomar Sanyal v. Kasi Das Sanyal*.<sup>(2)</sup> There is a tendency to suppose that this decision has struck out of the section the words "arising between the parties to the suit . . . or their representatives," so that it is important to see what precisely was decided there.

Their Lordships stated with approval that the result of the decisions was that "when a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser who is no party to the suit is interested in the result has never

(1) (1898) 23 Bom. 450.

(2) (1892) L. R., 19 I. A. 166; 19 Cal. 683.

been held to be a bar to the application of the section." It is clear, therefore, that their Lordships did not hold the auction-purchaser to be a party or a representative: they merely held that his interest in the result did not prevent the question being one between parties. This is made even more apparent by the cases to which their Lordships refer. Thus in *Kurigali v. Mayan*<sup>(1)</sup> it was said :

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And section 244 (c) expressly prohibits any separate suit regarding questions arising between the parties to the suit in which a decree has been passed, or their representatives, and relating to the execution of the decree. The question whether the property mentioned in the decree was available for execution is such a question, and it arose between the decree-holders and this plaintiff, who had been made a party to the decree as the judgment-debtor's representative.

So in *Sakharam v. Damodar*,<sup>(2)</sup> where an auction-purchaser was interested and a party, it was said :

The Subordinate Judge was also wrong in referring the judgment-debtor to a suit, inasmuch as the relief sought by him, *at all events as against the judgment-creditor*, could only be obtained on an application of the kind contemplated in section 244 (c) of the Code of Civil Procedure.

Now here the question is simply between the judgment-debtor and the purchaser of his interest in the land: and can it be said that the auction-purchaser is the representative of a party? Certainly not of the decree-holder: therefore he can only claim to be a representative of the judgment-debtor. I doubt whether he can claim this character, but assuming, for the sake of argument, he can, it would not aid him; for in our opinion the section does not cover a question between a party to the suit and his representative. Therefore we have not the necessary basis for the application of section 244, and as a consequence we hold no appeal lies, because it is only so far as an order under section 310A comes under section 244(c) that it is appealable.

But if no appeal lies, then section 622 applies, so that we must next have to see whether, notwithstanding the private sale, the judgment-debtor has a *locus standi*. In execution under Chapter XIX it is only property of the judgment-debtor that can be attached and sold, so that the petitioner seems to me to answer

<sup>(1)</sup> (1883) 7 Mad. 255.

<sup>(2)</sup> (1885) 9 Bom. 468.

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the description of a "person whose immoveable property has been sold under this chapter," notwithstanding his private sale. Moreover, it is to be noticed that "when an attachment has been made . . . any private alienation of the property attached . . . shall be void against all claims enforceable under the attachment."

For these reasons we think we can interfere and ought to make the rule absolute with costs in both the Courts on the opponents.

*Rule made absolute.*

## CRIMINAL REFERENCE.

*Before Mr. Justice Candy and Mr. Justice Fulton.*

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*April 1.*

KING-EMPEROR *v.* THE CHIEF OFFICER OF THE  
S.S. "MUSHTARI."\*

*Jurisdiction—High seas—Offence committed on the high seas—Procedure—  
Penal Code (Act XLV of 1860)—37 and 38 Vict., chapter-27, section 3.*

A Presidency Magistrate has authority to charge, convict and sentence under the Indian Penal Code (Act XLV of 1860) a person who has committed an offence in a British ship during her voyage on the high seas. The law applicable both as regards procedure and punishment is the Indian law.

REFERENCE by Khán Bahádur P. H. Dastur, Third Presidency Magistrate, Bombay. The reference was as follows:

"I have the honour to refer for the opinion of the High Court the following question of law which has arisen in a case now pending in this Court.

"Has the Presidency Magistrate, Bombay, authority to convict a person for an offence under the Indian Penal Code, the said offence having been committed in a British ship during her voyage on the high seas?"

The facts of the case briefly are as follow:

"The chief officer of the S.S. 'Mushtari,' a ship belonging to the Bombay and Persian Steam Navigation Company, Limited, is charged with criminal breach of trust as a servant (under

\* Criminal Reference No. 16 of 1901.