

question whether the debts alleged to be due are due to the deceased person whom the applicant claims to represent.

The respondent has established his representative title and a succession certificate may quite possibly be put to a legitimate use by him even in the Suit 106 of 1902 if it be decided in that regular suit that Bai Kashi, plaintiff in that regular suit, is not entitled to the debt of Rs. 1,500 which present respondent claims to be a debt due to Jiwandas Vardhman, deceased.

If the respondent should seek to make use of the certificate in order to harass Bai Kashi with unnecessary litigation, that could be a matter for the consideration of any Court in which further litigation about this particular claim to the Rs. 1,500 might be undertaken, but this argument cannot be entertained as a reason for refusing the certificate when respondent has established his representative title. The issue of the certificate in no way affects the question whether the debt of Rs. 1,500 alleged in the application to be due to the estate of Jiwandas is or is not due to that estate.

I would therefore confirm the order of the lower Court and dismiss this appeal. The cross-objection is overruled. No order as to costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

PANDURANG BALAJI BAGAVE (ORIGINAL PLAINTIFF), APPELLANT, v. KRISHNAJI GOVIND PARAB AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1903.
August 25.

Civil Procedure Code (Act XIV of 1882), section 266 (c)—House—Sale in execution—Exemption from liability to attachment or sale—Facts to be taken to exist which are proved.

A certain house was sold in execution of a decree. Subsequently the purchaser having brought a suit to recover possession of the house, the defendant, that is, the judgment-debtor under the decree, contended that

* Appeal No. 8 of 1903 from order.

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inasmuch as he was an agriculturist and the house was occupied by him, the materials of it could not be sold having regard to clause (e) of section 266, Civil Procedure Code (Act XIV of 1882).

Held, that the judgment-debtor having never suggested, much less proved, in the execution proceedings that clause (e) of section 266 of the Civil Procedure Code (Act XIV of 1882) had application to the case, the house was liable to be attached and sold and it was not open to him to contend that the Court had no jurisdiction to order the sale of the house by reason of clause (e). Only those facts can be taken to exist which are proved. In the absence of proof the exemption from liability to attachment or sale does not exist for the purposes of execution proceedings. "Strangers to a suit are justified in believing that the Court has done that which by the direction of the Code it ought to do."

Mallanjan v. Narkari⁽¹⁾ applied, *Gurupadapa v. Irappa*⁽²⁾ and *Vasanti Haribhai v. Lallu Akhu*⁽³⁾ distinguished.

APPEAL against a remand order passed by Mahadev Shridhar, First Class Subordinate Judge of Ratnagiri with appellate powers, reversing the decree of M. M. Bhat, Joint Subordinate Judge.

The plaintiff purchased at a sale in execution of a decree the western moiety of the house in dispute and he was put in joint possession of the house with the person entitled to the other moiety. Subsequently the judgment-debtor having caused obstruction to the plaintiff's management, he brought the present suit either for the recovery of possession of the moiety purchased by him or for partition.

Defendant 1, the judgment-debtor under the decree, contended that as he was an agriculturist, his house could not be attached in the execution of the decree and that the sale being illegal, the plaintiff got no title to the house by his purchase.

Defendant 2, the owner of the other moiety, answered that he had no objection to the house being partitioned at the instance of the plaintiff if his moiety was not thereby affected.

The Subordinate Judge found that the sale to plaintiff was not illegal and that he was entitled to a partition and separate possession of the moiety of the house. He therefore decreed that by equitable partition the plaintiff should recover possession of the moiety belonging to defendant 1.

(1) (1900) 25 Bom. 387 at p. 347.

(2) (1890) 14 Bom. 558.

(3) (1885) 0 Bom. 235.

On appeal by defendant 1 the Judge reversed the decree and remanded the suit for trial after raising proper issues. The reason for the remand was as follows:—

The Subordinate Judge remarks: "In the execution proceedings no objection was taken by the defendant under section 266. That was the only time when such objection should have been taken under section 244. It cannot be taken in this suit." Now section 244 bars a suit in respect of questions arising between parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge or satisfaction of the decree. It has been held in *Vishvanath v. Subraya* (I. L. R. XVI Bom. 290) that a purchaser at a Court's sale is not a party or the representative of a party within the meaning of section 244 of the Civil Procedure Code.

Section 244 does not therefore preclude the defendant from raising the question. It is open to the plaintiff to contend that the defendant is estopped from questioning the sale. If this question of estoppel by conduct or otherwise is raised by the plaintiff, proper issues must be framed and the question decided according to law.

The plaintiff appealed.

H. C. Coyajee for the appellant (plaintiff):—The order of remand was passed under section 562 of the Civil Procedure Code. We contend that the said order is not correct, and the decision arrived at by the first Court was right. Sections 244 and 266 of the Civil Procedure Code relate to execution of decrees; therefore, any question as to the legality or propriety of the execution sale should have been raised while the proceedings in execution were pending. If the sale was illegal the defendant should have appealed under section 244. It is not now open to him in the present suit to contest the legality of the sale.

Further, the question as to the illegality of the sale on the ground of section 266 (c) was not only not raised in the execution proceedings but there was no evidence offered by the defendant to prove that he was an agriculturist entitled to the benefit of clause (c) of section 266 of the Civil Procedure Code. We bought the moiety of the house under the belief that the Court executing the decree was empowered to sell it. Under these circumstances the judgment-debtor cannot impeach the sale: *Seth Chand Mal v. Durga Devi*⁽¹⁾.

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Narayan V. Gokhale for the respondent (defendant) :—He referred to *Gurupadapa v. Irapa*⁽¹⁾ and *Vasanji v. Lallu Akhu*⁽²⁾. (*Jenkins, C. J.* referred to *Malkarjun v. Narhari*⁽³⁾).

JENKINS, C. J. :—The plaintiff sues to recover possession of the western moiety of a house, alleging that he purchased that moiety at an auction sale in execution of a decree.

The defendant I pleads that inasmuch as he is an agriculturist and the house was occupied by him, the materials of it cannot be sold, having regard to clause (e) of section 266, Civil Procedure Code.

The first Court decided in the plaintiff's favour and against the plea, but on appeal the 1st Class Subordinate Judge, A. P., reversed the decision and remanded the suit for trial after raising proper issues. From that order this appeal is preferred.

Now the house, apart from clause (e) of section 266, clearly could be attached and sold in execution of the decree, and it was only if it were shown that it fell within clause (e) that it could not be attached and sold. But admittedly the judgment-debtor never suggested, much less proved, that clause (e) had any application to the case.

It is a general rule that in Courts of Law only those facts can be taken to exist which are proved; so that it is manifest that in the absence of proof the exemption from liability to attachment or sale did not exist for the purposes of the execution proceedings. Therefore the executing Court had complete jurisdiction to make the order it did; and I do not think that it is now open to the judgment-debtor in the former suit, who is the defendant in the present suit, to contend that there was no jurisdiction to order the sale of the house by reason of clause (e).

This case appears to me to be distinct from *Gurupadapa v. Irapa*⁽¹⁾, and also from *Vasanji Haribhai v. Lallu Akhu*⁽²⁾, on which it proceeded.

I think that to come to any other conclusion than that which we have expressed would be to disregard what has been laid

(1) (1890) 14 Bom. 558.

(2) (1885) 9 Bom. 285.

(3) (1900) 25 Bom. 337.

down by the Privy Council in the recent case of *Malkarjun v. Narhari* (1), where it was said that "strangers to a suit are justified in believing that the Court has done that which by the direction of the Code it ought to do." Here I think the purchaser, who was a stranger to the suit, was justified in believing that the Court had authority to attach and sell this property.

For these reasons I think that the order of the lower appellate Court was wrong and that it must be reversed and the decree of the Subordinate Judge restored with costs throughout.

Decree reversed.

(1) (1900) 25 Bom. 337 at p. 347.

CRIMINAL APPELLATE.

*Before Mr. Justice Chandavarkar and Mr. Justice Jacob; on reference,
before Mr. Justice Aston.*

EMPEROR v. ALLOOMIYA HUSAN.*

Gambling—Bombay Prevention of Gambling Act (Bombay Act IV of 1887), sections 4, 5, 6, 7—Keeping a common gaming house—Applicability of presumption under section 7 to cases under section 4—Warrant under section 6—Delay in executing the warrant—Previous conviction—Criminal Procedure Code (Act V of 1898), section 343—Evidence Act (Act I of 1872), sections 11, 54.

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On the 19th May, 1903, a warrant was issued by the Commissioner of Police at Bombay, under section 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), for the arrest of accused 1. In execution of this warrant, when, on the 7th June, 1903, the police entered the room of accused 1, no actual play was seen by the raiding party, but there were found playing cards on the ground, and ten persons, including accused 1, were found sitting in a circle. Upon these facts the Magistrate convicted the accused of keeping a common gaming house, an offence under section 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), by applying to him the presumption created by section 7 of the Act; and taking into consideration the previous convictions of the accused under the Act, he sentenced him to pay a fine of Rs. 500, the maximum amount of fine allowed by the section. On appeal to the High Court,

Held, by Chandavarkar and Aston, JJ. (Jacob, J., dissenting), affirming the conviction, (1) that the presumption created by section 7 of the Bombay