

of justice, which are applicable in British India, to give the person affected by the order an opportunity of being heard.

Therefore, I consider that the rule must be made absolute.

Rule made absolute.

R. R.

1911.

EMPEROR
v.
AMIR BALA.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

NARAYAN SADOBA HALWAI (ORIGINAL DEFENDANT), APPELLANT, v.
UMBAR ADAM MEMON (ORIGINAL PLAINTIFF), RESPONDENT.*

1911,
March 31.

Civil Procedure Code (Act XIV of 1882), sections 282, 287—Decree—Execution—Attachment—Application to raise attachment by a third person—Court declaring lien in his favour—Property sold subject to lien—Third party suing the auction purchaser for amount of lien—Auction purchaser can question the existence of lien.

In execution of a money decree obtained by G against H certain property belonging to the latter was attached. U intervened in those proceedings and asked to raise the attachment on the ground that the property was his. The Court investigated the claim under sections 280 and 281 of the Civil Procedure Code of 1882 and held that the property belonged to H and that U was entitled to a lien on the property for Rs. 687-11-3. The property was then sold at a Court sale subject to the lien and purchased by N. U sued N to recover the amount of his lien. N contended that the order passed in the miscellaneous proceedings did not bind him and that he was entitled to question the existence of the lien :—

Held, that N was not bound by the order passed in the miscellaneous proceedings, for he could not be regarded as a party to it being not a representative either of the judgment-debtor or of the judgment-creditor.

Vasanji Haribhai v. Lallu Akhu⁽¹⁾, *Vishwanath Chardu Naik v. Subraya Shivaya Shetti*⁽²⁾, followed.

Held, further, that N was entitled to question the existence of the lien, inasmuch as the order passed by the Court as to the lien could not be regarded as one passed under section 282, but as one passed under section 287 of the Civil Procedure Code of 1882.

* Second Appeal No. 958 of 1909.

(1) (1885) 9 Bom. 285

(2) (1890) 15 Bom. 290.

1911.

NARAYAN
SADOBHA
HALWAIv.
UMBAR
ADAM
MEMON.

SECOND appeal from the decision of P. J. Talyarkhan, District Judge of Thana, reversing the decree passed by D. D. Cooper, Subordinate Judge of Bassein.

One Govind Sadoba Halwai obtained a money decree against one Haroo Hassan Memon in 1903. In execution of the decree Govind attached some property as belonging to his judgment-debtor Haroo Hassan Memon. In those proceedings, one Umbar Adam Memon intervened and applied to raise the attachment on the ground that the property belonged to him. The Court investigated the claim under sections 280 and 281 of the Civil Procedure Code of 1882 and found that the property belonged to Haroo Hassan, the judgment-debtor; but declared Umbar Adam entitled to the lien on the property for Rs. 687-11-3. The Court, on the 20th December 1905, ordered the property to be sold subject to Umbar Adam's lien. The property was sold subject to the lien at a Court sale on the 16th March 1906, and purchased by Narayan Sadoba Halwai (the defendant).

In 1908, Umbar Adam brought the present suit to recover the amount of his lien from Narayan Sadoba (the defendant).

The defendant in his written statement contended *inter alia* that he had no knowledge of plaintiff's encumbrance and that he was not liable for the claim.

The Subordinate Judge held that the defendant was not bound by what took place in the miscellaneous proceedings to which he was not a party, but as the plaintiff adduced no evidence to prove his claim he dismissed the suit.

This decree was, on appeal, reversed by the District Judge, who held that the defendant was precluded from disputing the lien. The plaintiff's claim was decreed.

The defendant appealed to the High Court.

D. A. Khare and B. V. Desai for the appellant.

G. S. Rao for the respondent.

CHANDAVARKAR, J. :—The facts which arise in this second appeal for the determination of the question of limitation argued before us are shortly these. One Govind Sadoba obtained a money decree against one Haroo Hassan. In execution of

that money decree the property in dispute was attached by the judgment-creditor. The present respondent-plaintiff intervened and applied to have the attachment raised on the ground that he was owner of, the property.

Upon investigation of the claim under sections 280 and 281 of the Civil Procedure Code the Court held that the property belonged to the judgment-debtor, not to the present plaintiff. But it also held that the intervenor was entitled to a lien on the property. Accordingly the Court passed an order that the property should be attached and sold, subject to the lien of the intervenor. The property was sold subject to the present plaintiff's lien, namely, Rs. 687-11-3, and the defendant purchased it at the Court sale.

The plaintiff has now brought the suit to recover the amount of the lien which, he contends, has been established conclusively by the order passed in the miscellaneous proceeding. The lower Court has allowed the claim. But it is contended before us by defendant, the auction-purchaser, that he is entitled to question the existence of the lien; that the miscellaneous order does not bind him; and that he was not bound to bring a suit to set aside that order after the sale within a year from its date. It has been held by this Court, in a series of cases, that under the circumstances mentioned above, the auction-purchaser cannot be regarded as a party to the miscellaneous order, being not a representative either of the judgment-debtor or of the judgment-creditor: see *Vasanji Haribhai v. Lallu Akhu*⁽¹⁾ and *Vishvanath Chardu Naik v. Subraga Shivapa Shetti*⁽²⁾. Unless, therefore, the plaintiff brings this case within the principle of the decisions in *Yashvant Shenvi v. Vithoba Sheti*⁽³⁾ and *Nemagauda v. Paresha*⁽⁴⁾, his suit must fail. But these two decisions cannot apply here, because there the auction-purchaser was also the attaching creditor, and, therefore, the order was one which bound the parties to it and the suit was brought by the party who was unsuccessful in the miscellaneous proceeding.

(1) (1885) 9 Bom. 285.

(2) (1890) 15 Bom. 290.

(3) (1887) 12 Bom. 231.

(4) (1897) 22 Bom. 640.

1911.

NARAYAN
SADOBHA
HALWAI
v.
UMBAR
ADAM
MEMON.

1911.

NARAYAN
SADIBA
HALWAI
v.
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ADAM
MEMON.

The second ground is that in the miscellaneous proceeding the plaintiff came in and sought to raise the attachment upon the ground that the property belonged to him. There was no question directly raised by him that he was entitled to a lien. The question of lien came in only incidentally, and, therefore, the order passed by the Subordinate Judge, that the property should be sold subject to the plaintiff's lien, cannot be treated as an order under section 282. It must under the circumstances be regarded as one made under section 287.

The lower appellate Court having erroneously disposed of the preliminary point arising in this case, we must reverse the decree and remand the appeal to that Court for a hearing on the merits.

Costs to be costs in the appeal.

HEATON, J.:—I agree to this order. I notice that the District Judge has distinguished clearly between two different aspects of the case. The first was the question whether the auction-purchaser is bound by the order in the miscellaneous proceeding; and he held, I think quite rightly, that the auction-purchaser was not bound; the second aspect of the case was whether the property sold was the equity of redemption and nothing else. The Judge held, in my opinion, wrongly that what was sold was the equity of redemption only.

Now, if this were a finding of fact, we should be bound by it; but to my mind it is not a finding of fact. It is merely a determination of the legal effect of certain documents. There is no dispute as to the meaning of the words in the documents. They are the proclamation of sale and the certificate of sale, and they are undoubtedly to the effect that what is sold is the property, *i. e.*, landed property, subject to a certain charge, the nature and amount of which are mentioned. It is not in terms a sale of the equity of redemption. Therefore, it seems to me, that the District Judge was wrong in deciding the case on the ground that the purchaser had bought nothing but the equity of redemption.

As to the first aspect of the case I will say a few words. The dispute arose between the decree-holder and a third person

who objected to the sale of certain properties alleged to belong to the judgment-debtor. To that dispute the judgment-debtor himself was not made a party, in any sense of the word whatever. He had no notice of this dispute and he never intervened in it. The dispute was heard, in that summary manner, which is adopted in such proceedings. It was not tried with the thoroughness and with that care to secure that all persons interested are parties with which such a suit, for instance as a mortgage suit, is tried; the decision arrived at by the Court is a decision which not only binds the parties to the dispute, but, unless a suit to set it aside is brought within one year, it is final. But it seems to me, that it would be wrong on principle to hold that the decision arrived at binds anyone whatever who is not a party to the dispute or one who derives interest from a party. Now the judgment-debtor was not a party to that dispute and he is not a person who has derived interest from either of the parties. It seems to me therefore to be contrary to first principles to say that the decision arrived at in that dispute has any legal effect whatever as regards the judgment-debtor, in the nature of *res judicata*, or for the purpose of preventing him or the auction-purchaser, if indeed the auction-purchaser can be supposed to be his representative, from reopening that matter which was decided.

Decree reversed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Robertson.

MOTILAL MITHALAL AND ANOTHER, PLAINTIFFS, v. THE ADVOCATE GENERAL OF BOMBAY AND OTHERS, DEFENDANTS.*

1910.

August 5.

Hindu Law—Will—Use of expression “malik”—Widow’s estate—Construction.

A Hindu died, leaving a Will by which (*inter alia*) he appointed his wife as residuary legatee in the following words:—“As regards whatever may

* Suit No. 236 of 1910, Originating Summons.

1911.
 NARAYAN
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 v.
 UMBAR
 ADAM
 MEMON