

that Messrs. King, King & Co. should be paid their debt in this manner. Therefore, in my opinion, defendant is not entitled to a refund of what has already been paid out to the execution plaintiffs.

It was suggested in argument that the defendant might be estopped from claiming a refund; and it is quite possible that the plaintiffs may have acted upon the belief arising from the defendant making no attempt to dispute the attachment that he acquiesced in it. But, as far as this case is concerned, there is no evidence on which a case of estoppel could be founded.

Attorneys for the plaintiffs: *Messrs. Captain and Vaidya.*

Attorneys for the defendant: *Messrs. Craigie, Blunt and Caroe.*

H. S. C.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

ARJUNA BIN RAGHU NAROLE (ORIGINAL OPPONENT, AUCTION-PURCHASER),
APPLICANT, *v.* KRISHNAJI VENIMADHAV WALIMBE (ORIGINAL
PLAINTIFF), OPPONENT.^o

Civil Procedure Code (Act V of 1908), sections 68, 70, Rule 14, † Order XXI, Rule 101—Decree—Execution by Collector—Court functus officio for the time being—Exhaustion of all the power conferred upon the Collector for execution—Matters requiring to be done in execution must be done by the Court which passed the decree.

After a decree has been transferred to a Collector for execution, the Court which passed that decree is for the time being *functus officio* for all purposes of execution; but as soon as the Collector has exhausted all the power of

^o Application No. 147 of 1913 under the extraordinary jurisdiction.

† Rule 14 framed under section 70 of the Civil Procedure Code (Act V of 1908) is as follows:—

14. When the property sold is in the occupancy of the judgment-debtor, or of any other person, and a certificate in respect thereof has been granted under the last preceding rule, the Collector or other official aforesaid shall, on

1914.

KING, KING
& Co.

v.

MAJOR
DAVIDSON.

1914.

June 16.

1914.

ARJUNA BIN

RAGHU

v.

KRISHNAJI.

execution conferred upon him by Rule 14 framed under section 70 of the Civil Procedure Code (Act V of 1908), then any matters requiring to be done, and usually regarded as in execution, must be done by the Court which made the decree.

Titā v. Chuhilal⁽¹⁾, referred to.

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the order passed by V. N. Rahurkar, First Class Subordinate Judge of Satara, in Miscellaneous Application No. 2 of 1913, in an execution proceeding.

The proceeding in execution of a decree was transferred by the Court of the First Class Subordinate Judge of Satara to the Collector under section 68 of the Civil Procedure Code, Act V of 1908.

The Collector in due course sold certain property in execution and granted a certificate of sale to the auction-purchaser Arjuna bin Raghu Narole and put him in possession by dispossessing a third party named Krishnaji. Krishnaji, thereupon, applied to the First Class Subordinate Judge for being restored to possession. The Subordinate Judge granted the application on the following grounds :—

The applicant is dispossessed. His title is derived from a sale-deed subsequent to the mortgage on which the decree was obtained. The applicant was in actual possession. His sale-deed was registered. He was not a party. The auction-purchaser cannot oust the applicant otherwise than in due course of law. The application is allowed with costs.

Against the said order the auction-purchaser preferred an application under the extraordinary jurisdiction

application by the purchaser, order delivery to be made by putting the purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property ; by proclaiming to the occupant by beat of drum, or in such other manner as may be customary, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser ; and, if need be, by removing any person who refuses to vacate the same.

(1) (1906) 31 Bom. 207.

(section 115 of the Civil Procedure Code, Act V of 1908) and a *rule nisi* was issued requiring the plaintiff to show cause why the order of the Subordinate Judge should not be set aside on the grounds *inter alia* that the lower Court had no jurisdiction to make the order in execution and that the execution proceeding having been transferred to the Collector, the Collector alone could pass any order that might be necessary.

Jayakar with *K. N. Kojaji* for the applicant (auction-purchaser):—The execution proceeding having been transferred to the Collector, he alone had jurisdiction to deal with matters arising in execution under the Rules made under section 70 of the Civil Procedure Code: *Ragho Chandrarao v. Hanmati Chandrarao*⁽¹⁾. It would be disastrous if the Collector and the Court should both carry out the execution proceeding simultaneously. Sections 68 to 70 of the Civil Procedure Code empower the Collector to carry out the execution: *Muhammad Said Khan v. Payag Sahu*⁽²⁾. Under the Rules under section 70 the Collector has to hear claims, etc. If the Collector dispossesses a third party, he can undo his own act. The Court has no jurisdiction.

Gadgil with *D. R. Patvardhan* for the opponent (plaintiff):—The Collector can only act so far as the Rules framed under section 70 of the Civil Procedure Code permit. He cannot act beyond them: *Pita v. Chunilal*⁽³⁾.

Jayakar in reply:—The case relied on has no application. It was a case of setting aside a sale and Rule 17 especially provides that the applicant should be referred to the Civil Court.

BEAMAN, J.:—A decree was sent to the Collector for execution under section 68 of the Civil Procedure Code.

⁽¹⁾ (1913) 37 Bom. 488.

⁽²⁾ (1894) 16 All. 228.

⁽³⁾ (1906) 31 Bom. 207.

1914.

ARJUNA BIN
RAGHU
v.
KRISHNAJI.

1914.

ARJUNA BIN
RAGHU
v.
KRISHNAJI.

The Collector appears to have put up the property of the judgment-debtor for sale, to have sold it, and given the purchaser a sale-certificate. Thereafter the present opponent, claiming to be in possession in his own right, appears to have obstructed the auction-purchaser, and the Collector removed him, as he has power to do, under Rule 14 made under section 70 of the Civil Procedure Code. Thereupon the opponent went to the Court which passed the decree and obtained from it an order under Rule 101 of Order XXI. Against this the present applicant, the auction-purchaser, has moved this Court in the exercise of its extraordinary jurisdiction to declare that the Subordinate Judge's order under Order XXI Rule 101 was made, in the circumstances stated, without jurisdiction. I think that the true answer to the question which arises here, a question which must frequently arise in similar cases, is that the execution entrusted to the Collector was completed and must have been completed before the Court which made the decree could properly be invited to make or certainly before it could properly have made any order under Rule 101. I agree that in principle there could not be two Courts executing the same decree at the same time, and this appears to me to have been the reason underlying Burkitt, J.'s decision in *Muhammad Said Khan v. Payag Sahu*⁽¹⁾. But when we examine the Rules framed under section 70, and it is under those Rules alone that the Collector exercises his powers, it will be seen that in the execution of the decree he is authorized to do a certain number of necessary acts, while on the other hand his powers are much less extensive than those conferred upon an ordinary Court executing its own decree under Order XXI. So that while I do not demur to the principle I have stated, namely, that after a decree has been transferred to a Collector the Court

⁽¹⁾ (1894) 16 All. 228

which passed that decree is for the time being *functus officio* for all purposes of execution, I also say that as soon as the Collector has exhausted all the power of execution conferred upon him by Rule 14 framed under section 70, then any matters requiring to be done, and usually regarded as in execution, such as those provided for in Rules 97 to 103, for example of Order XXI, must be done by the Court which made the decree. Otherwise there might certainly arise situations in which parties have suffered wrong at the hands of a Collector tied down by the Rules conferring upon him very restricted powers, and yet be entirely without redress. This can never have been the intention of the legislature, and were authority needed, I might refer to a decision by Sir Lawrence Jenkins to which I myself was a party in *Pita v. Chunilal*⁽¹⁾. There again, I think, the reason is precisely and accurately stated by the learned Chief Justice and that reason will certainly cover the present case. We are, therefore, of opinion that the order complained of was not *ultra vires* but made in the exercise of jurisdiction vested in the learned Judge who made it, and was very properly made. The rule must, therefore, be discharged with all costs.

HAYWARD, J. :—This application raises the question whether a Collector's order dispossessing a third party in execution under Rule 14 of the Rules in force under section 70 of the Civil Procedure Code can be called in question by that third party by application to the Court under Rules 100 and 101 of Order XXI of the Civil Procedure Code.

The powers of the Collector in execution must be looked for either in schedule III or in the Rules in force or framed under section 70 of the Code. Where powers are conferred on the Collector the effect is to oust the

1914.

 ARJUNA BIN
 RAGHU
 v.
 KRISHNAJI.

⁽¹⁾ (1906) 31 Bom. 207.

1914.

ARJUNA BIN
RAGHU
v.
KRISHNAJI.

jurisdiction to that extent of the Court as provided by sub-section 2 of section 70 of the Code. Now the Collector has been granted power to dispossess third parties in execution under Rule 95 of Order XXI of the Code by the inclusion of that provision in Rule 14 in force under section 70 of the Code. But the Collector has not been granted power to hear the grievances of third parties after being so dispossessed in execution under Rules 100 and 101 of Order XXI of the Code. This power must, therefore, be deemed to have been left with the Court and not to have been taken away under sub-section 2 of section 70 of the Code. "If the power has by rules been vested in the Collector, then it is exercisable by him and not by the Court. If that power has not been conferred on him, then . . . the power must continue still to be exercisable by the Court," as was stated by Jenkins, C. J., in the case of *Pita v. Chunilal*⁽¹⁾.

The rule on this application must, therefore, in my opinion also, be discharged with costs inasmuch as it proceeds on the alleged want of jurisdiction of the lower Court.

Rule discharged.

G. B. R.

⁽¹⁾ (1906) 31 Bom. 207 at p. 217.
