

(1900) 08 CAL CK 0003
In the Calcutta High Court
Case No : Civil Rule No. 2830 of 1899

Kedar Nath Sen

APPELLANT

Vs

Uma Charan alias Gopal Gupta and Others

RESPONDENT

Date of Decision : 31-08-1900

Acts Referred:

Citation : (1900) 08 CAL CK 0003

Judgement

1. A decree was obtained by Russick Lal Shaha and Kunja Lal Shaha against Ambica Charan Gupta in the Small Cause Court. Certain property of the judgment-debtor was sold in the execution sale and purchased on the 5th of May 1899 by the Petitioner. On the 13th of June 1899 an application was made by Uma Charan Gupta under sec. 310A of the CPC for deposit of the amount of the decree and for the setting aside of the sale. It appears that Uma Charan Gupta had brought a suit for accounts against Ambica Charan Gupta, and on the 9th of September 1896 he had obtained an attachment before judgment of the property in question. The application made by him under sec. 310A was made by him as attaching creditor. On the 25th of September 1899 the application was disposed of by the Court below in his favour. The auction-purchaser has obtained this rule to show cause why the order of the Court below granting the application under sec. 310A, C. P. C., should not be set aside.

2. The question then, which we have to consider is whether an attaching creditor can be said to be a "person whose immoveable property has been sold" within the meaning of those words in sec. 310A. It does not appear that the question has ever before been decided with reference to the provisions of sec. 310A ; but it was held in the case of Matungini Dassi v. Monmotho Nath Bose 4 C. W. N. 542 (1900) that an attaching creditor is not a person whose immoveable property is sold within the meaning of sec. 311; and as the words "person whose immoveable property has been sold" are identical in both the sections the judgment in that case is authority in favour of the Petitioner in the present case.

3. In showing cause against the granting of the rule it has been contended by the

learned vakil who appears for the opposite party that an attachment creates a charge, and that the attaching creditor is therefore a chargee and occupies the same position as a mortgagee. It has been pointed out for the opposite party that in the case of *Hamidal Huq v. Matungini Dassi* 2 C. W. N. cclviii (1898), it was held that in the case of a mortgage made by conditional sale the mortgagee had such an interest in the property as to constitute him a person whose immoveable property has been sold within the meaning of sec. 310A ; and although that case was distinguished by another Bench of this Court in the case of *Nitya Nanda Patra v. Hera Lal Kurmakar* Civil Rule No. 76 of 1900, decided on the 22nd of March 1900 on the ground that in the latter case the mortgage was a simple mortgage, it has been contended in the first place that there is no distinction in law between the case of a mortgage by conditional sale and a simple mortgage, so far as this question is concerned. And it has further been argued that as those two cases are in conflict, it will be necessary for this Court to make a reference to a Full Bench for the purpose of deciding the case now before it. It appears to us, however, that it is unnecessary to enter into any consideration of the two cases in question, for we are unable to see any analogy between the position of a party obtaining an attachment before judgment and a mortgagee. The object of an attachment, as was observed in the case of *Kashy Nath Roy Chowdhry v. Surbanand Shaha* I. L. R. 12 Cal. 317 at p. 321 (1885), is simply to prevent the judgment-debtor from dealing with the property by way of private alienation ; and accordingly when property is once sold in execution of a decree, it cannot be sold again at the instance of another decree-holder who had attached it before the attachment effected by the decree-holder under whose decree it is actually sold.

4. The second point urged for the opposite party is that this Court cannot interfere under sec. 622 of the Code of Civil Procedure, because the most that can be said is that the order of the Court below was erroneous and that it cannot be said to have exercised a jurisdiction not vested in it by law, because it had jurisdiction over the subject-matter in dispute. In support of this contention we have been referred to some observations by Lindley, Master of the Rolls, in, the case *In re A. B. & Co.* L. R. 2 Q. B. 429 at p. 437 (1900), where at page 437, a distinction is drawn between an order made without jurisdiction and an erroneous order. We believe that this Court has never in construing sec. 622 placed so narrow an interpretation upon the term jurisdiction ; and we are not prepared to interpret the term now in a different sense from that which has been attached to it in a long current of decisions.

5. In the third place, we have been referred to a portion of a decision of O'Kinealy, J., in the case of *Girish Chundra Basu v. Apurba Krishna Dass* I. L. R. 21 Cal. 940 (1894), decided by a Full Bench of this Court in which he says, at page 952 that under sec. 316 of the Code of Civil Procedure, a purchaser has no vested interest in the property before the date of his certificate and that the purchaser could not insist upon the sale being confirmed and a certificate being given to him if before that date the judgment-debtor put into Court the amount

due. He goes on to say that inasmuch as when a question arises under sec. 244 the fact that the purchaser who is not a party to the suit is interested in the result has never been held to be a bar to the application of 244 and the question to be decided under sec. 310A is one which falls under sec 244, it would not be proper to allow a person who has no vested interest in the property nor the carriage of the suit to ask the Court to decide as between him and the parties to the suit, a point which is properly the subject of appeal between the parties. It has further been argued in connection with this dictum that an appeal lay in this case and therefore this Court has no jurisdiction to interfere under sec. 622 of the Code of Civil Procedure. In the first place we must observe with all respect, that the portion of the judgment of O'Kinealy, J., to which we have been referred was obiter, the only question before the Full Bench in that case being whether or not retrospective effect could be given to the provisions of sec. 310A. The fact is that the question whether or not an order under sec. 310A is subject to appeal or to revision under sec. 622 is one which depends upon the circumstances of the particular case. Where the purchaser has been the decree-holder himself and the question has been between him and the judgment-debtor, an appeal will lie, as in the case of Chundi Charan Mandal v. Banke Behary Lal Mandal I. L. R. 26 Cal. 449 (1899), decided by a Full Bench of this Court. On the other hand where the auction-purchaser has been a stranger the provisions of sec. 622 have been applied by this Court in numerous cases. Both on this point and as to the interpretation to be put on the term jurisdiction we may refer to the case of Jogodanund Singh v. Amrita Lal Sircar I. L. R. 22 Cal. 767 (1895), decided by the Full Court. We may further refer to the case of Bungshidhar Haldar v. Kedar Nath Mondal 1 C. W. N. 114 (1896) in which it was decided that where an order under sec. 310A did not determine a question arising between the parties to the decree or their representatives, although it was an order relating to the execution of a decree, it did not come within the provisions of sec. 244 of the CPC and, therefore, no appeal lay.

6. Finally it has been contended for the opposite party that it is discretionary with this Court to interfere or not to interfere under sec. 622 and that this is not a proper case for its interference inasmuch as the Court below was of opinion that there was some suspicion of collusion between the auction-purchaser and the decree-holder. It does not appear, however, that such a question was raised, and we are not prepared to say that the grounds suggested by the Court below for its suspicions are sufficient to justify us in refusing to interfere. We think that the case of Matungini Dasi v. Monmotha Nath Bose 4 C. W. N. 542 (1900) to which we have referred is strictly in point, and we do not see any reason to dissent from it. We therefore make this rule absolute with costs. We assess the hearing fee at three gold mohurs.