

Reasons of the Lords of the Judicial Committee of the Privy Council for the Report made on the 4th December 1880, on the Appeal of Dinendronath Sannyal and another v. Ram Coomar Ghose and others, and also for the Report on the Appeal of Taruck Chunder Bluttacharjya v. Bykuntnath Sannyal and others, from the High Court of Judicature at Fort William, in Bengal, made on the 26th January 1881.

Present on the 4th December :

SIR JAMES COLVILLE.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

THIS is an appeal from a judgment and decree of the High Court at Calcutta, dated the 16th of March 1877, which reversed an order of the Subordinate Judge of Rajshahye, dated the 10th July 1875, by which he ordered, amongst other things, that an Execution Case, No. 69 of 1875, instituted by the Respondents against the Appellants should be postponed until further orders.

At the close of the arguments on the hearing of the appeal their Lordships, after deliberation, stated that they would humbly advise Her Majesty by their Report to reverse the decree of the High Court and to affirm that of the Subordinate Judge of Rajshahye so far as it related to the Execution Case, No. 69 of 1875, and that the Respondents must pay the costs of the appeal. They, however, reserved the statement of their reasons for this Report until after the argument of another appeal in some respects connected with this case, in which Taruck Chunder Buttarharjya is the Appellant and Bycuntnauth Sannyal and others are the Respondents.

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Their Lordships will now proceed to give their reasons for the Report in the first appeal, which will be submitted to Her Majesty at the next Council.

The history of the case is stated by the learned Judges in the judgment under appeal. It appears that in the year 1828 certain persons who are now represented in estate by the Appellants, and whom, as well as the Appellants, it will be convenient to speak of as the Sannyals, obtained a decree against certain other persons who, as well as the Bhuttacharjee, Respondents, may be called the Bhuttacharjees, for a sum exceeding Rs. 82,000. It was subsequently held that the judgment carried interest at 12 per cent. from the date of the decree until the realization thereof. In execution of the decree the Sannyals attached, sold, and became the purchasers of certain immovable properties of the Bhuttacharjees, and obtained possession thereof, which they retained for many years. After considerable delay the Bhuttacharjees instituted proceedings to set aside the sale in execution, and on the 10th of November 1857 obtained a decree of the Principal Sudder Ameen, of Rajshahye, setting aside the sale and declaring the right of the Bhuttacharjees to be restored to possession of their property with mesne profits. That decree was affirmed on appeal by the late Sudder Court on the 23rd May 1860.

In the interval between the date of the decree of the Principal Sudder Ameen and the affirmation thereof by the Sudder Court, viz., on the 17th of May 1858, Anund Mohun Ghose, the father of the Respondent, Ram Coomar Ghose, and who is now represented by him, obtained a decree against the Bhuttacharjees for a sum exceeding 67,000 rupees. In execution of that decree Anund Mohun Ghose attached, in May 1863, the Bhuttacharjees' right to mesne profits

under their decree against the Sannyals of the 10th of November 1857, and, on the 26th May 1865, an order was issued by the District Court for sale of the decree for mesne profits. (*See Respondent's Case, p. 4, para. 1.*)

The sale in execution of the Sannyals' decree of 1828 having, as before stated, been set aside, they took fresh proceedings to have the decree again executed for the amount of principal and interest due thereon. Numerous conflicting judgments were from time to time given by different Courts as to the amounts due to the Sannyals and to the Bhuttacharjees respectively, on their respective decrees, and as to the right to set off one judgment against the other. The amount due to the Sannyals under their decree exceeded the amount due by them to the Bhuttacharjees under their decree for mesne profits. It is unnecessary, and it certainly would not be profitable, to point out in detail the effect of the several conflicting judgments which were delivered in the course of the litigation between the Sannyals and the Bhuttacharjees. It is sufficient to say that, on the 14th of September 1865, upon an application for a review of a judgment which is not set out in the record, a judgment was given by Justices Kemp and Campbell, stating that it had been arranged, by consent of both parties, that the Sannyals should have simple interest only on their original decree from the year 1828 to the date of payment, it being understood that the cross decree of the Bhuttacharjees for mesne profits should also bear simple interest from the date of ascertainment only. The learned Judges, having then proceeded to modify an order which had been previously made, declared that simple interest only should be calculated on the Sannyals' decree from 1828, and that then the decree of the Bhuttacharjees should be set off against the

gross amount of the Sannyals' decree once for all.

It is not clear that the operative part of the order was made by consent, but the fact has not been disputed, and it may be taken to have been so. The judgment was given in a proceeding in which the Sannyals were petitioners, and the Bhuttacharjees were judgment debtors. Ram Coomar Ghose was not a party to the proceeding. He did not, however, proceed to a sale under the execution against the Bhuttacharjees of the decree for mesne profits which he had attached, but he entered into a private arrangement with them, by which they sold to him the whole of the mesne profits due to them under their decree against the Sannyals, together with all interest due thereon, in lieu of the sum of Rs. 74,506 due to him upon the decree obtained against them by Anund Chunder Ghose, his father. The arrangement was carried into effect by a deed of sale, dated the 15th Cheyt 1272, corresponding with the 27th March 1866 (Record, p. 28). It was correctly stated by the High Court (Record, p. 56) that the only question they had to deal with was whether Ram Coomar Ghose, by purchasing the Bhuttacharjees' claim to mesne profits on the 27th of March 1866, after their agreement with the Sannyals to have their decree adjusted by set-off, recorded in the order of the 14th September 1865, was bound by that order, and consequently lost the advantage which he had gained by attaching the Bhuttacharjees' decree.

The Subordinate Judge had held that Ram Coomar Ghose, by privately purchasing the mesne profits from the Bhuttacharjees, had destroyed the right which he possessed under his attachment as a decree holder, and stayed his execution against the Sannyals. The High Court reversed

that decision, and held that the benefit of the attachment was not affected by the private purchase, and that Ram Coomar Ghose was entitled, so far as might be necessary to secure his own rights, to hold the decree clear of the incumbrance created by the consent decree between the Sannyals and the Bhuttacharjees which had been recorded behind his back while the property was subject to his attachment. They, however, limited the right of Ram Coomar Ghose to avail himself of the mesne profits freed from the Sannyal's right of set-off to the extent of satisfying the amount of his decree against the Bhuttacharjees with simple interest to the 14th September 1865, the date of the consent order.

Their Lordships are of opinion that the private sale to Ram Coomar Ghose was not tantamount to and had not the same effect as a sale in execution of Ram Coomar Ghose's decree, under which the mesne profits had been attached, and that Ram Coomar Ghose, by virtue of his purchase, acquired no greater interest than the Bhuttacharjees had in the decree for mesne profits, and consequently that he was bound by the order of the 14th September 1865.

By Section 201 of Act 8 of 1859 it is enacted that if the decree be for money (which Ram Coomar Ghose's decree was), it shall be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of his property, or by both if necessary. By Section 205 debts due to the judgment debtor may be attached and sold as property in execution of a decree. By Section 236, where the property shall consist of debts not being negotiable instruments or shares in any railway, banking, or other public company or corporation, the attachment shall be made by a written order prohibiting the creditor from re-

ceiving the debts, and the debtor from making payment thereof to any person whomsoever until the further order of the Court; and then by Section 240, in the case of an attachment by written order, any payment of the debts to the judgment debtor after the order shall have been made known in the manner in the said Act mentioned and during the continuance of the attachment, shall be null and void.

It is not necessary to decide whether, if Ram Coomar Ghose had purchased at a sale, under his execution, the attachment would have protected him from the effect of the order of the 14th September 1865, the attachment having been issued *pendente lite*, that is to say, pending the proceedings between the Sannyals and the Bhuttacharjees, in which the question was raised as to the right of set-off. It may be admitted for the sake of argument, but only for the sake of argument, that the order of the 14th September 1865, made by consent of the Sannyals and of the Bhuttacharjees, directing the set-off, amounted to a payment of the mesne profits by the Sannyals to the Bhuttacharjees, and a receipt thereof by the Bhuttacharjees within the meaning of Section 240. The effect of that section, however, is not to render the payment of a debt which has been attached in execution absolutely void, under all circumstances and against every one, but merely to make it void, so far as may be necessary to secure the execution of the decree. The principle is clearly laid down in the case of *Anund Loll Doss v. Jullodhur Shan*, 14 Moore's Ind. Appeals, pp. 549 and 550. The private sale, pending the attachment, was binding upon Ram Coomar Ghose, and also upon the Bhuttacharjees. Ram Coomar's decree, was satisfied by the sale to him of the mesne profits in lieu of the sum due to him under his decree. He never afterwards could have proceeded to

execute that decree or to sell under the attachment. By privately purchasing the mesne profits which he had attached he abandoned his execution, and also the attachment, which was a part of the execution.

There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. In the former the price is fixed by the vendor and purchaser alone; in the latter the sale must be made by public auction conducted by a public officer, of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter the purchaser, notwithstanding he acquires merely the right, title, and interest of the judgment debtor, acquires that title by operation of law adversely to the judgment debtor, and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution.

The High Court relied upon a case in 6 Madras High Court Reports, p. 65. But there is a distinction between that case and the present, for there the property sold was hypothecated to the Plaintiff by the bond for which the decree was obtained. The case, however, is of no greater authority than the decision under consideration, and their Lordships are not prepared to say that it would have been affirmed on appeal.

Their Lordships cannot but regard as lamentable the long, harassing, and expensive litigation to which the Saunials have been subjected in endeavouring to obtain the fruits of their decree of 1828, an object which, although upwards of half a century has elapsed since the date of the decree, they have not as yet attained. It is in-

deed a subject of deep regret that in the course of that litigation so many contradictory and conflicting judgments have been delivered, sometimes on appeal from an inferior to a superior Court, and sometimes even by the same Judges in reviewing their own judgments.

Present on the 26th January 1881.

SIR BARNES PEACOCK.
 SIR MONTAGUE SMITH.
 SIR ROBERT P. COLLIER.
 SIR RICHARD COUCH.

The hearing of the appeal of Taruck Chunder Bhattacharjya *v.* Bykunt Nath Sanyal and another, having been interrupted by the lamented death of Sir James Colvile, the case was re-argued this day before the Lords of the Committee above named, and their Lordships delivered judgment at the close of the argument in the following terms:—

Their Lordships are of opinion that the decision of the High Court was correct as to the construction of the order of the 14th September 1865. That order runs as follows:—

“At the hearing of this case this day by consent of both parties it (torn) arranged that the Plaintiff (torn) have simple interest only (torn), original decree from the year (torn), date of payment, it being (torn) that the cross decrees of (torn), for wasilat also bears simple interest from date of ascertainment only. The orders therefore for calculating interest on the one hand upon the sum ascertained to be due in 1250, and for setting off the wasilat due to Defendants year by year is modified, and there will be no annual account to set the two accounts against one another. The simple interest only will be calculated from 1828, when the other decree can be set off against the gross amount once for all. Decree as above, with costs in proportion.”

From this judgment and from the decree which was drawn up upon it, it appears to their Lord-

ships that the intention of the Court was, as the Court have themselves subsequently expressed in the judgment now under appeal, that the interest should be calculated on the Sannyals decree from 1828 down to the time of that order, and that interest on the mesne profits which had been assessed as due to the Bhuttacharjyas should be calculated at the same rate of 12 per cent. from the date when those mesne profits were ascertained down to the time of that order of the 14th September 1865. In point of fact the interest was calculated up to the 31st of December in that year, but in that respect the Bhuttacharjyas, who were the Appellants, have gained a benefit, and the other side have not objected. Their Lordships, therefore, think that the judgment of the High Court so far as it relates to the calculation of interest is quite correct.

The decree of the Bhuttacharjyas has not been set out on this record, but it appears that that decree included other matters than the mesne profits which were alluded to in the Order. On the taking of the accounts before the Judge of the Lower Court the Sannyals admitted a set-off to the amount of Rs. 3,00,104. 0. 1. That amount included the sum of Rs. 16,324. 10. 15. in addition to the Rs. 2,11,914. 11. 11, the amount of mesne profits as appears in the Appendix A I referred to in the judgment of the Judge of the Lower Court. But in the account taken by the officer of the High Court, and in the decree of the High Court itself which was drawn up upon that account, no allusion whatever is made to the sum of Rs. 16,324. 10. 15. No explanation could be given at the Bar of this omission. Their Lordships, therefore, think that the cause should be remanded to the High Court to consider and determine whether or not that sum or any part thereof should be deducted from the sum decreed to the Respondents.

In adjusting the accounts between the parties the High Court has calculated interest on the Rs. 291. 7 allowed for the Ameen's fees from the 28th September 1828, whereas interest on that account should have been calculated only from the 25th June 1844. It is a very small matter, but their Lordships think that the decree ought to be amended in that respect by deducting from the amount decreed to the Respondents the excess of interest so allowed.

Their Lordships will therefore humbly advise Her Majesty that the decree be varied to that extent, and that the case be remanded to the High Court for the purpose of considering and determining whether the sum of Rs. 16,324. 10. 15, or any part thereof, should or should not be deducted from the sum decreed to the Respondents, and that in all other respects the decree ought to be affirmed.

Upon the whole their Lordships think that the Appellants ought to pay the costs of this appeal.