

*Judgement of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of Rewah  
Mahton v. Ram Kishen Singh, from the High  
Court of Judicature at Fort William, in  
Bengal; delivered July 9th, 1886.*

Present :

LORD WATSON.

LORD HOBHOUSE.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

THIS is an appeal from a decree of the High Court at Calcutta in a suit in which the Respondent, Mussumat Radheh Koeri, was the Plaintiff, and Khoob Lal and the Appellant, Rewah Mahton, and others, were the Defendants. Koeri died pending this appeal, and Ram Kishen Singh, her son and heir, was substituted for her. It appears that on the 7th of September 1877 the Moonsif of Jamoi, in the district of Bhagulpore, made two decrees, one in favour of the Respondent against Khoob Lal for Rs. 788 0a. 9p., and the other in favour of Khoob Lal against her for Rs. 661. On the 10th November 1877 the Respondent took out execution against Khoob Lal for the whole amount of her decree without giving him any credit for the Rs. 661 which he had recovered against her. Under that execution Khoob Lal was arrested and detained in prison for a period of about two months, at the expiration of which time he was released on the failure of the Respondent to lodge the necessary diet money. Subsequently, on the 26th March 1878, the Respondent made another application for execution against Khoob Lal upon her decree,

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and in that application she gave him no credit for the Rs. 661 which he had recovered against her. Upon that execution being granted, an application was made to the Moonsif by Khoob Lal to set it aside. The Moonsif granted that application, but his decision was, on the 26th July 1878, reversed by the District Judge, who held that the Respondent was entitled to execute her decree for Rs. 788, notwithstanding all that had previously taken place. Upon that Khoob Lal appealed to the High Court, and whilst the matter was pending before that Court, viz., on the 31st of August 1878, he applied for execution against the Respondent for the total amount of his decree for Rs. 661. The execution was issued, and under it the property of the Respondent, consisting of a 2-annas share of Mouzah Mo-koondpore Mahamda, was attached and sold to the Appellant for a sum of Rs. 9,775. Application was made to set aside that sale under sections 311 and 312 of Act 10 of 1877. The Moonsif disallowed the application and confirmed the sale, and his order was on appeal affirmed by the Judge. By the last paragraph of section 312 it is enacted that "No suit to set aside on the ground of such irregularity, an order passed under this section shall be brought by the party against whom such order has been made."

The present Respondent, however, brought a regular suit against Khoob Lal, and the present Appellant, the purchaser under the execution, and others, alleging that, owing to her having a decree against Khoob Lal for an amount greater than that of his decree against her, the latter decree was not fit to be executed; that the sale under it was contrary to the powers of the Court, and was not binding upon her, and that the purchaser acquired no right under the sale; and further, that the purchase by the present

Appellant took place in collusion with Khoob Lal; that Khoob Lal was really the purchaser; that he, by fraud, had kept her from knowing that the execution had issued; and consequently that the sale in execution ought to be set aside. She prayed:—“(1). That the “ Court will be pleased to hold that the processes of execution of decree of Khoob Lal, the “ Defendant No. 1, were carried out entirely in “ contravention of law; and that in reality “ according to law and justice, the Defendant “ aforesaid had nothing to obtain from your “ petitioner the Plaintiff; and that the sale “ which has been held is invalid. (2.) That the “ Court will be pleased to hold that the processes “ of the sale aforesaid, and the sale in question, “ were executed and held fraudulently. (3.) That “ the Court will be pleased to cancel this sale.”

Written statements were put in on the part of the several Defendants, and issues were settled. The Subordinate Judge in the first instance settled two issues in bar. The first was:—“Is this case in the regular department,”—that is, is this suit which is brought as a regular suit—“unfit for hearing under the last portion “ of section 312 of the Code of Civil Procedure, or not?” 2nd. “Was it necessary for “ the Defendant, first party, to set off the “ amount of the decree of the Plaintiff against his “ own decree under section 246 of the Code of “ Civil Procedure, or not?” Subsequently he settled further issues of fact? He said:—“ To-day the arguments of the pleaders for both “ parties on the first issue were heard. After “ hearing the arguments of the pleaders for “ both parties, I come to the conclusion that “ issues on facts also ought to be framed; that “ after receiving the evidence I shall try, on all “ the issues, as to whether this sale has been “ held fraudulently or not, and determine whether,

“ in case fraud be proved, a regular suit will lie  
 “ for cancelment of the sale in question.” Then  
 he settled the following issues of fact:—“1st.  
 “ Did the Defendant No. 1 take the proceedings  
 “ for execution of decree and service of attach-  
 “ ment processes and a sale notification  
 “ fraudulently (and) surreptitiously, with a view  
 “ that the Plaintiff might not be aware of it;  
 “ or were the proceedings of execution of decree  
 “ and the issue of attachment processes and  
 “ sale notifications executed in a *boná fide*  
 “ manner without fraud? 2nd. Is the Defend-  
 “ ant No. 2”—that is the present Appellant—  
 “ furzi for the Defendant No. 1 in the auction  
 “ purchase, or is he the real purchaser; and  
 “ were the Defendants Nos. 2 and 3 aware  
 “ of the fraud stated by the Plaintiff at the  
 “ time of the auction purchase or not? 3rd.  
 “ Has the property sold at auction been sold  
 “ for a small value owing to the fraud alluded  
 “ to, or not?” Those issues came on for trial.  
 Witnesses were heard on both sides, and the  
 Judge delivered judgement, by which, after  
 stating that the pleas in bar were over-ruled by  
 his predecessor, he decided in favour of the  
 Defendants. With regard to the principal  
 point as to the fraud, he said:—“There is  
 “ no proof of the allegation that Khoob Lal  
 “ purchased the share in question in the name  
 “ of Rewa Mahton.” And again:—“In my  
 “ opinion Rewa Mahton is the real purchaser,  
 “ who made the other Defendant, Omed Ali,  
 “ a partner in his purchase. I do not think  
 “ that Khoob has any interest in the pro-  
 “ perty.” He also held that the property was  
 not sold for an inadequate price. An appeal  
 was preferred to the High Court, and that Court,  
 without entering into the question of fraud or  
 no fraud, but assuming that the Defendant, the  
 present Appellant, was a *boná fide* purchaser at the

sale, proceeded to consider the question whether the sale in execution was valid or not in consequence of the Moonsiff's having granted Khoob Lal's execution when the Plaintiff held a decree for a larger amount against him.

That question depends upon section 246 of the Code of Civil Procedure, Act 10 of 1877, which enacts as follows:—“ If cross decrees between  
 “ the same parties and for the payment of money  
 “ be produced to the Court ”—that is the Court to which the application is made for execution, and which is dealing with the case as to whether execution shall be issued or not,—“ execution  
 “ shall be taken out only by the party who  
 “ holds the decree for the larger sum, and  
 “ for so much only as remains after deducting  
 “ the smaller sum, and satisfaction for the smaller  
 “ sum shall be entered on the decree for the  
 “ larger sum, as well as satisfaction on the decree  
 “ for the smaller sum.” In this case the Plaintiff's decree was not brought before the Court when Khoob Lal applied for execution. At that time he brought before the Court only his own decree, and the Court ordered that an attachment should issue to satisfy his judgement for Rs. 661, and the property was attached. We cannot in this suit enter into the question whether the decisions upon the petition to set aside the sale under sections 311 and 312 were correct or not. Those decisions cannot, in consequence of section 312, be impeached in this suit on the ground of any irregularity which was the subject of those decisions.

The High Court determined the question simply upon section 246. They said:—“ The  
 “ provisions of section 246 are explicit, that if  
 “ cross decrees between the same parties and for  
 “ the payment of money be produced to the  
 “ Court, execution shall be taken out only by  
 “ the party who holds the decree for the larger

“ sum, and for so much only as remains after  
“ deducting the smaller sum. It was not com-  
“ petent to the Moonsif by his judgement to  
“ modify this provision of the law, even if it  
“ were his intention to do so, which is by no  
“ means clear.” The High Court does not say  
that the decree of the Plaintiff was brought  
before the Moonsif, or that the two decrees  
were before him at the time when he awarded  
execution for the smaller decree. They go on—  
“ Nor does it appear to us that there was any-  
“ thing in the Plaintiff’s conduct which could  
“ render legal and valid proceedings of the  
“ Defendant, which were without the sanction  
“ of law. When the Defendant on the 31st  
“ August applied for execution of his cross  
“ decree for a smaller amount he must have been  
“ aware that the Plaintiff’s decree had been  
“ produced to the Court, and that since the order  
“ of the Appellate Court, 26th July 1878, it was  
“ capable of execution. The Defendant ac-  
“ cordingly had no right to execution, except as  
“ provided by section 246, and the whole of the  
“ subsequent proceedings taken in execution of  
“ the Defendant’s decree were, in our opinion,  
“ a nullity, and must be set aside.” The Court,  
therefore, notwithstanding the finding of the  
Lower Court that the Defendant—the present  
Appellant—was a *bonâ fide* purchaser at the  
sale under the execution, and without themselves  
entering into the question of fraud or no fraud,  
held that the execution issued by the Moonsif,  
and all the subsequent proceedings, were a  
nullity, and must be set aside. The Defendant  
Appellant purchased *bonâ fide*, and for a fair  
value, property exposed for sale under an  
execution issued by a Court of competent juris-  
diction upon a valid judgement.

Their Lordships are of opinion that the High  
Court came to an erroneous decision with regard

to the construction of section 246, and that the judgement of the High Court in that respect must be set aside. A purchaser under a sale in execution is not bound to inquire whether the judgement debtor had a cross judgement of a higher amount any more than he would be bound in an ordinary case to inquire whether a judgement upon which an execution issues has been satisfied or not. Those are questions to be determined by the Court issuing the execution. To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchases under executions. If the Court has jurisdiction, a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgement upon which the execution issues.

It would have been more satisfactory if in this case, which was one appealable to Her Majesty in Council, the High Court had not decided the case merely upon the construction of section 246 without expressing their opinion upon the other issues which were raised and determined by the Subordinate Judge. Their Lordships, being of opinion that the decision of the High Court with reference to section 246 is erroneous, have been obliged to determine the other issues, and for that purpose to go through the evidence in the absence of the Respondent, who did not appear before them on the argument of the case, without having the advantage of any expression of the High Court's opinion as to the effect of that evidence. If the High Court had determined the other issues and had concurred with the Subordinate Judge in his findings, the case would have fallen within the rule of concurrent findings of fact, and the examination of the evidence by their Lordships would in all probability have been unnecessary.

Their Lordships having examined the evidence very carefully, have come to the conclusion that the Subordinate Judge was correct in holding that there was no fraud; that the Defendant was a *bonâ fide* purchaser under the execution; and that the property was not sold for an inadequate price.

Under these circumstances their Lordships will humbly advise Her Majesty to dismiss the appeal to the High Court with costs, to reverse the judgement of that Court, and to affirm the decision of the Subordinate Judge. The Respondent must pay the costs of this appeal.