

*Judgement of the Lords of the Judicial Committee
of the Privy Council on the appeal of Nawab
Zain-al-Abdin Khan v. Mahammad Asghar
Ali Khan and others, from the High Court of
Judicature for the North-Western Provinces,
Allahabad; delivered December 3rd, 1887.*

Present:

LORD FITZGERALD.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

IN this case the Plaintiff sued several Defendants, claiming to set aside certain auction sales which had taken place under a decree of the Subordinate Judge of Moradabad, and for an order that the Plaintiffs be put into absolute possession of the properties which were sold and are mentioned in the schedule to the plaint. In the schedule the properties and the purchasers thereof are separately described, and the action may be treated not as a joint action as regards all the property, but as an action against the several Defendants as regards the properties of which they were severally purchasers.

Some of the Defendants were the decree holders, and some were persons who came in under them; but all the Defendants who are in that position may for the purpose of this Judgement be classed under the head of the decree holders. Others of the Defendants were not decree holders, but merely purchasers under the execution, and strangers to the decree upon which the execution issued. The circumstances are peculiar. The Plaintiffs in the suit in which the execution was issued sued the present Ap-

pellant in the court of the Subordinate Judge of Moradabad to recover certain landed property situate in that district, and also mesne profits in respect of that property. They also sued for a large amount in respect of promissory notes which were alleged to be due from the present Appellant to the Plaintiffs in that suit, and a large amount alleged to be due from the Appellant as dower to their mother, whom they represented. The Defendant in that suit—the present Appellant—objected that there was no jurisdiction on the part of the Subordinate Judge to try the suit, inasmuch as he, the then Defendant, was not a resident in the district of Moradabad, but a resident in foreign territory, namely, Jaipur. But the Subordinate Judge decided that he had jurisdiction, and gave a decree against him, not only for the lands which were situate in the district, and the mesne profits of those lands, but also for the amount which was claimed to be due on the promissory notes, and on account of the dower.

That case was appealed to the High Court, but that Court dismissed the appeal upon the ground that the case was not appealable. An appeal was then preferred to Her Majesty in Council against that decision of the High Court, and Her Majesty in Council reversed the decision of the High Court, and remanded the case to be tried upon the merits. The High Court, when they tried the case upon the merits, reversed the decision of the Subordinate Judge as regards the amount decreed by the Subordinate Judge, in respect of the dower, and of the promissory notes, but affirmed his judgement as to the land which was situate within his jurisdiction, and the mesne profits in respect of that land. But before the judgement of the Privy Council, and before the decree of the High Court, which reversed a part of the original judgement of the

Subordinate Judge, the Plaintiffs in that suit, who are now some of the Defendants, executed their decree, and several sales took place under that execution. Under the first sale a certain amount was realised which would have been sufficient to cover the amount finally allowed by the decree of the High Court upon appeal. A second sale took place under which one of the Defendants, Asghar Ali, purchased *bonâ fide*, he not being a party to the original decree.

The Plaintiff brought his suit on the 22nd of February 1881, not only against the decree holders who had purchased under the execution, but as against the *bonâ fide* purchaser who was no party to the decree.

Pending the suit certain other Defendants were added, as appears at page 2 of the Record. The entry on the record is as follows: "According to the order dated 17th January 1882, Har Sarup, Parshadi Lal and Jiwa Ram, auction purchasers, were joined as Defendants." The three Defendants who were then joined were no parties to the decree, so that there are two sets of Defendants in the suit: the decree holders who purchased under their own execution; Asghar Ali, who purchased a portion of the property of the Plaintiff, being a *bonâ fide* purchaser and a stranger to the decree; and the three other Defendants, who were alleged to be auction purchasers under the decree, and who were no parties to it.

The Plaintiff claimed that "the auction sales of the disputed property detailed in the plaint, held on 20th November 1874, 20th November 1875, and 15th November 1876, be declared null and void, and the sale deed in favour of Shaukat Hosain Khan, dated 2nd November 1880, so far as it appertains to the Plaintiff's claim, be set aside." Thus he claimed to set aside all the auction sales, not only as against the

decree holders who had purchased, but as against *bonâ fide* purchasers who were no parties to the decree. Secondly he claimed that "Plaintiff be put in absolute possession of the under-mentioned property of the value of Rs. 21,450 after dispossession of the Defendants."

Amongst other issues, one was whether the auction sale and the purchase having been made *bonâ fide*, could be invalidated or set aside by the modification of the decree, and whether limitation law barred the claim.

It appears to their Lordships that there is a great distinction between the decree holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bonâ fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order.

A great distinction has been made between the case of *bonâ fide* purchasers who are no parties to a decree at a sale under execution and the decree holders themselves. In Bacon's abridgment Title "Error" it is laid down, citing old authorities, that "If a man recovers damages, and hath execution by *feri facias*, and upon the *feri facias* the sheriff sells to a stranger a term for years, and after the judgement is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself, because the sheriff had sold it by the command of the writ of *feri facias*. There are decisions to a similar effect in the High Court at Calcutta. They are collected in a note in Broughton, in his book on the Code of Civil Procedure, Fourth Edition, note to section 246, Act 8 of 1859. So in this case, those *bonâ fide* purchasers who were no parties to the decree which was then valid and in force, had nothing

to do further than to look to the decree and to the order of sale.

The Subordinate Judge held that the Defendants were bound to restore the property; not only the decree holders who had purchased, but the Defendants who had purchased *bonâ fide*, not being parties to the decree. In his judgment, he says "The limitation period of one year has nothing to do with this case. The cause of action having accrued to Plaintiff on 1st March 1880, the date when the decision was modified, and as he instituted the claim on 22nd February 1881, it is on no account considered beyond time." Therefore he held that the suit was not barred, but that the Plaintiff had a right to recover, not only as against the decree holders, but as against the *bonâ fide* purchasers, who were no parties to the decree under which they purchased, and he decreed the Plaintiff's suit. The Defendant Asghar Ali and the three added Defendants, none of whom was a party to the decree in execution of which the sales were effected, appealed to the High Court.

When the case came before the High Court they reversed that decision. They passed two decrees, one as regards the three Appellants who were the added Defendants, and the other as against Asghar Ali; but they are both in similar words. They said:—"Both appeals must be decreed with costs, and the decision of the Subordinate Judge being reversed, the Plaintiff's claim will stand dismissed." According to the strict grammatical construction of the decrees the Plaintiff's claim was dismissed, not only as regards the Defendants who had appealed, but as regards the others who had not appealed. The decrees must, however, be construed as applicable only to the Defendants who had appealed and whose appeals were decreed, and not

to the Defendants who had not appealed, and who were not before the court, and had not objected to the decision of the Subordinate Judge.

Their Lordships therefore will humbly advise Her Majesty that the decrees of the High Court ought to be treated as decrees against the Plaintiff only so far as his suit related to the Defendants who had appealed to the court; and that being so treated, they ought to be affirmed, and that the decree of the Subordinate Judge should be reversed, so far only as it related to the Plaintiff's claim against those Defendants. Their Lordships also think that the Appellant must pay the costs of the Respondents in this appeal.

Their Lordships wish it to be distinctly understood that in affirming the decrees of the High Court they treat them merely as decrees in favour of the Defendants who were Appellants to the High Court.