

1926
 MIDNAPUR
 ZAMINDARY
 Co., LTD.
 v.
 AMULYA
 NATH
 ROY
 CHOWDHURY
 PAGE J.

rejected upon the ground that the appellants had neglected to apply for substitution within the time provided in that behalf, and had not been able to satisfy the Court that there was any sufficient ground for an extension of time being granted [see the observations of Mookerjee and Panton JJ., in *Kali Dayal's* case (1)]. In these circumstances, in my opinion, both the appeals must be dismissed.

B. M. S.

Appeals dismissed.

(1) (1919) 24 C. W. N. 44.

APPELLATE CIVIL.

Before Cuming and Page JJ.

RISHIKESH LAHA

v.

MANIK MOLLA AND OTHERS.*

Execution Sale—Auction-purchasers, if entitled to sue for refund of purchase money—Judgment-debtor having no saleable interest, is the auction-purchaser entitled to recover his purchase money—Auction-purchaser, if entitled to receive compensation from execution-creditor—Civil Procedure Code (Act V of 1908), O. XXI, rr. 89 to 93.

The effect of O. XXI, r. 93, is that the only method under the Civil Procedure Code by which an auction-purchaser at a Court sale is entitled to obtain a refund of the purchase money is by applying to set aside the sale as therein provided.

Jurann Mahamad v. Jathi Mahamad (1) and other cases referred to.

The principle laid down in *Dorab Ally Khan v. Abdool Azeer* (2) followed.

* Appeal from Appellate decree No. 283 of 1924, against the decree of Pasupati Bose, Subordinate Judge of Khulna, dated Sep. 28, 1923, confirming the decree of Ramesh Chandra Sen Gupta, Munsif of Satkhira, dated Dec. 12, 1921.

(1) (1917) 22 C. W. N. 760.

(2) (1878) L. R. 5 I. A. 116.

1926
 March 23.

In a case where property in which the judgment-debtor has no saleable interest has been purchased in execution of a decree, and the circumstances are such that in accordance with the equitable rules obtaining in that behalf it would be against reason and conscience that the person to whom the purchase price has been paid should retain the purchase money as against the auction-purchaser, the auction-purchaser is entitled to recover such money as money had and received to his use.

Dorab Ally Khan v. Abdool Azees (1) referred to.

Where an auction-purchaser at a Court-sale has suffered loss through the fraud of the execution-creditor, or the breach of any duty which the execution-creditor owes to the auction-purchaser, *semble*, he is entitled to receive compensation for the loss which thereby he has sustained.

Dojal Krishna Naskar v. Anrita Lal Das (2) and other cases referred to.

Rustomji Ardeshir Irani v. Vinayak Gangadhar Bhat (3), *Prasanna Kumar Bhattacharjee v. Ibrahim Mirza* (4), and *Asadullah Khan v. Karam Chand* (5) dissented from.

SECOND APPEAL by Raja Rishikesh Laha, the defendant No. 35.

The plaintiffs were the auction-purchasers of certain property which was sold in execution of a decree. The plaintiffs sued the defendants for possession or, in the alternative, for a refund of the purchase-price. The trial and the lower Appellate Courts decreed the suit for a refund of the purchase-price.

Mr. Narenbra Chandra Bose (with him *Babu Nalin Chandra Pal*), for the appellant, contended that no suit lay for the recovery of the purchase-price paid for property purchased at a sale in execution of a decree. An application might have been made under Order XXI, rules 89 to 93, to set aside the sale.

(1) (1878) L. R. 5 I. A. 116.

(3) (1910) I. L. R. 35 Bom. 29.

(2) (1901) I. L. R. 29 Calc. 370.

(4) (1917) 36 C. L. J. 205.

(5) (1923) I. L. R. 4 Lah. 354.

1926
RISHIKESH
LAHA
v.
MANIK
MOLLA.

Babu Pares Lal Shome, for the respondents, contended that the Courts below were right in giving a decree for the recovery of the purchase-price.

PAGE J. The suit out of which this appeal arises was brought by certain auction-purchasers to recover *khas* possession of property which they had bought at a sale in execution of a decree obtained by defendant No. 35 against defendants Nos. 1 and 2. In the alternative the plaintiffs claimed that they were entitled to be refunded the amount of the purchase-price if in the event it transpired that the judgment-debtors possessed no saleable interest in the property.

The trial Court dismissed the claim for *khas* possession, but decreed the plaintiffs' suit for a refund of the purchase-money and interest thereon. Defendant No. 35, the decree-holder, preferred an appeal, but the lower Appellate Court affirmed the decree of the trial Court and dismissed the appeal.

The learned advocate for defendant No. 35, who has prosecuted a further appeal to this Court, contended that no suit lies for the recovery of the price paid for property purchased at a sale in execution of a decree. In support of his contention the learned advocate referred to Order XXI, rules 89 to 93, Civil Procedure Code, and urged that the only mode by which a purchaser at an execution sale is entitled to obtain a refund of the purchase money "from the person to whom it has been paid" is by preferring an application to set aside the sale as provided in Order XXI, rules 89 to 93. Now, there is authority for the proposition that the provisions of section 315 of the Code of 1882 were repealed by Order XXI, rule 93 of the Code of 1908, and that except under the Code of 1908 there is no mode in which an auction-purchaser at a Court sale can recover the purchase price that

he has paid. I find myself unable to give my assent to that view. In section 315 of the Code of 1882 it is provided that—

“ When a sale of immoveable property is set aside under sections 310A, 312 or 313 or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase-money with or without interest as the Court may direct from any person to whom the purchase-money had been paid. The repayment of the said purchase-money and of the interest, if any, allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money.”

Order XXI, rule 93 of the Code of 1908 provides that—

“ Where a sale of immoveable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest, as the Court may direct, against any person to whom it has been paid.”

In my opinion, the effect of Order XXI, rule 93, is that the only method under the Code by which an auction-purchaser at a Court sale is entitled to obtain a refund of the purchase-money is by applying to set aside the sale as therein provided. The reason that the Code was passed in this form is that the Legislature intended that after a sale was confirmed and the execution had been concluded the sale should not further be questioned, for by that time the purchase-money may have been distributed, and it may have become a matter of great difficulty to trace the persons into whose hands it has come. On the other hand, I am of opinion that rule 93 does not, and does not affect to, repeal any right which prior to the enactment of the Code of 1908 a purchaser of property at an execution-sale may have possessed under the law, apart from the Code, to recover the purchase-price of the property which he purported to have bought but in which afterwards it has been discovered that the judgment-

1926

RISHIKESH

LAHA

2.

MANIK

MOLLA.

PAGE J.

1925

RISHIKESH

LAHA

v.

MANIK

MOLLA.

PAGE J.

debtor had no saleable interest. Now, what other right to recover the purchase-money does an auction-purchaser at a Court-sale possess under the law in such circumstances? Clearly, he has lost the statutory right to proceed by suit which was granted specifically under section 315 of the old Code, because the Code of 1882 was superseded by the Code of 1908, and any right to recover the purchase-money which formerly was given under section 315 of the Code of 1882 is now to be found in the Code of 1908. It is necessary, therefore, to consider whether apart from the statutory right to recover the purchase money in the manner provided by the Code a purchaser at a Court-sale is entitled otherwise under the law to obtain a refund of the price which he has paid. In my opinion the answer to this question is to be found in, and the matter is concluded by, the judgment of the Privy Council in *Dorab Ally Khan v. Abdool Azeez* (1). In that case an auction-purchaser sought to recover the purchase-price which he had paid for property that purported to have been sold at an execution-sale upon the ground that the Sheriff had no power to sell the property in suit because it was situate outside the jurisdiction of the Court. It appeared from the evidence in that case that the execution-creditor had specifically authorized the Sheriff to sell the property then in suit, notwithstanding that it was outside the district within which the Sheriff was entitled to seize in execution the property of the judgment-debtor. Sir James Colville, in delivering the judgment of the Board, stated that the question must be determined upon a consideration of the rights of the auction-purchaser as against the execution

creditor to recover the purchase-money. His Lordship observed that—

“It is of course perfectly clear that when the property has been so sold under a regular execution and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor. This, however, is because the Sheriff is authorized by the writ to seize the property of the execution-debtor which lies within his territorial jurisdiction and to pass the debtor’s title to it without warranting that title to be good.”

Later in his judgment his Lordship added :

“The Sheriff may be held to undertake by his conduct that he has seized and put up for sale the property sold in the exercise of his jurisdiction, although when he has jurisdiction he does not in any way warrant that the judgment-debtor had a good title to it or guarantee that the purchaser shall not be turned out of possession by some person other than the judgment-debtor.”

That is the general rule, but in a case where property in which the judgment-debtor has no saleable interest has been purchased in execution of a decree, and the circumstances are such that in accordance with the equitable rules obtaining in that behalf it would be against reason and conscience that the person to whom the purchase-price has been paid should retain the purchase-money as against the auction-purchaser, the auction-purchaser is entitled to recover such money as money had and received to his use. If he did not possess such a right he might be exposed to loss resulting from fraud or collusion at the sale between an execution-creditor and the judgment-debtor, and yet remain without redress. But against loss sustained in such circumstances the law does not leave him defenceless, and the auction-purchaser may recover the purchase-price which he has paid if he can bring himself within the equitable principles which justify a suit for money had and received upon the ground that it is unconscionable that the defendant should retain the money as against the plaintiff. That, I think, is the true position of the

1926

RISHIKESH

LAHA

v.

MANIK

MOLLA.

PAGE J.

1926
 RISHIKESH
 LAHA
 v.
 MANIK
 MOLLA.
 PAGE J.

auction-purchaser under the law upon principle and apart from any statutory right which he may possess; see *Dorab Ally Khan v. Abdool Azeez* (1). There is authority also for the view that where an auction-purchaser at a Court-sale has suffered loss through the fraud of the execution-creditor or the breach of any duty which the execution-creditor owes to the auction-purchaser, he is entitled to receive compensation for the loss which thereby he has sustained. See *Doyal Krishna Naskar v. Amrita Lal Das* (2), *Parvathi Ammal v. Govindasami Pillai* (3) and *Balvant Raghunath v. Bala* (4).

Now, in the present case it appears that the agents of the defendant No. 35, who is a large Zemindar, by inadvertence, and it may be through carelessness, included the property in suit in the particulars which they gave to the Court officials for the purpose of the sale as belonging to the judgment-debtor, although in fact the judgment-debtor had no saleable interest therein. No misrepresentation, or fraud, or privity of contract were, or could have been, suggested in the circumstances of this case as founding any legal or equitable cause of action for the recovery of the purchase-price that has been paid by the plaintiffs. Nay, more, in the events that have happened, if it was held that the plaintiffs are now entitled to recover the purchase-money from defendant No. 35, the result would be that the execution-creditor would wholly lose the fruits of the decree which he has obtained, for he cannot now execute the decree, because the execution proceedings are at an end, full satisfaction of the decree having been obtained by payment. In my opinion, in this case, having regard to the evidence, the plaintiffs are not

(1) (1878) L. R. 5 I. A. 116.

(3) (1915) I. L. R. 39 Mad. 803.

(2) (1901) I. L. R. 29 Calc. 370.

(4) (1922) I. L. R. 46 Bom. 833.

1926
 RISHIKESH
 LAHA
 &
 MANIK
 MOLLA.
 PAGE J.

entitled to recover the purchase-money from the execution-creditor as being money had and received by defendant No. 35 to the plaintiffs' use. The only remedy open to the plaintiffs, therefore, was to apply as provided in the Code for an order setting aside the sale, and a consequential order for a refund of the purchase-money. See the case of *Juranu Mahamad v. Jathi Mahamad* (1), *Banku Behari Das v. Gurudas Dhar* (2), *Ram Sarup v. Dalpat Rai* (3), *Balvant Raghunath v. Bala* (4), *Parvathi Ammal v. Govinda Sami Pillai* (5) and *Nagendra Nath Ghosh v. Sambhu Nath Pandey* (6). The only authorities which were cited in support of the view that an auction-purchaser at an execution-sale is entitled to recover the purchase-price which he paid for property in which the judgment-debtor was found to have no saleable interest without having recourse to Order XXI or the equitable doctrine to which I have referred, are *Rustomji Ardeshir Irani v. Vinayak Gangadhar Bhat* (7), *Prasanna Kumar Bhattacharjee v. Ibrahim Mirza* (8), and *Asadullah Khan v. Karam Chand* (9). The decision in *Rustomji's* case (7), however, was decided under the Act of 1882, as was pointed out by Macleod C. J., in *Balvant Raghunath v. Bala* (4), and further the judgment in that case proceeded upon the ground that

"There can be no objection to treating the relations of the parties, namely, the judgment-creditor and the Court sale-purchaser, as relations "in the nature of contract."

With all due deference, however, in my opinion, the view taken by their Lordships of the position of

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| (1) (1917) 22 C. W. N. 760. | (5) (1915) I. L. R. 39 Mad. 803. |
| (2) (1923) 40 C. L. J. 157. | (6) (1924) I. L. R. 3 Pat. 947. |
| (3) (1920) I. L. R. 43 All. 60. | (7) (1910) I. L. R. 35 Bom. 29. |
| (4) (1922) I. L. R. 46 Bom. 833. | (8) (1917) 36 C. L. J. 205. |
| (9) (1923) I. L. R. 4 Lah. 354. | |

1923
 RISHIKESH
 LAHA
 v.
 MANIK
 MOLLA.
 PAGE J.

an auction-purchaser *vis-à-vis* the execution-creditor cannot be supported, having regard to the decision of the Privy Council in *Dorab Ally Khan v. Abdool Azeez* (1). In *Asadull's* case (2), the learned Judges appeared merely to have followed the decision of this Court in *Prasanna Kumar Bhattacharjee v. Ibrahim Mirza* (3). I am of opinion, however, that the *ratio decidendi* in *Prasanna Kumar Bhattacharjee v. Ibrahim Mirza* (3) cannot be reconciled with the ruling of the Privy Council in *Dorab Ally Khan v. Abdool Azeez* (1), and runs counter to a strong and persistent current of opinion in all the High Courts in India. In my opinion the rulings in the decisions to which I have referred, and which I have endeavoured to restate, should now be followed as a settled *cursus curiæ*, and with great respect for the learned Judges who decided *Prasanna Kumar's* case (3), I cannot regard it in such circumstances as a binding authority, or as having been correctly decided. For these reasons, in my opinion, this appeal should be allowed; the decisions of the lower Courts reversed; and the plaintiffs' suit dismissed. As the plaintiffs have misconceived their remedy they must pay the costs in all the Courts.

CUMING J. I agree.

B. M. S.

Appeal allowed.

(1) (1878) L. R. 5 I. A. 116.

(2) (1923) I. L. R. 4 Lah. 354.

(3) (1917) 36 C. L. J. 205.