

ORIGINAL CIVIL.

Before Lord-Williams J.

GOWAL DAS SIDANY

v.

LUCHMI CHAND JHAWAR.*

1929

Feb. 22.

Sale—High Court, Original Side—Decree to enforce deed of charge—Forfeiture of deposit money of auction purchaser by the decree-holder in part satisfaction of the decree, when allowed—Civil Procedure Code (Act V of 1908), s. 129; O. XXI, rr. 84, 86, 89—Rules and orders of the High Court, Original Side, Chapters XXV, XXVII, App. J.—Indian Contract Act (IX of 1872), s. 78—Specific Relief Act (I of 1877), s. 18.

The provisions of Order XXI, rule 86 of the Code of Civil Procedure, 1908, do not apply to a sale in execution of a decree of the Original Side of a chartered High Court to enforce a deed of charge.

When an auction-purchaser, at a sale in execution of such a decree, deposited in court 25 per cent. of the amount of his bid under the conditions of sale, but failed to deposit the balance of the purchase-money in terms of the said conditions of sale,

held that the amount of the said deposit (less the Registrar's Commission) was forfeited to the decree-holder in part payment of the mortgage debt. Virjiban Dass Moolji v. Biseswarlal Hargovind (1) distinguished.

APPLICATION.

This suit was instituted for the recovery of money due under a deed of charge. A decree was passed under which the property charged was put up for sale by the Registrar, Original Side. At the time of the said sale, one Khagendranath Sen was declared the highest bidder and purchaser and he deposited in Court the sum of Rs. 7,500 in terms of the conditions of sale, but subsequently failed to pay the balance of the purchase-money under the said conditions of sale. Thereupon, the decree-holder made this application for an order that the sum of Rs. 7,500 deposited as aforesaid be forfeited.

The conditions of sale referred to were as follows:—

5. The purchaser shall at the time of sale pay a deposit of twenty-five per cent. on the amount of his purchase-money to the Registrar, otherwise the lot shall immediately be again put up for sale.

* Original Civil Suit, No. 318 of 1926.

(1) (1920) I. L. R. 48 Cal. 69.

6. The Registrar shall, as soon as possible after the sale, proceed to certify the result and such certificate shall, within eight days after the sale, be filed by, and at the expense of, the party having the carriage of the proceedings, and in case of his neglect the purchaser of any lot shall be at liberty to file the same, and to retain the cost out of the purchase-money.

7. The party having the carriage of the proceedings shall, within seven days after such certificate has become binding, deliver to the purchaser or his attorney an Abstract of Title Deeds in respect of the lot or lots purchased by him, subject to the stipulation contained in these conditions; and the purchaser shall within seven days after the actual delivery of the Abstract of Title, deliver at the office of Mr. H. C. Banerjee, the attorney for the plaintiff (the party having the carriage of the proceedings) at No. 7, Old Post Office Street, in the town of Calcutta, a statement in writing of his objections and requisitions (if any) to or on the title as deduced by such abstract, and to and in respect of the description of the property, and upon the expiration of such last mentioned time (and in this respect time is to be deemed as the essence of the contract) the title shall be considered as approved of and accepted by the purchaser, subject only to such objections and requisitions, if any.

8. The purchaser shall, under an order for that purpose to be obtained by him or, in case of his neglect, by the party having the carriage of the proceedings, at the costs of the purchaser, upon application to a Judge in Chambers, pay the amount of his purchase-money (after deducting the amount paid as a deposit) to the Controller of Currency for the time being of the Government of India, and the Secretary and Treasurer for the time being of the Imperial Bank of India, with the privity of the Accountant-General of this Court, to the credit of the Suit No. 318 of 1926 (wherein Gowal Das Sidany is the plaintiff and Luchmi Chand Jhawar and others are the defendants), within forty days from the day of sale; and where the same is not so paid, then the purchaser shall pay interest on his purchase-money at the rate of 12 per cent. per annum from the end of the forty days from the day of sale to the day on which the same is actually paid.

9. Upon payment of the purchase-money in manner aforesaid, the purchaser shall be entitled to a proper conveyance of the lot purchased by him, wherein all proper parties shall join as the Registrar shall direct, such conveyance shall be prepared by and registered at the expense of the purchaser and shall be tendered and left by him at the office of the said Mr. H. C. Banerjee for execution by the proper parties. The purchaser shall at his own expense take such steps as may be necessary for the purpose of taking possession.

10. The purchaser shall not be liable to pay the outgoings previous to the day of payment of the purchase-money and the rents (if any) and outgoings shall be apportioned where necessary.

11. The production and inspection of all deeds, evidences and muniments of title which are not in the possession or power of the party having the carriage of the proceedings, and the procuring and making of all certificates attested or other copies or extracts of or from any registered deeds, wills or other documents, and of all declaration or other evidences as to identity whether required for the verification of the Abstract of Title or for any other purposes, shall be at the expenses of the purchaser requiring the same.

12. Where any error or misstatement shall appear to have been made in the particulars or description of the property, such error or misstatement, where capable of compensation, shall not annul the sale nor entitle the purchaser to be discharged from his purchase, but a compensation shall be made to or by the purchaser as the case may be, and the amount of such compensation shall be settled by a Judge in Chambers.

1929

—
GOWAL DAS
SIDANY
v.
LUCHMI CHAND
JHAWAR.

1929

GOWAL DAS
SIDANY
v.
LUCHEMI CHAND
JHAWAR.

13. Where the purchaser shall not pay his purchase-money at the time above specified, or any other time which may be named in any order for that purpose, and in all other respects perform these conditions, an order may be made by a Judge in Chambers for the resale of the property and for payment by the purchaser of the amount of the deficiency, if any, at the price which may be obtained upon such resale and of all attorney and clients' costs and expenses occasioned by such default.

14. Where a resale is directed, if, for want of bidder, the property cannot be resold, the purchaser at the former sale shall pay the whole amount of his purchase-money into Court; but where the property be resold, and where the price obtained at the resale be less than the purchase-money payable by the original purchaser, he shall pay the amount of the deficiency. The costs occasioned by the default of the original purchaser shall also be paid by him. An order containing these directions may also be obtained from a Judge in Chambers.

Mr. J. C. Hazra, for the plaintiff.

Mr. S. N. Banerjee, for the auction purchaser,
Khagendranath Sen.

LORT-WILLIAMS J. In this case, the petitioner instituted a suit for the recovery of a sum of money due under a deed of charge and obtained a decree, under which the property charged was put up for sale by the Registrar and one Khagendranath Sen was declared the highest bidder and purchaser and paid Rs. 7,500 as deposit under the conditions of sale. Subsequently, he failed to pay the balance of the purchase-money. The petitioner now asks that the deposit of Rs. 7,500 be declared forfeited. He states that he decided to treat the contract as rescinded and does not, therefore, ask for an order against the purchaser to pay any deficiency arising on a resale.

My attention has been drawn to Order XXI, rule 86 of the Code of Civil Procedure, which provides that in sales of immovable property by the court, any deposit made under rule 84 may, if the court thinks fit, after defraying the expenses of the sale, be forfeited to Government and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold. But section 129 of the Code provides that, notwithstanding anything in the Code, the High Court may

make such rules not inconsistent with the Letters Patent to regulate its own procedure in the exercise of its original civil jurisdiction. Reading that rule and the section together, I am of opinion that the rule does not apply when a High Court has made rules regulating its own procedure in the exercise of its original civil jurisdiction which are not inconsistent with the Letters Patent. In coming to this conclusion, I am not in any way disagreeing with the judgment of Acting Chief Justice Mookerjee in *Virjiban Dass Moolji v. Biseswarlal Hargovind* (1). That case dealt with rule 89 and it was held that that rule applied to sales under a mortgage decree on the Original Side of the High Court. The rules of the High Court did not provide for the matters contained in rule 89 and, as the Code itself, except for specific sections, applied to all the courts of British India, obviously rule 89 applied. The position as to rule 86 is different, because provision has been made in rules, which are not inconsistent with the Letters Patent, for the conduct of sales by the Registrar. Those rules are contained in Chapter XXVII of the rules of this Court. Under those rules the mortgagee has the carriage of the proceedings relating to the sale which is regulated by conditions in writing, under which the purchaser must make a deposit of 25 per cent. of the purchase-money with the Registrar at the time of the sale. Rule 19 provides that the attorney of the party having the carriage of the proceedings shall be present at the sale, and under rule 23, if the deposit, to which I have referred, is not made, the bid of the purchaser shall be rejected and the property again immediately put up for sale unless the party having the carriage of the proceedings decides that the bid shall be accepted and time allowed to the purchaser to pay the amount payable by him. Rule 37 specifically provides that, where a sale is set aside, owing to defect in title or other similar cause, the purchaser shall receive back his deposit. Under rule 38, the purchaser may apply for leave to pay the balance of

1929

GOWAL DAS
SIDANY

v.

LUCHMI CHAND
JHAWAR.LORT-WILLIAMS
J.

1929

GOWAL DAS
SIDANY.
v.
LUCHMI CHAND
JHAWAR.
LORT-WILLIAMS
J.

his purchase-money into Court, i.e., to pay the difference between the amount of his deposit and the total amount of his bid. Under rule 39, any party interested may apply to compel the purchaser to pay his purchase-money and comply with the conditions of sale, and rule 65 provides the form which must be used under this chapter. That form is contained in Appendix J, which sets out the conditions of sale. Condition 5 provides for the deposit of 25 per cent. Condition 8 provides for the payment of the purchase-money after deducting the amount paid as a deposit. Condition 13 provides that, where the purchaser makes default in paying the balance of his purchase-money, an order may be made by a Judge in Chambers for the resale of the property and for payment by the purchaser of the amount of the deficiency, if any, in the price which may be obtained upon such resale and all costs and expenses occasioned by such default. Presumably "deficiency" means the difference between the amount of the original bid and the amount paid on the resale. The condition is silent as to whether in calculating that deficiency credit for the amount of the deposit must be allowed.

Condition 14 provides that where such a resale is directed, if for want of bidders the property cannot be resold, the purchaser at the former sale shall pay the whole amount of his purchase-money into Court and where the property is resold and the price obtained at the resale is less than the purchase-money payable by the original purchaser, he shall pay the amount of the deficiency and the costs occasioned by the default. Thus under the first part of condition 14, in the event of inability to resell the property, the purchaser must pay the whole of the purchase-money without any allowance for the deposit which he has already made, but where there is a resale he shall pay only the amount of the deficiency. It will be seen that under these conditions there is no definite rule providing for forfeiture of the deposit and whether my decision on this matter be right or wrong I think it would be much better if a definite statement were

made in the conditions of sale about what is to happen to the deposit in case of default by the original purchaser.

In sales by the Sheriff, which are dealt with in Chapter XXV of the rules, this question about the deposit is specifically provided for. Under rule 7, the second condition is that a deposit of 25 per cent. of the amount of the bid must be made. Under the 3rd condition, the balance of the purchase-money shall be paid within a certain time and, in default of payment within such time, the deposit, after defraying expenses of the sale, may be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may subsequently be sold and where the proceeds of the resale are less than the price bid by such defaulting purchaser the difference shall be leviable from him. It will be noted that the word used in the latter part of this condition is "difference" and not "deficiency," i.e., upon such resale the purchaser is liable for a sum equal to the difference between the price obtained on the resale and the price which he originally bid, thus disregarding altogether any question of the deposit or its forfeiture. The conditions in a Registrar's sale, with regard to the deposit and resale, are conditions which are usually found in an ordinary vendor and purchaser contract for sale of land and, in my opinion, the ordinary rules of English law which apply to such contracts must be applied in the present case, and that they have been so applied in India is clear upon reference to the cases mentioned under the heading "Earnest" in the notes to section 78 of the Indian Contract Act in Pollock and Mulla's Text Book (5th Edition, p. 454), and to the notes under "Return of Deposit" (and cases therein mentioned) to section 18 of the Specific Relief Act in the same book at p. 858, where the English and Indian Cases are discussed. Moreover, in the case of *Natesa Aiyar v. Appavu Padayachi* (1), it was held, by a majority

1929

GOWAL, DAS
SIDANY.

2.

LUCHMI CHAND
JHAWAR.LORT-WILLIAMS
J.

1929

GOWAL DAS
SIDANY
v.
LUCHMI CHAND
JHAWAR.
ROBT-WILLIAMS
J.

of the Court, that the law of India on this subject does not differ from the English law. Thus, to put it shortly, if the vendor, on default by the purchaser, chooses to treat the contract as rescinded, the deposit is forfeited. If, on the other hand, he chooses to treat the contract as subsisting, in order that he may proceed under the condition as to resale, then, in calculating deficiency which may arise thereunder, he must give credit for the amount of the deposit. A deposit paid under a contract of sale serves two purposes. If the sale is carried out, it goes against the purchase-money, but primarily it is a security for the performance of the contract. Often it is expressly provided in the contract that, in the event of default, the deposit shall be forfeited, but such express provision is not, in my opinion, necessary and, unless the contract read as a whole shows an intention to exclude forfeiture, the vendor is entitled to retain it as forfeited. The position is the same if the deposit has been paid to a stake-holder or as in this case to the Registrar. The authorities for these propositions are *Ex parte Barrell*. *In re Parnell* (1); *Howe v. Smith* (2); *Collins v. Stimson* (3); *Depree v. Bedborough* (4); *Hall v. Burnell* (5). If the vendor chooses to treat the contract as rescinded, he cannot, of course, take advantage of the condition which gives him a right to any deficiency arising on a resale, nor can he recover damages for breach of the contract, but he can retain the deposit as forfeited. If subsequently he resells the property, he does so as absolute owner and has no further recourse against the defaulting purchaser. The vendor can treat the contract as rescinded if the purchaser has expressly repudiated it, or if there has been implied repudiation, such as failure to complete on the due date, (*Hewe v. Smith, Supra*). If the vendor decides not to treat the contract as rescinded but to enforce it by resale and, by having recourse to the defaulting

(1) (1875) L. R. 10 Ch. Ap. 512.

(3) (1883) 11 Q. B. D. 142.

(2) (1884) 27 Ch. D. 89.

(4) (1863) 33 L. J. (N.S) Ch. 134.

(5) [1911] 2 Ch. 551.

purchaser for any deficiency upon resale, then, in calculating that deficiency, he must give credit for the amount of the deposit. *Ockenden v. Henley* (1); *Howe v. Smith* (*supra*); *Shuttleworth v. Clews* (2); *Vellore Taluk Board v. Gopalasami Naidu* (3). That being, in my opinion, the legal position as to the deposit in this case and, in view of the fact that the mortgagee who had the carriage of the proceedings decided to treat the contract as rescinded, he is entitled to forfeit the deposit, and to take it in part-payment of the mortgage debt.

I make an order against the mortgagor for resale of the mortgaged properties.

The mortgagee is entitled to the costs of this application to be paid by the purchaser.

Application allowed.

Attorney for the petitioner: *H. C. Banerjee.*

Attorneys for the opposite party: *N. C. Bose & Co.*

A. K. D.

(1) (1858) E.B. & E. 485; 120 E.R. 590. (2) [1910] 1 Ch. 176.

(3) (1914) I. L. R. 38 Mad. 801.

1929.
 GOWAL DAS
 SIDANY
 v.
 LUCHMI CHAND
 JHAWAR.
 LORD WILLIAMS
 J.