

RUPABAI
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interest thereon at 4 per cent. per annum until payment into Court. It is ordered that in case the said sum of Rs. 38,639 and interest is not sufficient to pay to the plaintiffs the sum they shall be entitled to receive according to the above directions, that defendant No. 4 shall pay into Court to the credit of the cause a sum sufficient along with the said sum and interest to make up the sum payable to the plaintiffs.

The claim of the plaintiffs and of defendant No. 4 to costs are nearly equally balanced. The plaintiffs have succeeded in the appeal, but not to the full extent for which they sued. Unless the plaintiffs had chosen to go in and claim under the order of the 7th of June 1882 a suit was unavoidable to finally dispose of the fund in No. 4 of 1881. As between the plaintiffs and the defendant No. 4, each party—plaintiffs and defendant No. 4—should abide their own costs. Confirm the decree of the Sub-Judge in other respects with the above directions. The case is remitted to the Court of first instance to be carried out.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

MADDEN (DECREE-HOLDER),

and

CHAPPANI (DECREE-HOLDER).*

Civil Procedure Code, ss. 294, 295.

M and C each obtained a decree against the same judgment-debtor and applied for execution. C, in execution of his decree, attached certain immovable property, and, with the permission of the Court, purchased the same under s. 294 of the Code of Civil Procedure and set off his purchase money against the decree. M claimed that the proceeds of the sale to C should be rateably distributed under s. 295 of the Code and that C should either elect to have the property resold or pay into Court the rateable proportion due to M. C objected to a resale or to pay:

Held, that C might be compelled to refund the rateable amount due to M by summary process in execution.

CASE referred, under s. 617 of the Code of Civil Procedure, by W. E. Clarke, Subordinate Judge of the Nilgiris.

* Referred Case No. 10 of 1887

The case was stated as follows :—

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“Mrs. Madden, plaintiff in original suit No. 62 of 1885, is a decree-holder against three persons. Peria Chappani Pillai, plaintiff in original suit No. 38 of 1885, is a decree-holder against one of Mrs. Madden’s judgment-debtors. In execution of her decree, Mrs. Madden has taken out various execution proceedings, one of which is still pending. In execution of his decree, Chappani Pillai attached certain immovable property of his judgment-debtor, and, with permission of the Court, purchased a portion of it at a court-sale, setting off his purchase money against his decree amount—s. 294. On this purchase and set-off becoming known to Mrs. Madden, she, through her solicitor, Mr. Smith, protested against this course being allowed, and urged that the proceeds of the sale of the property attached by Chappani Pillai should be rateably divided amongst the decree-holders under s. 295. On hearing Mr. Smith for Mrs. Madden in support of this contention and Mr. Orr for Chappani Pillai against it, the Court was of opinion, on the authority of *Shrinivas v. Radhabai*(1), that, although it had given Chappani Pillai leave to bid and set off, this could not deprive Mrs. Madden of her right as a decree-holder to a rateable distribution of the purchase money under s. 295; but it had a doubt as to whether it could order such purchase money to be paid into Court, as, however, the case already cited seemed to show that, under circumstances very similar to the ones which exist in this case, the Bombay High Court allowed a judgment-creditor to elect a resale, and s. 294, cl. 3, provides for a resale, the Court ordered that Chappani Pillai should exercise such election, or show cause why he should not pay the purchase money into Court. Notice to this effect was served on the said Chappani Pillai. On the day appointed for the said Chappani Pillai to show cause, he appeared by Mr. Winterton, who argued that his client was not bound by the Court’s order to elect or show cause, and maintained that the last proviso of s. 295 operated to secure him from being compelled to pay his purchase money into Court, and that Mrs. Madden could only get her share of such money by filing a suit for it.

“OPINION.—I am of opinion that the case of *Shrinivas v. Radhabai* is clear authority for the position that s. 294 only applies

(1) I.L.R., 6 Bom., 570.

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as between a purchasing decree-holder and his judgment-debtor and cannot avail to deprive a competing decree-holder under s. 295 of his rights under the latter section; as to Mr. Winterton's argument founded on the wording of the last proviso to s. 295, I am of opinion that it is not at all in point, for this proviso seems to me only to apply in respect of assets which have been realized and paid into Court and then paid out of Court to a person not entitled to receive them.

“In this case, however, no assets at all have been received by the Court or paid out to any one, and, therefore, I think this proviso inapplicable to the present case. I am, however, doubtful whether, since this Court allowed Chappani Pillai permission to bid and set off under s. 294, it can order him to pay his purchase money into Court, there being no provision of the Code to this effect. I would, therefore, respectfully solicit the decision of the Honorable the Judges of the High Court as to whether, under the circumstances narrated, this Court has power to order his purchase money to be paid into Court by Chappani Pillai, or whether its power is restricted to ordering a resale under cl. 3 of s. 294.”

Mr. *Shaw* for Mrs. Madden.

Chappani did not appear.

The Court (Muttusami Ayyar and Brandt, JJ.) delivered the following

JUDGMENT:—The permission granted under s. 294, Civil Procedure Code, to a judgment-creditor to set off the amount of the purchase money payable for the property sold against the debt due to him under his decree must be taken to be granted subject to the provisions of s. 295—*Viraragara v. Varada*(1).

The set-off so allowed in effect represents the payment, into and out of Court, of the purchase money due by the purchaser, and we agree with the view expressed in *Taponidi Hordanund Bharati v. Mathura Lall Bhagat*(2) that the substantial nature of the transaction is not altered and that the set-off is allowed as a substitute for payment into and out of Court as a matter of convenience.

It is clear then that Chappani Pillai would not be bound to pay into Court the purchase money if he considered it to his interest to elect for a resale, and that if he wishes the sale to

(1) I.L.R., 5 Mad., 123.

(2) I.L.R., 12 Cal., 499.

stand he must pay in so much of the purchase money as may be rateably due to other creditors under s. 295 on account of their money decrees.

If he will neither elect a resale nor pay the money into Court as above limited, such refund may be enforced either by suit or by an order in execution proceedings by way of restitution. Clause 3, s. 294, of the Code of Civil Procedure is applicable only to cases in which the purchaser buys without the permission of the Court, and there is no other provision in the Code which authorizes the Court executing the decree of its own motion to order a resale by reason of non-compliance with a direction to refund.

We, therefore, answer the question referred to us as follows :— The Court executing the decree has no power to order the purchaser to pay the whole of the purchase money into Court, but it is competent to the Court to give him the option of electing a resale, and if he does not avail himself of that option, it is open to the Court to order him to pay into Court so much of the price as is due to the other decree-creditors entitled to share rateably in the distribution of the assets, and to enforce that order by summary process in execution. The Court is also at liberty, where it sees fit, to refer the execution-creditor or creditors to a regular suit when the circumstances of the case appear to render such a course desirable.

There will be no order as to costs in the matter of this reference.

APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Muttusami Ayyar.*

KHADAR KHAN, IN RE.*

Cattle Trespass Act I of 1871, s. 22—Compensation.

1887.
Dec. 15.

No appeal lies against an order made under s. 22 of Act I of 1871.

CASE referred under s. 438 of the Code of Criminal Procedure, by A. F. Cox, Acting Sessions Judge of Cuddapah.

The facts of the case as stated by the Judge were as follows :—

One Khadar Khan was ordered by a Second-class Magistrate to pay Rs. 35 as compensation under s. 22 of the Cattle Trespass

* Criminal Revision Case 467 of 1887.