

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice,
and Mr. Justice Parker.

1889.
April 4, 30.

VALLABHAN (PETITIONER), APPELLANT,

v.

PANGUNNI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, ss. 244, 293, 306, 309, 588—Court-sale—Liability of defaulting purchaser—Appeal from order under s. 293—Resale.

At a sale in execution of a decree a decree-holder, who had obtained leave to bid, was alleged to have made a bid through his agent of Rs. 90,000, but he shortly afterwards repudiated the bid and did not pay the deposit. The property was put up for sale again on the following day under s. 306 of the Code of Civil Procedure and was in due course knocked down for a smaller sum. The judgment-debtor filed a petition under s. 293 to recover from the decree-holder the loss by resale; the petition was rejected. On appeal:

Held, (1) that the question at issue was one arising between the parties to the suit and that an appeal lay against the order rejecting the petition;

(2) that the property having been forthwith put up again and sold under s. 306 of the Code of Civil Procedure was resold within the meaning of s. 293.

APPEAL against the order of E. R. Krishnan, Subordinate Judge of South Malabar, on miscellaneous petition No. 60 of 1888.

In original suit No. 28 of 1879, a decree was passed in favor of the plaintiff (the present counter-petitioner No. 1), and certain forest land, the property of the family of the judgment-debtors, (of whom the present petitioner was one,) was brought to sale in execution. The present counter-petitioners Nos. 2—4 were the holders of other decrees, in execution of which they claimed rateable distribution of the proceeds of the above sale. At the sale counter-petitioner No. 5, who was alleged to be the agent for counter-petitioners Nos. 1—4, bid Rs. 90,000, and the property was knocked down in the name of counter-petitioner No. 1, who had obtained leave to bid; counter-petitioner No. 1, however, in a few minutes repudiated the bid. The matter having been at once reported to the Subordinate Judge, he on the same day made the following order:—

* Appeal against Order No. 76 of 1888.

“ The withdrawal cannot be permitted. The nazir is directed to levy 25 per cent. of the purchase money or get such of the purchasers as hold decrees against the judgment-debtors to put in satisfaction of decree to that extent. In default the property is to be forthwith put up again and sold. The deficiency, if any, will be recovered from the purchasers under the ruling in *Jawherbai v. Haribhai*(1).”

No deposit was paid: the property was put for sale again on the next day, 13th December, and on the 19th it was knocked down to petitioner No. 6, the Collector of Malabar, for Rs. 42,100.

In the present petition it was sought to recover from the counter-petitioners Rs. 47,900, being the difference between the two sums above referred to. The Subordinate Judge held that counter-petitioners Nos. 2—4 had not authorized the first bid, and rejected the petition, expressing his reasons as follows:—

“ From all the circumstances, I find that there was no sale as contemplated by section 306, because there was no payment of 25 per cent. and poundage. The ruling in *Intizam Ali v. Narain Singh*(2) appears to me in point, and there was certainly no resale under section 293, because the property was not again proclaimed. The sale, as a matter of fact, took place on the 19th December, on which date it was adjourned by the Court under the discretion vested in it by section 291. I therefore think that the order which I endorsed on the nazir’s report, dated 12th December, based on *Jawherbai v. Haribhai*(1) cannot be enforced. It is cancelled, and the petition is rejected.”

The petitioner preferred this appeal.

Mr. W. Grant for appellant.

The *Acting Government Pleader* (*Subramanya Ayyar*) *Bhashyam Ayyangar*, *Sundara Ayyar* and *Govinda Menon* for respondents.

The further facts of the case and the arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Parker, J.).

JUDGMENT.—The application now under appeal was made under section 293 of the Code of Civil Procedure by the third defendant in original suit No. 28 of 1879 on the file of the Calicut

(1) I.L.R., 5 Bom., 575.

(2) I.L.R., 5 All., 316.

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Subordinate Judge's Court to recover from the counter-petitioners Rs. 47,900 being the difference between the sum of Rs. 90,000 bid by counter-petitioner No. 5 as agent for the other counter-petitioners, and Rs. 42,100 the sum for which the properties were ultimately sold.

Counter-petitioners Nos. 1—4 were decree-holders entitled to rateable distribution, and counter-petitioner No. 5 is alleged to have been their agent. The property was put up on 12th December 1887, the upset price in the proclamation being given as Rs. 5,000; but on it being represented to the Subordinate Judge that at the last auction which had been stopped, the Collector had bid Rs. 84,000 for the same property, the Subordinate Judge ordered the nazir to cry up the property at that price. The only bid after that was for Rs. 90,000 which was bid by counter-petitioner No. 5 as the agent for counter-petitioner No. 1, Pangunni Menon, in whose name the property was knocked down. Pangunni Menon failed to deposit the 25 per cent. of the purchase money, or to pay the poundage; and on it being reported to the Subordinate Judge by the nazir, that all the judgment-creditors withdrew from the sale, he passed an order directing that the property be forthwith put up again and sold and that the deficiency, if any, might be recovered from the purchasers, under the ruling in *Jawherbai v. Harihhai*(1). The property was put up again on the following day (13th December) and purchased by the Collector for Rs. 42,100 on 19th December 1887. The sale was confirmed on 20th February 1888.

The Subordinate Judge found that counter-petitioners Nos. 2—4 had not authorized counter-petitioner No. 5 to bid for them; that there was no sale as contemplated by section 306 of the Civil Procedure Code since there was no deposit *Intizam Ali v. Narain Singh*(2) and that in any case there was no resale under section 293, because the property was not again proclaimed. On these grounds he dismissed the judgment-debtor's petition.

It is first objected that there is no appeal, since section 588 of the Code of Civil Procedure does not provide any appeal from an order under section 293 of the Code of Civil Procedure, and it is argued that the question is not one arising between the parties to the suit or their representatives, but between the judgment-debtor

(1) I.L.R., 5 Bom., 575.

(2) I.L.R., 5 All., 316.

and the auction-purchasers, and that the summary order can only be set aside in a regular suit.

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Pangunni Menon, counter-petitioner No. 1, had obtained leave on 12th December to bid at the sale, and as far as this Court is concerned, the first question appears to have been decided in *Viraraghava v. Venkata*(1). In that case it was held that a judgment-debtor, who claimed to have a sale set aside on the ground of fraud, the judgment-creditor having procured a sale without advertisement and purchased without leave of the Court, was debarred from bringing a separate suit to set aside the sale, inasmuch as the question arose between the parties to the suit and related to the execution of the decree within the meaning of section 244 of the Civil Procedure Code. The decision in *Pachayappan v. Narayana*(2) was referred to as against this view, but in that case it does not appear that the auction-purchaser was a party to the suit. We are therefore of opinion that an appeal does lie.

We agree with the Subordinate Judge that the evidence does not show that counter-petitioner No. 5 had authority to bid for counter-petitioners Nos. 2—4, and we observe that the Collector, counter-petitioner No. 6, has been improperly made a party in this appeal. As against counter-petitioners Nos. 2—4 and 6, the appeal must therefore be dismissed with costs. The appeal must also fail as regards counter-petitioner No. 5, who only bid as Pangunni Menon's agent in the presence of his principal.

The decision in *Intizam Ali v. Narain Singh*(3) does not appear to us to affect the present case. There the bidder did not pay the deposit till some days subsequent to the sale, and the Court held on the application of the judgment-debtor that the sale was invalid since the property should have been forthwith put up again and sold; hence the judgment-debtor was held entitled to have the sale set aside. In the case before us there is no question whether Pangunni Menon is entitled to claim the benefit of the sale. The only question is whether the judgment-debtor is entitled to recover from him the deficiency of price which has happened on a resale.

In this case the Subordinate Judge ordered the procedure laid down in section 306 of the Civil Procedure Code to be observed, and the property to be forthwith put up again and sold. But it

(1) I.L.R., 5 Mad., 217.

(2) I.L.R., 11 Mad., 269.

(3) I.L.R., 5 All., 316.

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is contended that such sale was not a resale within the meaning of the code, but only a continuance of the original sale, and we are referred to section 309 of the Civil Procedure Code as showing that where a resale was intended, a fresh notification was necessary. We were also referred to the remarks of Mr. Justice Norris in *Bhim Singh v. Sarwan Singh*(1).

With regard to the case last quoted, we may observe that the real question before the learned Judge was whether there had been a material irregularity in publishing or conducting the sale and the question whether the putting up to sale again under section 306 was a resale within the meaning of the code was not before the Court. We observe also that under section 309, a fresh notification is not prescribed in the case of *every* resale, but only when the resale is in default of payment of the purchase money within the time allowed for such payment. The reason for this is obvious. Under section 307 a purchaser who has paid the deposit is allowed 15 days' grace to pay the balance; if he fail other bidders will have dispersed and a fresh notification is necessary; but it is not necessary when the purchaser fails to deposit at once his 25 per cent. under section 306 and the property is put up again forthwith.

We are unable to hold that when property is put up again forthwith and sold under section 306 of the Civil Procedure Code that it is not resold within the meaning of section 293, and we are fortified in this opinion by the fact that the High Courts of Bombay and Calcutta have arrived at a similar conclusion, *Jawherbai v. Haribhai*(2) and *Ramdhani Sahai v. Rajrani Koer*(3).

The claim as against counter-petitioner No 1, Pangunni Menon, has not been determined on the merits. We must therefore allow the appeal with respect to him and remand the case for a fresh order. The costs hitherto incurred as between him and the appellant will be provided for in the revised order. As against the other respondents the appeal must be dismissed with costs. (Separate costs for Collector and one set of costs for the others).

(1) I.L.R., 16 Cal., 33, 38.

(2) I.L.R., 5 Bom., 575.

(3) I.L.R., 7 Cal., 337.