

*Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.*

MAHOMED GAZEM CHOWDHRY (PLAINTIFF) *v.* RAM LOLL SEN  
AND OTHERS (DEFENDANTS).\*

1884  
May 16.

*Execution of decrees—Sale—Application by judgment-creditor to be permitted to bid at sale—Refusal—Purchase by judgment-creditor—Invalidity of sale—Civil Procedure Code, Act XIV of 1882, s. 294.*

A mortgagee having obtained a decree, declaring his lien on certain property, put up for sale in execution of this decree the mortgaged property. The decree-holder asked for, but was refused leave to bid at the sale, but notwithstanding such refusal, purchased the property in the name of a third person.

Possession under the sale was opposed, and the decree-holder as purchaser brought a suit for possession of the property.

The defendants contended that, inasmuch as the plaintiff (decree-holder) had been refused leave to bid at the sale, his purchase could not be enforced: *Held*, that the plaintiff had been guilty of an abuse of the process of the Court, in bidding at the sale and buying the property benami, and that the sale, therefore, ought not to be enforced.

THIS was a suit to recover possession of a 10-anna share in a certain taluq and for mesne profits.

The plaintiff stated that in 1281 B. S. he lent a sum of money to Akturiuessa and Maimona Bibi, and that as security for this advance they executed a bond mortgaging to him the 10 annas of the taluq above referred to. That on the 23rd August 1879 he instituted a suit, and obtained a decree against them on the 9th October declaring his lien on the property.

That in execution of this decree, property was sold and was purchased by his benamidar, Chunder Kant Dass; but Chunder Kant's possession was opposed by the defendants; the plaintiff, therefore, brought the present suit to recover possession.

The defendants stated that the plaintiff had asked permission from the Court to bid at the sale, and that such permission had been refused, but that notwithstanding such refusal, the plaintiff had purchased the property in the name of Chunder Kant Dass, and they contended that the sale therefore was void.

The Court of first instance found that the Court had refused to

\* Appeal from Original Decree No. 169 of 1882, against the decree of F. W. J. Rees, Esq., Judge of Noakhally, dated the 4th of April 1882.

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allow the plaintiff to bid at the sale, and that, therefore, the purchase through Chunder Kant Dass was fraudulent and could not be enforced, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Baboo *Rashbehari Ghose* and Moulvi *Serajul Islam* for the appellants contended that, no objection having been made by the judgment-debtor to the sale under s. 294 of the Code of Civil Procedure, the suit should not have been dismissed. That s. 294 did not make the sale void, but only voidable at the application of the judgment-debtor—*Janherbai v. Haribhai* (1).

Baboo *Bhuban Mohun Doss* and Baboo *Ratneswar Sen* for the respondents relied on the case of *Rukhinee Bullubh v. Brojonath Sircar* (2) as showing that without permission of the Court such a purchase would be invalid.

Judgment of the High Court was delivered by

GARTH, C.J., (BEVERLEY, J., concurring).—The plaintiff in the suit was the mortgagee of certain property. He brought a suit to enforce his rights, and obtained a decree for sale; and the property was sold in execution under that decree.

The mortgagee then applied to the Court to be allowed to bid at the sale, but his application was refused. He, however, notwithstanding that refusal, purchased the property through a benamidar, and the Court, in ignorance of the fact, confirmed the sale.

The mortgagee then brought this suit against the mortgagor, and other persons who had purchased a portion of the mortgagor's interest, for possession of the mortgaged property, and for mesne profits; and the defence was that the plaintiff had bought the property, not only without the permission, but contrary to the express orders of the Court, and that consequently he had no right to enforce his sale.

The Judge of the Court below has dismissed the suit upon the ground that the plaintiff was guilty of a fraud; and that the purchase was one which the plaintiff had no right to make, having regard to s. 294 of the Code.

Upon appeal it has been contended by the plaintiff that the

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

(2) I. L. R., 5 Cal., 308.

Court below was wrong ; and that s. 294 in its present amended form does not render such a sale absolutely void, but only voidable by an application to the Court under the last clause of the section, which runs thus : " When a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person interested in the sale, by order set aside the sale ; and the costs of such application and order and any deficiency of price, which may happen on the resale, and all expenses attending it, shall be paid by the decree-holder."

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It is contended that a purchase made by a mortgagee, without the permission of the Court, is not *ipso facto void*, but only voidable at the instance of the mortgagor, under the clause which I have just read ; and in support of that view we have been referred to a case of *Jawherbai v. Haribbai* decided by the Bombay High Court and reported in I. L. R., 5 Bom., 575, in which the Court says : " In the absence of such an application, (that is, an application made under the last clause of s. 294) the Code does not, in s. 294, contemplate a sale being set aside."

But in order to understand that case correctly, we must see what the nature of the suit was. A mortgagee had purchased property under a decree without the permission of the Court ; and having done so, he failed to deposit the earnest money, in consequence of which the Court ordered the property to be sold again, and another person bought it for Rs. 125 less than what had been bid by the defaulting purchaser at the first sale.

The mortgagor then sued the mortgagee, the first purchaser, for Rs. 125, upon the ground that he had been a loser to that extent by reason of the first purchaser's default ; and the answer to that suit by the mortgagee was, that he had purchased without the permission of the Court, and that his purchase was consequently void.

Of course this was no defence. His purchase would only be void at the option of the mortgagor. If the mortgagee chose to bid without permission, and made a bad bargain, he could not, of course, take advantage of his own wrong to throw his purchase

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up. His purchase could only be avoided at the instance of the mortgagor, or of somebody who was interested in setting it aside.

Another case (*Rukhinee Bullubh v. Brojonath Sircar*) to which we were referred, and which is applicable here, is reported in I. L. R., 5 Calc., 308. That was a suit brought by a mortgagor to set aside a purchase made by a mortgagee without permission of the Court, when Act X of 1877 was in force; and consequently before the clause, which I have just read, formed part of s. 294, and the Court held that it was competent to the plaintiff to set the purchase aside.

At that time a regular suit was the only remedy which the mortgagee could take; but now he has a further remedy. He can, if he chooses, by a summary application, not only have the sale set aside, but he may also recover the costs of the application, and any deficiency in the price which may happen on the re-sale, and all expenses attending it.

But in this case the plaintiff is in a much worse position. He has not only not obtained the permission of the Court, but he has applied to the Court and his application has been refused, and then knowing that his own bidding would not be accepted, and that the Court would not confirm any purchase which he might make, he gets a benamidar to buy for him, and is guilty of an abuse of the process of the Court; and now he asks against the mortgagor that his sale should be enforced. It is clear that the Court below was quite right in dismissing his suit.

The appeal must be dismissed with costs.

*Appeal dismissed.*