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APPELLATE CIVIL.

1887
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Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

BEHARI LAL AND OTHERS (PLAINTIFFS) v. GANPAT RAI AND ANOTHER
(DEFENDANTS).*

Civil Procedure Code, ss. 244, 291—Sale in execution of decree—Tender of debt by transferee of property—Question for Court executing decree—Separate suit.

Held that the assignees of a purchaser from a judgment-debtor of property, the subject-matter of a decree for enforcement of hypothecation, were entitled to come in and protect the property from sale in execution of the decree by tendering the debt and costs under s. 291 of the Civil Procedure Code, and that the executing Court was bound to accept the money and stop the sale.

Held also, where the executing Court had refused to accept the money and the sale had taken place, that a suit by the assignees to set aside the sale and for a declaration of their right to come in under s. 291, was not barred by s. 244 of the Code.

THE facts of this case were as follows:—The defendants, Ganpat Rai and Shambhu Nath, in execution of a decree for enforcement of hypothecation of zamindari property, which they had obtained against Musammat Gaura, caused the property to be attached and advertised for sale. Subsequently, the decree-holders having failed to pay the necessary fee for the issue of the proclamation of sale, the case was struck off the file on the 17th September, 1884.

On the 18th December, 1884, the judgment-debtor conveyed her proprietary right in the property to one Kundan Lal by a deed of sale which was registered on the date of execution.

* First Appeal, No. 64 of 1886, from a decree of Maulvi Muhammad Maqsood Ali Khan, Subordinate Judge of Saharanpur, dated the 29th July, 1885.

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On the 6th January, 1885, the defendants made a fresh application for execution of their decree, and by an order passed on the next day, the 20th February was fixed for sale of the property.

On the 18th February, 1885, Kundan Lal conveyed his rights under the deed of the 18th December, 1884, to the plaintiffs, Behari Lal, Bindrabai, Tej Nath, Shambhu Nath, Rahman Bakhsh, and Balram, by a deed of sale which was registered on the same date.

On the 20th February, the date fixed for the sale, the plaintiffs made an application under s. 291 of the Civil Procedure Code, to the Deputy Collector, who was the officer conducting the sale, for leave to pay the amount of the judgment debt and costs into Court. This application was opposed by the decree-holder on the allegation that the sale in favour of the petitioners had not been completed, and that the judgment-debtor had denied her sale to Kundan Lal. The Deputy Collector passed the following order:—"I cannot give permission to the petitioners to deposit money on the part of the judgment-debtor in any Court, inasmuch as the decree-holders cannot receive it. The petitioners should seek relief formally in reference to their right of purchase." The petitioners thereupon renewed their application to the Court executing the decree, but the application was rejected. The sale then took place, and the property was purchased by the decree-holders themselves on the 20th February, 1885.

The plaintiffs then instituted the present suit, in which they prayed "that the plaintiffs' right to pay off the amount of the defendants' decree, as representatives of the judgment-debtor, be declared; and that by setting aside the sale of the 20th February, 1885, at which the defendants became the purchasers, a decree for the property in suit be passed in the plaintiffs' favour with costs."

The Court of first instance (Subordinate Judge of Saharanpur) found that "the original vendor, Musammam Gaura, whose rights were under attachment and put up to sale, denied the sale executed by her." The material portion of the Court's judgment was as follows:—"In this case, when the plaintiffs offered to pay the money on the day fixed for sale, the defendants decree-holders, who represented the mortgagee, refused to receive the money, declaring the sale to be disputed and unadmitted. They were not bound, and

could not be compelled, to receive it. The Court could not receive the money in deposit and stay the sale by reason of such deposit. S. 291 does not contemplate the payment of money by a stranger asserting a disputed or unproved right in the property, and render it incumbent on the Court to receive it. As the decree-holders' refusal to receive the money and the Court's order not allowing it to be deposited were legally valid, and as the not staying of the sale was a necessary consequence thereof, the plaintiff is not entitled to the relief he seeks by his suit, nor is such a suit maintainable. Moreover, even if the sale alleged by the plaintiff had been admitted, he would not have been competent to bring a fresh suit. What he should have done was to apply to be made a party to the execution case." The Court accordingly dismissed the suit.

The plaintiffs appealed to the High Court.

The Hon. Pandit *Ajudhia Nath*, for the appellants.

The Hon. *T. Conlan* and *Mr. C. H. Hill*, for the respondents.

EDGE, C. J., and TYRRELL, J.—In this case the respondents had obtained a decree on a hypothecation bond against Musammat Gaura. They attached her property in execution thereof, but not having paid the proper fees into Court, the Court made an order striking the execution off the list of pending cases. That was on the 17th September, 1884. On the 18th December following Musammat Gaura sold the property in question to Kundan Lal. That sale-deed was registered on the 18th February. Kundan Lal sold the property to the appellants-plaintiffs. That sale-deed was registered. On the 6th January, 1885, the respondents-decree-holders put in an application for execution against the property. The 20th February following was fixed for the sale. On the 20th February the appellants, acting under s. 291 of the Code of Civil Procedure, presented a petition for leave to pay the judgment-debt and costs into Court. That petition was opposed by the respondents, they raising a doubt as to the transfer. The Deputy Collector referred the case to the Court, which seems to have been close by. The application was then made to the Court, and was refused. The sale proceeded, and the decree-holders-respondents purchased on the same day. Upon that this suit was brought. The Subordinate Judge dismissed the suit, apparently on the ground that as Musammat Gaura had questioned the sale made by her, the appel-

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lants were not persons entitled to have the sale stayed by paying the money into Court. He also held that s. 244 barred the suit. This involved one question of fact and two questions of law. The question of fact was whether Musammât Gaura had sold the property to Kundan Lal. The evidence proved that she did, and had executed the sale-deed of the 18th December, 1884. When that deed was registered, she was identified by a person deputed by the Registrar for that purpose from the office. Mr. Conlan admits that he cannot dispute that the sale did take place. The first question of law is, whether the appellants, who were the assignees who purchased from Kundan Lal, who purchased from Musammât Gaura, were entitled to come in and protect the property by tendering the money under s. 291 of the Code of Civil Procedure. The only right of the decree-holders was to have this debt and costs paid to them, or to have the property sold to satisfy this judgment and costs. It is only as a matter of grace that a decree-holder is allowed to purchase at auction-sale at all. If the debt and costs are paid by a third person on behalf of the debtor, the decree-holder ceases to have any interest in the property, and the money so paid cannot be recovered from him. The judgment-debtor might object to the intervention of a third party, but that is not the present case. Indeed, we are strongly of opinion that if Musammât Gaura had attempted to interfere, the assignees would have been entitled to an injunction against her; and further, we think they would be entitled to use her name in paying the money into Court, because her rights had passed to her vendees. Consequently, we are of the opinion that the executing Court was bound to accept the money and stop the sale.

The only other point now remaining is, whether the case is governed by s. 244 or not. We think that the current of decisions show that s. 244 does not apply to a case like this, and that current of decisions is opposed to the doctrine in the case cited to us (1). On these grounds we decree the appeal with costs, that is to say, the appellants should have a decree conditioned on payment into Court within thirty days of the judgment-debt and costs as it stood on the 20th February, 1885, at the first stage of the sale, minus the costs of this litigation.

Appeal allowed.

(1) *Banachandra Kolathar v. Mahadaji Kolathar*, I. L. R., 9 Bom. 141.