

Before Mr. Justice Mahmood.

1891
June 2.

ILAHİ BAKHSH AND ANOTHER (DECREE-HOLDERS) v. BAIJ NATH
(JUDGMENT-DEBTOR).*

Execution of decree—Default of purchaser at sale in execution—Deficiency in price arising on re-sale - Order against defaulter to make good such deficiency—No appeal from such order—Civil Procedure Code, ss. 2, 293, 540, 588.

No appeal lies from an order under s 293 of the Code of Civil Procedure directing a defaulting purchaser at a sale in execution of a decree to make good the loss happening on a re-sale occasioned by his default. *Soudagar Mal v. Abdul Rahman Khan* (1) and *Tapesri Lal v. Deokinandan Rai* (2) followed.

THE facts of this case sufficiently appear from the judgment of Mahmood, J.

Pandit *Moti Lal*, for the appellants.

Mr. D. *Banerji*, for the respondent.

MAHMOOD, J.—Upon the case being called on for hearing Mr. *Dwarka Nath Banerji* for the respondent takes a preliminary objection to the effect that the appeal does not lie, and in order to render the objection and the grounds upon which it proceeds intelligible, it is necessary to state the following facts:—

On the 24th January 1880, one Jugal Kishore obtained a decree for recovery of Rs. 11,583-0-9, against the present appellants, Ilahi Bakhsh and Rahim Bakhsh, by enforcement of lien against certain immovable property belonging to them.

In execution of the abovementioned decree mauza Dharampur was sold by auction on the 20th June 1882, when the present respondent, Baij Nath, made a bid of Rs. 7,500, and deposited one-fourth of the price in Court as required by law. He, however, failed to deposit the three-fourths of the sale-money within the period of fifteen days, and the result was that the auction-sale of the 20th June 1882, stood as annulled.

On the 20th November 1883, the same property was brought to sale by auction for the second time, and upon this occasion two

* First Appeal No. 182 of 1890 from an order of Babu Mata Prasad, Subordinate Judge of Bareilly, dated the 9th June 1890.

(1) Weekly Notes, 1890, p. 85.

(2) Weekly Notes, 1890, p. 89.

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persons, Ghulam Ahmad and Ghias-ud-din, purchased it in lieu of Rs. 6,665, that is to say, for a sum which fell short of Baij Nath's bid of the 20th June 1882, by Rs. 835.

Matters stood thus, when on the 19th November 1886, Rahim Bakhsh and Ilahi Bakhsh aforesaid applied to the Court for recovery of Rs. 835 from the defaulting bidder Baij Nath, present respondent. This application purported to have been made under s. 293 of the Code of Civil Procedure, and, upon the application having been made, Baij Nath, respondent, preferred objections, but his objections were disallowed, and on the 8th January 1887, the Subordinate Judge made an order that the sum of Rs. 835 was to be paid to them by Baij Nath.

It appears then that on the same day, namely, the 8th January 1887, Jugal Kishore, the holder of the decree of the 24th July 1880, applied for attachment of the sum of Rs. 835 in the hands of the respondent, Baij Nath. The attachment was actually made on the 14th January 1887, and it seems that subsequent to the attachment the decree-holder, Jugal Kishore, sold the decree to one Raghubar Dyal, who is no party to this litigation.

On the 1st December 1889, the respondent, Baij Nath, paid the sum of Rs. 835 to Raghubar Dyal, the abovementioned purchaser of the decree.

On the 4th January 1890, the abovementioned Ilahi Bakhsh and Rahim Bakhsh applied to the Subordinate Judge to execute his order of the 8th January 1887, with the object of recovering Rs. 835 from Baij Nath, respondent. Baij Nath thereupon objected to the execution upon the ground that he had already paid the sum of Rs. 835 to Raghubar Dyal, and was therefore no longer liable to pay to Ilahi Bakhsh and Rahim Bakhsh. These objections were allowed on the 9th June 1890.

It is from this order that this first appeal has been preferred, and Mr. *Dwarka Nath Banerji* contends that inasmuch as the order must be taken to have been one made under the provisions of s. 293 of the Code of Civil Procedure, and inasmuch as Baij Nath, respon-

dent here, was no party to the original decree of the 24th January 1880, the order which is the subject of appeal is not such an order as can be called a decree either in the regular sense of the terms as understood in the regular suit, or a decree within the explanation of it in s. 2 of the Code of Civil Procedure, and therefore no first appeal could lie under s. 540 of the Code. Mr. *Dwarka Nath Banerji* in support of his contention has relied upon *Soudagar Mal v. Abdul Rahman Khan* (1), in which the learned Chief Justice and Mr. Justice Brodhurst concurred in holding that no appeal lies from an order under s. 293 of the Code of Civil Procedure for recovery from a defaulting purchaser of a deficiency of price happening on a re-sâle of the property, such order not being a "decree" within the meaning of s. 2 of the Code. This view of the law was followed by my brother Tyrrell in *Tapesri Lal v. Deokr Nandan Rai* (2).

In view of these two rulings Mr. *Moti Lal* frankly concedes that he cannot support the appeal so far as the preliminary objection is concerned. Following the principle of the rulings cited I hold that no appeal lies, and I dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

NATHAN AND OTHERS (DEFENDANTS) v. KAMLA KUAR AND ANOTHER (PLAINTIFFS)*

Land-holder and tenant—Suit for possession of fallen wood of self-sown trees growing on an occupancy-holding—Burden of proof.

A zamindâr claiming a right to the fallen wood of self-sown trees which had been growing on an occupancy-holding must prove some custom or contract by which he is entitled to take such wood. The English law as to ownership under similar circumstances cannot be applied, and (*sed quære*) there is no general rule in India to decide that there is a right in the landlord or a right in the tenant by general custom to the fallen wood of self-sown trees.

* Miscellaneous application No. 128 of 1890, under s. 617 of the Civil Procedure Code, with a reference by H. B. Pannett, Esq., District Judge of Sahâranpur, dated the 5th August 1890.

(1) Weekly Notes, 1890, p. 35.

(2) Weekly Notes, 1890, p. 89.

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