

the Court alone, and not to enable the appellant to take the respondent by surprise by urging matters of which he had no notice. Neither of the two rulings cited conflicts with this view.

The only two grounds taken in the memorandum of appeal having been abandoned, I have no alternative but to dismiss the appeal, and I do so with costs.

Appeal dismissed.

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

KISHUN LAL (PLAINTIFF) v. MUHAMMAD SAFDAR ALI KHAN AND
OTHERS (DEFENDANTS).*

1891
April 28.

Execution of decree—Sale in execution—Sale set aside—Suit by purchaser for return of purchase money—Civil Procedure Code, ss. 295, 315.

Where an auction purchaser seeks to have refunded the price paid by him for property sold in execution of a decree, on the ground that at the time of sale the judgment-debtor had no saleable interest therein, it is competent to him to proceed by way of a regular suit against the person into whose hands such price has come as such person's rateable share of the assets of the judgment-debtor under s. 295 of the Code of Civil Procedure. He is not limited to the procedure in the execution department mentioned in s. 315 of the said Code.

Munna Singh v. Gajadhar Singh (1) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Mr. *W. M. Colvin*, for the respondents.

EDGE, C. J., and KNOX, J.—This was a suit brought to recover purchase money which was paid by the plaintiff, and which had been distributed after payment amongst certain creditors of the firm of Lachmi Narain. The defendant No. 1 was one of those creditors. Lachmi Narain's firm failed. There was a large number of decrees obtained by creditors under which property of the firm was from time to time brought to sale and assets realized. On the 20th November 1885, a property of Lachmi Narain's firm was sold in

* First Appeal No. 157 of 1889 from a decree of Maulvi Muhammad Abdul Qayum, Subordinate Judge of Bareilly, dated the 21st June 1889.

(1) I. L. R., 5 All., 577.

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execution of a decree. On the 5th May 1886, that sale was set aside on the objection of the judgment-debtor. On the 20th September 1886, the purchasers at that sale filed their suit to have it declared that the sale was good. On the 7th March 1887, the Subordinate Judge, in whose Court that suit was, dismissed it. The purchasers appealed to this Court, and, on the 14th May 1888, this Court decreed the relief prayed for, holding that, as the defendants there had filed a confession of judgment, the plaintiffs, purchasers, were entitled to a decree. On the 10th September 1888, those purchasers obtained possession. Now we come to the connection of the plaintiff here with the property. On the 20th September 1886, the same property was sold in execution of another decree which had been obtained against the firm of Lachmi Narain and was purchased by the plaintiff for Rs. 21,125, which included the charges in connection with the sale. On the 4th December 1886 the sale of the 20th September 1886 was confirmed. On the 20th September 1886 the plaintiff paid in one-fourth of the purchase-money. The sum paid on that day, Rs. 5,235, was paid into the treasury of Bareilly to the account of the Subordinate Judge of that place under the head of Civil Court's deposit. Money is not received in the treasury without the authority of the proper officer given for the payment of the money. On the 11th October 1886 the balance of the purchase-money was paid, and of that the sum of Rs. 15,843 was similarly paid into the treasury to the account of the Subordinate Judge. The authority for payment of the money out of those sums indicated the transactions out of which those payments arose. Those indications are merely indications for the purposes of the Subordinate Judge's Court. The defendant No. 1 here was entitled to a rateable proportion of the assets which were realized after the 7th July 1886. That is, in the case of each realization he became, under s. 295 of the Code of Civil Procedure, entitled to his rateable share. The total amount of the money due to him was Rs. 36,166. The total amount of his rateable shares came to Rs. 10,569-3-0, and this sum of Rs. 10,569-3-0, which represented his rateable shares in some 12 realizations, was paid to him out of the treasury on the orders of the Subordinate

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Judge's Court. The money was paid out in two sums; one of Rs. 5,334-3-0 under voucher numbered 331, the other of Rs. 5,235 under voucher numbered 326. The last voucher carrying back a reference by numbers shows that in the book of the Court the sum of Rs. 5,235, which had been paid in on the 20th September 1886, was accounted for. As a matter of fact, that Rs. 5,235 did not represent the defendant's rateable share on the money which was realized by the sale to the plaintiff, but represented his share on that money plus, in part, his shares on the other realizations. The plaintiff here has sued the defendant to recover that sum of Rs. 5,235 and interest, on the ground that, owing to the decree of this Court having made valid the previous sale, there was no saleable interest of the judgment-debtors in the property which he bought. In the 8th paragraph of the plaint it is alleged that the judgment-debtor had no saleable interest in the village Saidpur, and that the plaintiff got nothing as consideration for the money paid by him. The written statement did not traverse that allegation, but raised certain defences, such as that the sale to the plaintiff was still subsisting. We must, consequently, on the pleadings, take it to be admitted that at the time of the sale of the 20th September 1886, there was no saleable interest of the judgment-debtors in the property. We must deal with this case on the basis that the judgment-debtors had, within the meaning of s. 315 of the Code of Civil Procedure, no saleable interest at the time of sale to the plaintiff.

It is contended, amongst other things, that the plaintiff's remedy, if any, was to obtain repayment of the purchase money under s. 315 of the Code through the court which had executed the decree. There is, in our opinion, a good deal to be said in support of that contention, but we are bound by the decision of the Full Bench of this Court in *re Munna Singh v. Gajadhar Singh* (1), in which it was distinctly held that in such a suit as this the purchaser can sue the decree-holder for recovery of the purchase money, and that he is not limited to the procedure in the execution department mentioned in

(1) I. L. R. 5 All., 577.

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s. 315. We were referred to the case of *Kunki Moidin v. Tarayil Moidin* (1), in which the procedure was that the person who sought repayment of money proved in a suit that the judgment-debtor had no saleable interest, and, under s. 315, went to the proper Court to obtain redress of payment. The Subordinate Judge tried this case and dismissed the plaintiff's claim.

In our opinion, according to the Full Bench ruling to which we have above referred, we must give the plaintiff a decree for the rateable share received by the defendant of the Rs. 21,000, speaking roughly, that the plaintiff paid in respect of the purchase. We cannot give the plaintiff the full amount of Rs. 5,235, because, with exception of Rs. 1,016, the defendant received nothing out of the moneys paid by the plaintiff in respect of the purchase of the 20th September 1886. The Rs. 1,016 is accepted as representing the rateable share of the plaintiff's money which the defendant No. 1 received.

We reverse the decree below and give the plaintiff a decree for Rs. 1,016 with proportionate costs, dismissing his claim as to the balance with proportionate costs. We do not allow interest, as we think there was no real foundation for making a claim for the whole of the money.

Appeal decreed.

1891
April 29.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MAHABIR PRASAD MISR AND OTHERS (PLAINTIFFS) v. MAHADEO DAT MISR AND OTHERS (DEFENDANTS).*

Act X of 1873 (Oaths Act) ss. 10 and 11—Referee's depositions inadequate for decision of question referred—Appeal after death of referee—Practice.

Where a cause had been decided under the provisions of ss. 10 and 11 of the Oaths Act (Act X of 1873) with reference to the depositions of a person appointed by agreement of the parties as referee, and where, after the death of the referee, on an appeal being preferred against the decree so based upon those depositions, it was found that the said depositions did not fully cover the questions in issue between the parties.

* First Appeal No. 146 of 1889, from a decree of Maulvi Ahmad Hasan, Officiating Subordinate Judge of Gorakhpur, dated the 16th May 1889.

(1) I. L. R. 8 Mad., 101.