

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice  
Banerji.

1901  
April 17.

SHANTO CHANDAR MUKERJI (PLAINTIFF) v. NAIN SUKH AND OTHERS  
(DEFENDANTS).\*

*Execution of decree—Sale in execution—Decree on mortgage of joint family property executed by the father alone—Sale of joint family property—Subsequent exemption of sons' interests—Suit by purchaser for refund of purchase money—Rights of auction purchaser as against the decree-holder and as against the sons—Civil Procedure Code, section 315—Act No. IV of 1882 (Transfer of Property Act), section 82.*

In execution of a decree for sale upon a mortgage executed by the father of a joint Hindu family, certain joint family property was put up to sale without specification of the interests of the other members of the family. On suit by the sons their interests, amounting to four-fifths of the entire property, were exempted. The auction purchaser thereupon brought a suit against the decree-holders and the sons to recover four-fifths of the price paid by him.

*Held* (1) that the auction purchaser's remedy by suit was not excluded by reason of section 315 of the Code of Civil Procedure; (2) that the auction purchaser could not recover anything as against the decree-holders, but (3) that the auction purchaser had acquired a lien on the interests of the sons to the extent of four-fifths of the purchase money, which could be enforced by sale of their interests to that extent in the property exempted from sale in their favour, *Munna Singh v. Gajadhar Singh* (1), *Kishun Lal v. Muhammad Safdar Ali Khan* (2), *Sundara Gopalan v. Venkatavarada Ayyangar* (3), *Dorab Ally Khan v. Abdool Azeez* (4), *Ram Nurain Singh v. Mahtab Bibi* (5), *Derry v. Peek* (6), *Hariraj Singh v. Ahmad-ud-din Khan* (7), *Dharam Singh v. Angan Lal* (8) and *Muhammad Askari v. Radhe Ram Singh* (9), referred to.

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

Babu Jogindro Nath Chaudhri, for the appellant.

Pandit Sundar Lal and Mr. J. Simeon, for the respondents.

STRACHEY, C. J., and BANERJI, J.—The plaintiff in this case is a purchaser, at a sale in execution of a decree for sale, of an 8½ biswas zamindari share which was mortgaged by Shib Singh, the head of a joint Hindu family, consisting of himself, his sons, and his grandsons. After the sale the sons of Shib Singh obtained a decree against the plaintiff and the mortgagees decree-holders,

\* First Appeal No. 138 of 1897 from a decree of Rai Anant Ram, Subordinate Judge of Aligarh, dated the 30th March 1897.

(1) (1883) I. L. R., 5 All., 577.

(2) (1891) I. L. R., 13 All., 383.

(3) (1893) I. L. R., 17 Mad., 228.

(4) (1878) L. R., 5 I. A., 116.

(5) (1880) J. L. R., 2 All., 828.

(6) (1889) L. R., 14 A. C., 337.

(7) (1897) I. L. R., 19 All., 545.

(8) (1899) I. L. R., 21 All., 301.

(9) (1900) I. L. R., 22 All., 307.

1901

SHANTO  
CHANDAR  
MUKERJI  
v  
NAIN SUEH.

declaring that their interests, amounting to four-fifths of the mortgaged property, were not affected by the decree or the sale, as they had not been made parties to the suit for sale as required by section 85 of the Transfer of Property Act, 1882. The decree for sale was for Rs. 13,913-10-6. The amount paid by the plaintiff on his purchase was Rs. 12,000. The present suit is brought against (1) the decree-holders to whom the Rs. 12,000 were paid and (2) the sons and grandsons of Shib Singh. The plaintiff claims to recover from the decree-holders Rs. 9,600, being four-fifths of the Rs. 12,000 purchase money with interest. In the alternative he claims to recover the same amount from the sons and grandsons of Shib Singh by sale of their rights and interests (four-fifths) in the mortgaged property. The certificate of sale has not been produced; but having regard to the pleadings and to the judgment of the Court below, it must be taken that what was put up for sale and purchased by the plaintiff for Rs. 12,000 was the entire  $8\frac{1}{2}$  biswas share and not merely Shib Singh's one-fifth share therein. It has been found by the Court below, and the finding has not been disputed before us, that the mortgage was executed by Shib Singh for necessary family purposes so as to be binding on the joint family, of which he was the head and manager. The Court below has dismissed the suit against both sets of defendants. The plaintiff now appeals.

As regards the claim against the decree-holders for a refund of Rs. 12,000 purchase money, we think that the Court below was clearly right. It has been held that where a sale of immovable property in execution of decree has been set aside, the purchaser's right to recover the purchase money paid by him is not limited to an application under section 315 of the Code to the Court executing the decree, but he may bring a suit for the purpose—*Munna Singh v. Gajadhar Singh* (1) and *Kishun Lal v. Muhammad Safdar Ali Khan* (2). We think that a purchaser is only entitled to receive back his purchase money under the conditions stated in section 315, whether by application under that section or by suit. As regards private sales, there is under section 55(2) of the Transfer of Property Act, in the absence of a contract to the contrary, an implied covenant for title by the

(1) (1883) I. L. R., 5 All., 577.

(2) (1891) I. L. R., 13 All., 383.

vendor. As regards sales under a decree of a Court, there is no warranty of title either by the decree-holder or by the Court. Section 237 of the Code shows that the decree-holder, when applying for execution, has only to specify the judgment-debtor's share or interest in the property "to the best of his belief," and "so far as he has been able to ascertain the same." Section 287 and the form of proclamation of sale prescribed by the rules of this Court show that the proclamation only professes to specify the particulars prescribed by the section, including the property to be sold and the judgment-debtor's interest therein, "as fairly and accurately as possible," and "as far as it has been ascertained by the Court," and subject to possible errors, misstatements, and omissions (see Rules of the 4th April, 1894, Part II, Appendix B, pp. 14 and 15, also Part I, Rule 94). The result is that the purchaser must be taken to buy the property with all risks and all defects in the judgment-debtor's title, except as provided by sections 313 and 315, that in the absence of fraud his only remedy is to recover back his purchase money, where it is found that the judgment-debtor had no saleable interest in the property at all, and that he cannot by suit, any more than by application, obtain a refund in proportion to the extent to which the judgment-debtor had no interest—see *Sundara Gopalan v. Venkata-varada Ayyangar* (1), *Dorab Ally Khan v. Abdool Azees* (2), and *Ram Narain Singh v. Mahatab Bibi* (3). The plaintiff cannot in this, more than in any other case, recover a portion of the price paid as money had and received to his use upon a merely partial failure of consideration, the purchase money not being severable and apportionable between the one-fifth share of Shib Singh and the four-fifths of the other members of the joint family. In the argument before us it was suggested that the claim might be supported on the ground that the plaintiff was induced to buy the property by a misrepresentation on the part of the decree-holders that the entire  $8\frac{1}{4}$ -biswa share belonged to the judgment-debtor Shib Singh. But, in the first place, no such suggestion was made by the plaintiff in his plaint or otherwise in the Court below. It is an entirely new case set up on his behalf for the first time

1901

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SHANTO  
CHANDAR  
MUKERJI  
v.  
NAIN SUKH.

(1) (1893) I. L. R., 17 Mad., 228. (2) (1878) I. R., 5 I. A., 116, at page 128.

(3) (1880) I. L. R., 2 All., 828.

1901

SHANTO  
CHANDAR  
MUKERJI  
v.  
NAIN SUKH.

at this stage of appeal. In the second place, there is no evidence of any such misrepresentation, and nothing to show that the decree-holders made any representation on the subject of the property beyond those made by all applicants for execution under the Code. In the third place, it is not suggested that the alleged misrepresentation amounted to fraud, and nothing short of actual fraud in the sense of dishonesty would entitle the plaintiff to compensation or damages, *Derry v. Peek* (1). For these reasons we think that, so far as regards the claim against the decree-holders for a refund of the purchase money, the decision of the Court below was right.

We have next to deal with the claim against the sons and grandsons of Shib Singh. This part of the case is by no means free from difficulty, but we think, upon full consideration, that the plaintiff is entitled to succeed. The result of the decree obtained by the sons of Shib Singh on the 11th November, 1895, was that the plaintiff's purchase was declared to be a valid purchase in respect of a fifth share only. So that after the passing of that decree the plaintiff must be deemed to be by virtue of his purchase the owner of a fifth share of the mortgaged property. As has been already observed, the auction sale at which the plaintiff purchased was a sale of the entire  $8\frac{1}{4}$ -biswa share, and not merely of a fifth part of that share. Therefore the price which the plaintiff paid was not the price of the one-fifth share which he validly acquired under his purchase but that of the entire  $8\frac{1}{4}$  biswas. As the whole of the Rs. 12,000 paid by him has been appropriated by the mortgagees-decree-holders, he has paid towards the discharge of the mortgage a much larger amount than that which represents the value of the one-fifth share of which he is the purchaser. Now, under section 82 of the Transfer of Property Act, 1882, where several properties are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage. As observed in *Hariraj Singh v. Ahmad-ud-din Khan* (2) this rule is based on the principle enunciated in *Fisher on Mortgages*, 4th edition, p. 659, "that a fund which is equally

(1) (1889) L. R., 14 A. C., 337. (2) (1897) I. L. R., 19 All., 545, at p. 548.

liable with another to pay a debt shall not escape because the creditor has been paid out of that other fund alone." As the debt incurred by Shib Singh was not tainted with immorality, the mortgage made by him was binding on his sons and grandsons, and therefore the four-fifths share of those persons was, equally with his own one-fifth share, liable for the mortgage debt. The one-fifth share of Shib Singh has passed to the plaintiff, and the latter has discharged, not only the fifth share of the debt, for which the property acquired by him was liable, but also a large portion of the rateable share of the debt, for which the shares of the sons and grandsons were liable. The plaintiff having thus discharged the burden which lay on the shares last mentioned is, according to the principle of the rule enacted in section 82, entitled to claim that he should recover from the sons and grandsons the amount by which he has relieved their share of the property from liability for the debt. If he had purchased Shib Singh's share by private sale or in execution of a money decree, and had then redeemed the whole, or practically the whole, mortgage, there can be no doubt that he would have had such a charge. It cannot make any difference against him that he has purchased the share, not by private sale or in execution of a money decree, but in execution of a decree for sale, or that the payment of the mortgage money was simultaneous with and formed part of the purchase. Any other conclusion would lead to injustice. If these defendants had been made parties to the suit for sale, they could not, having regard to Shib Singh's position in the joint family and to the nature of the debt secured, have resisted a sale of their four-fifths interest. Notwithstanding the decree in that suit, the mortgagees could sue these defendants for the balance due on the mortgage: *Dharam Singh v. Angan Lal* (1) and *Muhammad Askari v. Radha Ram Singh* (2). They have benefited by the payment made by the plaintiff, which has wiped out nearly the whole of the mortgage-debt. The conclusion at which, in reason and equity, we can arrive is that the plaintiff, as one of the holders of the equity of redemption, who has paid off almost the whole

1901

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SHANTO  
CHANDAR  
MUKERJI  
v.  
NAIN SINGH

(1) (1899) I. L. R., 21 All., 301.

(2) (1900) I. L. R., 22 All., 307.

1901

SHANTO  
CHANDAR  
MUKERJI  
v.  
NAIN SUKHE.

of the mortgage-debt, is entitled to contribution from the other holders for the amount paid by him in excess of his share, and to a charge for that amount on their shares of the mortgaged property. The total amount of the mortgage-debt was Rs. 13,943-10-6. Out of this amount Rs. 3,000 was realized by the sale of the mortgaged share in Bhojpur purchased by the mortgagees. The share purchased by the plaintiff was liable for one-fifth of the balance. He has therefore paid for the sons and grandsons the sum by which Rs. 12,000 exceeds that one-fifth. This excess amount, which is really more than the Rs. 9,500 claimed in the suit, he is, in our opinion, entitled to recover from the sons and grandsons of Shib Singh, and their four-fifths share of the mortgaged property, together with interest at the rate provided in the mortgage.

The result is that we allow the appeal, set aside the decree of the Court below, and make a decree in the terms of section 88 of the Transfer of Property Act in favour of the plaintiff for Rs. 9,600, with interest thereon at the mortgage rate of one rupee per cent. per mensem from 20th June, 1895, the date of confirmation of the sale at which the plaintiff purchased, to the date of payment, and costs in the Court below and this Court, to be recovered by sale of the rights and interests of the third set of defendants in the  $8\frac{1}{4}$ -biswa share, unless paid on or before the 16th October, 1901. The appeal is dismissed with costs against the first set of defendants.

*Decree modified.*

*Before Mr. Justice Banerji.*

BARU MAL AND OTHERS (PLAINTIFFS) v. NIADAR (DEFENDANT)\*

*Act No. XII of 1881 (North-Western Provinces Rent Act), sections 93, 95—Jurisdiction—Civil and Revenue Courts—Suit to eject as a trespasser a person who claimed to be entitled to succeed to the holding of a deceased occupancy tenant.*

Upon the death of an occupancy tenant a person who alleged that he was entitled to succeed the deceased in his holding obtained mutation of names in his favour and also got possession of the holding. The zamindars thereupon

\* Second appeal No. 915 of 1900 from a decree of Pandit Girraj Kishore Datt, Additional Subordinate Judge of Saharanpur, dated the 26th July 1900, confirming a decree of Babu Chajju Mal, Munsif of Saharanpur, dated the 14th June 1900.

1901  
April 18.