

APPELLATE CIVIL.

1907
April 5*Before Mr. Justice Sikman.*SHEO NARAIN (DEFENDANT) v. NUR MUHAMMAD AND ANOTHER (PLAIN-
TIFS. **Execution of decree Sale in execution - Purchase of share in property to some extent incumbered—Presumption—Civil Procedure Code, section 318—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 138—Suit for possession.*

Where in execution of a simple money decree an undivided share in immovable property, part of which was subject to mortgages, was sold, it was held that in the absence of specific indications to the contrary it must be presumed that the share sold was, as far as might be, the share which was not incumbered.

Held also that the fact that an application under section 318 of the Code of Civil Procedure made by an auction-purchaser has been rejected* is made beyond time is no bar to a suit for possession of the property purchased. *Seru Mohun Bania v. Bhagoban Din Pandey* (1) and *Kishori Mohun Roy Chowdhry v. Chunder Nath Pal* (2) followed.

THE facts of this case are as follows:—

One Param Singh owned an undivided share in a village, amounting to 9 annas 11 pies, 8 chataks. Out of this share he mortgaged 4 annas to Sheo Narain. Another 2 anna share he mortgaged to one Magau Lal. The rest was free from incumbrances. One Kale Khan, the predecessor in title of the plaintiffs, held a simple money decree, against Param, in execution of which a 4 anna share was attached and sold, and purchased by Kale Khan and Lal Khan for Rs. 100. In February 1902, the plaintiffs applied under section 318 of the Code of Civil Procedure to be put into possession of the property purchased. This application was, however, rejected on the 1st March 1902 as beyond time. The plaintiffs then instituted the present suit to obtain possession of the share purchased by them. The unincumbered residence of Param's original share was represented by 3 annas, 11 pies and 8 chataks, and this had been given by Param's widow, Musammat Maharani to Sheo Narain.

The Court of first instance (Munsif of Lalitpur) found that the share purchased by the plaintiffs was the 4 anna share

* Second Appeal No. 521 of 1905, from a decree of A. Sabonadiere, Esq., District Judge of Jhansi, dated the 8th of March 1905, reversing a decree of Babu Ladi Prasad, Munsif of Lalitpur, dated the 3rd of January 1905.

(1) (1883) I. L. R., 9 Calc., 602. (2) (1887) I. L. R., 14 Calc., 644.

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mortgaged to Sheo Narain and subject to his decree. The lower appellate Court, however, came to a different conclusion and decreed the plaintiffs' suit. The defendant Sheo Narain appealed to the High Court.

Mr. G. W. Dillon and the Hon'ble Pandit *Madan Mohan Malaviya*, for the appellant.

Hon'ble Pandit *Sundar Lal*, for the respondents.

AIKMAN, J.—This appeal arises out of a suit brought by the plaintiffs respondents to obtain possession of certain immovable property under the following circumstances. One Param owned an undivided share in a village. The extent of his share was 9 annas 11 pies 8 chataks, that is, he held a 10 anna share all but a very small fraction. Of this share he mortgaged to Sheo Narain, defendant, appellant here, a 4 anna share. Another 2 anna share he mortgaged to one Magan Lal. The rest was free from incumbrance. Kale Khan, the predecessor in title of the plaintiffs, held a simple money decree against Param, in execution of which he applied for attachment of a 4 anna share out of Param's estate. A 4 anna share was attached, sold and purchased by Kale Khan and Lal Khan on the 20th of April 1895 for a sum of Rs. 100. In February 1902, the plaintiffs applied under section 318 of the Code of Civil Procedure to be put into possession of the property purchased. Their application was rejected on the 1st of March 1902 as beyond time. The plaintiffs thereafter instituted the suit out of which this appeal arises to obtain possession of the property which they alleged they had bought. The mortgage in favour of the appellant Sheo Narain was a mortgage by conditional sale. At the time when Kale Khan put his simple money decree into execution, Sheo Narain had already got a decree *nisi* for foreclosure, which was subsequently made absolute. Magan Lal, the other mortgagee, also got his mortgage against the 2 anna share enforced by a decree. Param then died. His widow Musammat Maharani made a gift of the remaining 3 anna 11 pie 8 chatak share to the appellant Sheo Narain. The suit is to recover possession of that share as representing what was sold at the auction to the predecessor in title of the plaintiffs. The Court of first instance found that the share purchased at auction was the 4 anna share

mortgaged to Sheo Narain and subject to his decree. On appeal the learned District Judge came to the opposite conclusion and decreed the plaintiffs' suit. The defendant Sheo Narain comes here in second appeal. The case has been very fully and ably argued by his learned counsel. But the arguments of the learned counsel have failed to satisfy me that the decision of the learned District Judge is wrong. At the time of the attachment in execution of the simple money decree, the judgment-debtor Param possessed only the equity of redemption in 6 annas out of his estate, the remainder, *i.e.*, 4 annas all but a minute fraction, was unincumbered. There is nothing to show that when the decree-holder applied for attachment of a 4 anna share in execution of his money decree, he meant to or did apply for the attachment of an incumbered 4 anna share of his judgment-debtor. The presumption would be entirely against his having done so. The sale notification has not been produced, and there is nothing to show what was advertised for sale. In the paper showing the property attached in execution of the simple money decree it is described as a "4 anna share in mauza Jagatpura, valued at Rs. 50 standing in the name of Param." No mention is made in this *fard-i-taliqua* of any incumbrance. The learned counsel relies upon a paper which has been produced and which is called *fard-i-lat*, or list of purchasers at auction. It is true that in this there is a reference to an incumbrance of Rs. 148. How this came to be entered in the *fard-i-lat* is explained by the learned Judge. The share advertised for sale being an undivided 4 anna share and 6 annas of Param's property being under mortgage, a *portion* of the 4 anna share attached must in any case have been subject to incumbrance. I fully agree with the learned District Judge in holding that the presumption is in favour of the auction purchaser having bought unincumbered property so far as it was possible for him to do so. This disposes of the first three pleas in the memorandum of appeal. The fourth plea was based upon the decision in the case of *Raja Inayat Singh v. Izzat-un-nissa Begam* (1). In my opinion that case is distinguishable from the present case, for there, on the application of the auction purchaser himself, the property had been

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(1) (1904) I. L. R., 97 All., 97.

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notified as subject to incumbrance, which is not the case here. The last plea is that such a suit as this is not maintainable. In my opinion there is no force in this plea. The suit is one of the suits described in article 138, schedule II, of the Limitation Act. The mere fact that the auction purchasers or their representatives failed to apply within time to be put in possession under section 318 of the Code of Civil Procedure does not deprive them of their right to bring a regular suit, *vide Seru Mohun Bania v. Bhagoban Din Pandey* (1), *Kishori Mohun Roy Chowdhry v. Chunder Nath Pal* (2). I have not been referred to any case in which an opposite view has been taken. For the above reasons I am of opinion that the appeal fails, and it is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Richards.

ASHIQ ALI (PETITIONER) v. MOTI LAL (OPPOSITE PARTY). *

Civil Procedure Code, section 336—Insolvency—Security for filing application by judgment-debtor to be declared insolvent.

The petitioner gave security for one Aziz, who had been arrested in execution of a decree. He deposited a sum of money in Court on condition if an application which was to be made by Aziz within a time specified to be declared insolvent was rejected on any ground whatever, the amount deposited would be paid to the decree-holder. The judgment-debtor duly presented his application for a declaration of insolvency, but before any order could be passed on it he died. *Held* that the condition of the security was not fulfilled, and the decree-holder was not entitled to the money deposited by the surety. *Krishnan Nayar v. Utkin Nayar* (3) referred to.

ONE Aziz having been arrested in execution of a Civil Court decree, one Syed Ashiq Ali deposited a sum of money for him in Court as security. The terms of the security were that if an application which was to be made by Aziz within a time specified to be declared insolvent was rejected on any ground whatever, the amount deposited would be paid to the decree-holder. Aziz duly made his application to be declared insolvent; but before any

* Civil Revision No. 64 of 1906.

(1) (1883) I. L. R., 9 Cal., 602. (2) (1887) I. L. R., 14 Cal., 644.
 (3) (1901) I. L. R. 24 Mad., 637.