

required before the documents can be admitted in evidence. The provisions of section 44 are important as showing that when any duty or penalty has been recovered from any person in respect of an instrument, and some other person was bound to bear the expense of providing the proper stamp, the person from whom the duty and penalty has been recovered shall be entitled to recover from such other person the amount of the duty and penalty so recovered. We decree the appeal and dismiss the suit with costs in all Courts.

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OF STATE
FOR INDIA
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v.
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ULLAH.

Appeal decreed.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir
William Burkitt.*

AMIR BEGAM (PLAINTIFF) v. THE BANK OF UPPER INDIA, LIMITED
(DEPENDANT).*

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March 10.

Civil Procedure Code, sections 306, 293—Execution of decree—Sale in execution—Non-payment by purchaser of deposit required by law—Fresh sale—Claim by decree-holder for difference of price on resale.

Certain immovable property was put up to auction in execution of a decree and purchased by A. B, but the purchaser did not at once make the deposit required by section 306 of the Code of Civil Procedure, and the property was subsequently—but not “forthwith”—put up again to auction and sold for a considerably less sum to the decree-holder. *Held* that the first sale was not merely irregular, but no sale at all, and that the decree-holder was not entitled to claim against the first purchaser under section 293 of the Code, compensation for the loss resulting on the second sale. *Intizam Ali Khan v. Narain Singh* (1) followed.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Abdul Majid*, for the appellant.

Mr. *B. E. O'Connor*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The facts of this case are these. The Bank of Upper India held a decree for sale of the property of Afzal Shah, Dost Muhammad Khan and Amir Muhammad Khan. In execution of that decree they attached and advertised for sale the property of their judgment-debtors. The plaintiff, Musammam Amir Begam, who is the wife of Afzal Shah, authorized one Haidar Shah to purchase for her out of the property

* First Appeal No. 29 of 1906 from a decree of Muhammad Shah, Subordinate Judge of Aligarh, dated the 30th November 1905.

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so advertised for sale, as she alleges, the share which belonged to her husband, but not the shares of Dost Muhammad Khan and Amir Muhammad Khan, in the village of Purwana Mahmudpur. The share of Afzal Shah in this village was sold on the 20th of August 1903 to the plaintiff, and the deposit in respect of the purchase money was duly made and this sale was carried out. With this share we have nothing to do in this appeal. The shares of the other judgment-debtors in this village were put up for sale on the 23rd of August 1903 and were knocked down for a sum of Rs. 20,000. Haidar Shah attended at this sale and was the highest bidder. He represented that he attended and bid at the sale on behalf of the plaintiff. No deposit on account of the purchase money was made. Time was allowed to Haidar Shah to pay the deposit, but he failed to do so, and on the 25th of August 1903, this share of the property was sold for a sum of Rs. 12,500 to the decree-holders, the Bank of Upper India. The Bank then claimed to be entitled to recover from Musammat Amir Begam the amount of the difference in the sale price of the property and the price offered by Haidar Shah, namely, Rs. 7,500. Musammat Amir Begam objected, alleging that Haidar Shah had no authority from her to purchase the property in her name. The Bank then attached her property in execution for the purpose of raising the amount of their claim, and she thereupon instituted the present suit to have it declared that she was not liable to pay the deficiency, and that the defendant Bank was not entitled to recover that deficiency from her, and that her property could not be sold to satisfy the amount.

The Court below held upon the issue as to whether or not Musammat Amir Begam did give authority to Haidar Shah to bid on her behalf in respect of this share of the property, that she had given such authority and dismissed her suit. Hence the appeal which is now before us.

Evidence has been given by Haidar Shah, also by Musammat Amir Begam herself and by two other persons in support of her case. Musammat Amir Begam positively denies that she authorized Haidar Shah to purchase any shares in the property other than the shares which belonged to her husband. Haidar Shah corroborates her as to this. In his evidence he stated that Amir

Begam did not authorize him to make any bid for the property of Dost Muhammad Khan and Amir Muhammad Khan and he says :—" I advanced bids at the request of Ghafur Bakhsh and Burkat Ali Khan." Ghafur Bakhsh is a wakil who is employed by the Bank. Barkat Ali Khan is also an agent of the Bank. He further deposed :—" I caused the name of Amir Begam to be taken down, thinking that she might possibly take the property. Permission had not been given to me. Amir Begam has not executed any general power of attorney in my favour nor has she given me any written authority." Two other witnesses, Ahmad Mir Khan and Prasadi Lal, support the evidence of Haidar Shah and Musammat Amir Begam. No evidence to rebut the case of the plaintiff has been adduced. As Mr. O'Connor pointed out, there could not very well be any evidence procurable, seeing that there was no written authority given by the plaintiff to Haidar Shah. He did not act under any power of attorney, and, so far as the evidence goes, save and except that he was asked by Musammat Amir Begam to purchase some of her husband's property on her behalf, there is no evidence before the Court other than that to which we have referred. On this evidence, if we consider it trustworthy, the plaintiff was entitled to a decree.

The learned Subordinate Judge has, however, rejected it, and upon the following grounds. On the 2nd of September 1903 Musammat Amir Begam, together with Haidar Shah, who was entitled to certain shares in the property of Sardar Bahadur, Mir Khan and her husband Afzal Khan, executed a mortgage in favour of one Badri Prasad to secure a sum of Rs. 9,250. This money was borrowed for the purpose of satisfying the purchase money of property which had been purchased at the sale in question by Haidar Shah on behalf of Musammat Amir Begam. In addition to the shares of Afzal Shah in the village of Purwana Mahmudpur, Haidar Shah purchased for Musammat Amir Begam several bits of land of small value, one in Nayagaon and another in Kajraut. No authority apparently was given by Musammat Amir Begam for the purchase of these small properties, but she appears to have acquiesced in the act of Haidar Shah in making the purchases and paid the amount of the deposit and also the balance of the purchase money. The learned

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Subordinate Judge was of opinion upon a perusal of this document that Musammat Amir Begam must be taken to have authorized Haidar Shah to purchase other properties than those which are referred to in this document. He says, referring to this deed:—"She admitted that she had borrowed money from Badri Das to deposit the sale price. She admitted that Haidar Shah purchased for her Afzal Shah's share in Purwana and also *hakiats* in Kajraut and also in the town of Kila and in other villages," and he also says that "the properties so purchased, including *bist biswa* mauza Purwana Mahmudpur, were mortgaged by Amir Begam herself in this deed." We have carefully read the deed, and it appears to us that the learned Subordinate Judge has to some extent misunderstood its terms. The first recital in the deed runs as follows:—"We have borrowed from Seth Badri Das, son of Seth Lala Har Nath Rai, * * * Rs. 9,250 in cash, etc., for payment of the purchase money of the property in mauza Purwana Mahmudpur, etc., being the property of Agha Syed Afzal Shah aforesaid and Agha Syed Dost Muhammad Khan and Amir Muhammad Khan, relations, which was sold by auction from the 20th to the 22nd of August 1903 by the Revenue Court at Bulandshahr in satisfaction of the amount of the decrees held by the Bank of Upper India, Limited, Meerut, and which I, Musammat Amir Begam, have purchased through my relations Agha Syed Haidar Shah and others." Then in the operative part the mortgagors purport to hypothecate amongst other properties the entire village of Purwana Mahmudpur, that is 48 *sikams* out of 192 *sikams*. The learned Subordinate Judge treated the recital that the money which was borrowed was borrowed for the purpose of paying the purchase money of the property in Purwana Mahmudpur, which belonged to Afzal Shah, Dost Muhammad Khan and Amir Muhammad Khan, as conclusively showing that Musammat Amir Begam had knowledge of and acquiesced in and ratified the purchase by Haidar Shah of the shares in that village which belonged to Dost Muhammad Khan and Amir Muhammad Khan. It appears to us that this inference cannot be drawn from the document. The money which was borrowed was required for the purchase of not merely the property situate in Purwana Mahmudpur belonging

to Afzal Shah, but also other property belonging not merely to him but also to Dost Muhammad Khan and Amir Muhammad Khan, namely, the property in the village of Nayagaon and in the village of Kajraut, and the statement appearing later on in the document that Musammat Amir Begam had purchased the property, which was so intended to be hypothecated, through Haidar Shah and others, shows that the property hypothecated was that which she had authorized Haidar Shah to purchase. This appears to be indisputable from the fact that at the date of the mortgage, namely, the 2nd of September 1903, the shares which belonged to Dost Muhammad Khan and Amir Muhammad Khan had been put up for sale and sold to the Bank, namely, on the 25th of August 1903. It is impossible to believe that the mortgagors in this mortgage purported to hypothecate property in which they had no interest whatsoever, even if the mortgagee was careless enough to accept the security of property in which his mortgagors had no interest. The language in which the document is couched appears to us to have misled the Court below. It is only on a careful perusal of it that it is apparent that the advance was obtained from the mortgagor to enable Musammat Amir Begam to complete the purchase of her husband's property in Purwana Mahmudpur and the small portions of property in other villages which Haidar Shah had without authority purchased for her. There are other matters which seem to confirm the view which we have formed, and these are that the plaintiff only procured and sent for deposit in Court a sum of Rs. 3,600, that is, the 25 per cent. deposit required by the rules in respect of the purchase of the property of her husband, and further that the amount obtained by her on the security of the 2nd of September 1903 was only a sum of Rs. 9,250, which would have been entirely inadequate to satisfy the purchase, which Haidar Shah purported to make on her behalf. Upon the whole we are clearly of opinion that Haidar Shah had no authority whatsoever from Musammat Amir Begam to purchase the shares of Dost Muhammad Khan and Amir Muhammad Khan, and this being so, the plaintiff's suit ought to have been decreed.

There is a further matter which has occurred to us on the hearing of the appeal, and that is this. Under the provisions of

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section 306 of the Code of Civil Procedure, a purchaser is required to deposit 25 per cent. of the amount of his purchase money immediately after he has been declared the purchaser. The section provides that in default of such deposit the property shall be forthwith put up again and sold. It was decided by a Bench of this Court in the case of *Intizam Ali v. Narain Singh* (1) that if a purchaser failed to make the deposit required by this section, no sale whatever could be held to have taken place. Stuart, C.J., in that case held that the sale impugned by the appeal was not bad by reason of an irregularity in its conduct, but that "it was no sale at all, inasmuch as the indispensable conditions of the law, as contained in section 306 of the Code of Civil Procedure, were not fulfilled by the person declared to be the purchaser. The sale took place early in the afternoon of 20th April 1882, and the respondent did not pay a deposit of 25 per cent. on the amount of his purchase immediately after the declaration that he was the purchaser." Then they say:—"In default of such deposit the property should have been forthwith put up again and sold. The order of the Court below confirming the sale was therefore wrong and must be set aside." This is an authority which we are bound to follow. It decides that there was in this case no sale, and therefore no resale such as would justify the claim of the bank made under section 293. There was in fact no resale within the meaning of that section. Therefore upon the merits as well as in view of the provisions of section 306, it appears to us that the plaintiff ought to have succeeded in her suit.

We therefore allow the appeal. We set aside the decree of the Court below and give a decree to the plaintiff in the terms of the relief asked for in the plaint. The defendant Bank must pay the costs of this appeal and also the costs in the Court below.

Appeal decreed.

(1) (1883) I. L. R., 5 All., 316.