APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

BAIJNATH SAHAI (PETITIONER) *v.* MOHEEP NARAIN SINGH AND OTHERS (OBJECTORS).* 1889 *March* 28.

Civil Procedure Code (Act XIV of 1882), ss. 244 (c), 293—Question for Court executing decree—Defaulting purchaser answering for loss by resale—Description of property at sale and re-sale, Difference of—Regular suit.

An appeal will lie against an order made under s. 293 of the Code of Civil Procedure—*Sree Narain Mitter* v. *Mahtab Chund* (1), *Sooruj Buksh Singh* v. *Sree Kishen Doss* (2), *Joobraj Singh* v. *Gour Buksh* (3), *Bisokha Moyee Chowdhrain* v. *Sonatum Doss* (4), *Ram Dial* v. *Ram Das* (5), followed.

The sale contemplated by s. 293 of that Code must be a sale of the same property that was first sold and under the same description, and any substantial difference of description at the sale and re-sale, in any of the matters required to be specified by s. 287, to enable intending purchasers to judge of the value of the property, will disentitle the decree-holder to recover the deficiency of price under s. 293.

Semble :—That even if the difference of description was due to the value of the property having been changed, between the sale and re-sale, owing to causes beyond the control of any person, the decree-holder, if entitled to claim damages against a defaulting purchaser at the first sale, must proceed against him by way of suit and not by an application under s. 293.

THIS was an appeal by a decree-holder against an order rejecting an application made by him under s. 293 of the Code of Civil Procedure, for the recovery from a defaulting purchaser, the respondent, of a certain sum of money as deficiency of price on a re-sale of certain properties sold in execution. The circumstances under which that application was made were as follows: Originally eleven properties had been advertised for sale, but as the price bid for five of them was sufficient to satisfy the decree, the remaining six were not put up for sale. The purchaser paid

* Appeal from Order, No. 365 of 1888, against the order of Baboo Dwarka Nath Mitter, Subordinate Judge of Shahabad, dated the 2nd June 1888.

(1) 3 W. R., 3. (3) 7 W. R., 110.
(2) 6 W. R., Mis., 126. (4) 16 W. R., 14.
(5) I. L. R., 1 All., 181.

1889

BAIJNATH SAHAI v. MOHEEP NARAIN SINGH.

twenty-five per cent. of the price as required by law, but made default in paying the balance, and a re-sale was thereupon ordered. At the first sale no encumbrance, upon the properties sold, was notified. But before the re-sale, the decree-holder put in a petition asking the Court to notify to intending purchasers two encumbrances upon the said properties, one in favour of a third party under a mortgage bond, and the other in favour of the decree-holder himself under a security bond, by which the said properties were charged as security for arrears of rent of a certain tenure. Both these bonds were of dates long anterior to the date of the first sale, and the encumbrance under the former was fully subsisting at that date. As regards the latter, the amount of the encumbrance notified had not fully accrued due until about a month after the date of the first sale, but in the absence of evidence to show that the rent which constituted the charge was payable only at the end of the year, it may, under s. 53 of the Bengal Tenancy Act, be presumed that it was payable by four instalments, and that three of these had accrued due before the former sale. The two encumbrances were notified at the re-sale, and the price bid for the first five properties was considerably below what they fetched on the former occasion. The other six properties were then sold, and the decree-holder sought to recover from the defaulting purchaser the deficiency in the price of the five properties re-sold diminished by the amount realized by the sale of the other six.

The Nazir who held the sale did not certify the deficiency of price to the Court as required by s. 293. The Subordinate Judge of Shahabad, before whom the application under s. 239 came on for hearing, dismissed the application, holding that there was nothing in s. 293 which directed a Court to enter into these questions summarily, and that they ought to form the subject of enquiry in a regular suit; he also held that it was unnecessary for the Nazir to give the certificate required by law unless 'the properties sold on the last occasion were, according to description, the same as were sold on the first.'

The decree-holder appealed to the High Court, urging that the lower Court had jurisdiction to go into the question of the correctness of the Nazir's report, and that the property being the

same, and the second purchaser not being the appellant, the lower Court should have passed an order in his favour leaving the respondent to contest the matter in a regular suit. On the other hand, the defaulting purchaser, the respondent, contended —*firstly*, that there was no appeal against the order of the Court below; *secondly*, that by reason of the difference in the descriptions of the property at the two sales, the second sale could not be regarded as a re-sale within the meaning of s. 293 of the Code of Civil Procedure; *thirdly*, that the Nazir who held the sale, having refused to certify the deficiency of price, the decree-holder could not recover anything; and, *fourthly*, that the decree-holder, having proceeded against other properties of the judgment-debtor, was not entitled to proceed under s. 293.

Moulvie *Mahomed Yusuf* for the appellant.

Mr. *C. Gregory* for the respondent.

The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) (after stating the facts) proceeded as follows:—

The first point should, we think, be decided in favour of the appellant. Section 293 of the Code of Civil Procedure enacts, amongst other things, that the deficiency of price happening on a re-sale shall be recoverable by the decree-holder from the defaulting purchaser under the rules contained in Chapter XIX for the execution of a decree for money. Questions like the one disposed of by the Court below in this case, must, therefore, be taken to be of the nature of questions arising between the decree-holder and the judgment-debtor relating to the execution of decrees, such as are contemplated by clause (*c*) of s. 244.— And as an appeal is allowed from the decision of any of these questions, there is no reason why an appeal should not lie against the decision of the Court below in this case. This view is in accordance with the decisions of this Court in the cases of *Sree Narain Mitter* v. *Mahtab Chund* (1), *Sooruj Buksh Singh* v. *Sree Kishen Doss* (2) *Joobraj Singh* v. *Gour Buksh* (3), *Bisokha Moyee Chowdhrain* v. *Sonatun Doss* (4), and with the Full Bench ruling of the Allahabad High Court in the case of

(1) 3 W. R., 3.
(2) 6 W. R., Mis., 126.
(3) 7 W. R., 110.
(4) 16 W. R., 14.

1889

BAIJNATH SAHAI v. MOHEEP NARAIN SINGH.

Ram Dial v. *Ram Das* (1), with reference to the corresponding provisions of Acts VIII of 1859 and XXIII of 1861. It is true that the point has been considered open to doubt in two later cases,—*Huree Ram* v. *Hur Pershad Singh* (2) and *Ramdhani Sahai* v. *Rajram Kooer* (3); but in both these cases the appeal was heard and dismissed upon other grounds: and we see no reason to dissent from the earlier rulings by which an appeal is expressly allowed.

The second contention raised by the respondent is, however, in our opinion, perfectly valid, and this appeal must, therefore, fail. We think the re-sale contemplated by s. 293 of the Code of Civil Procedure must be a sale of the same property that was first sold, and under the same description, and any substantial difference of description at the sale and the re-sale in any of the matters required to be specified by s. 287 to enable intending purchasers to judge of the value of the property, should disentitle the decree-holder to recover the deficiency of price under s. 293. No doubt it is quite possible that, between the two sales, the value of the property may be changed by causes such as diluvion and the like, which are beyond the control of anybody; and, in such cases, it might fairly be urged that the decree-holder should not suffer for the purchaser's default. But in the first place that is not the case here. In this case the two encumbrances notified at the re-sale were in existance, either wholly or partially, at the time of the first sale; and one of them must have been known to the decree-holder since it was in his favour; and the other he was bound to enquire into, as the rules made by this Court under s. 287 of the Civil Procedure Code throw upon him the duty of ascertaining and notifying to the Court the encumbrances upon any property advertised for sale in execution of decree. In the second place, even if the difference of description were due to any such cause as is above refered to, although the decree-holder may, under certain circumstances, be entitled to recover damages from the defaulter, that must be by a regular suit and not by an application under s. 293. A claim to recover the deficiency of price

(1) I. L. R., 1 All., 181. (2) 20 W. R., 397.
(3) I. L. R., 7 Calc., 337.

by way of compensation would involve inquiry into difficult questions which must be decided before the proper amount of damages could be ascertained; and, the Legislature by leaving it to the officer holding the sale (who is generally a ministerial officer) to certify to the Court the amount that is to be recovered under s. 293, has sufficiently indicated that cases involving questions like these were never intended to be covered by that section, and that the only cases to which that section was intended to apply, are cases where the same property is sold under the same description at both the two sales. In the present case, after the decree-holder has succeeded in misleading the defaulting purchaser to bid a high price, by withholding information as to encumbrances which it was his duty to notify, if he were allowed to recover the deficiency of price at the re-sale, it would be allowing him to take advantage of his own neglect of duty. That would be so manifestly inequitable that we are unable to hold that the Legislature could have ever intended such a result.

As the appeal fails upon this ground, it is unnecessary to say anything upon the other two points raised by the respondent.

As regards one of the five properties (it is one of very small value), it was urged that the encumbrances were not notified at the re-sale, just as they had not been notified at the first sale, and that the appellant was consequently entitled to succeed in regard to that property in any case. But the decree-holder's petition, before the re-sale, stated that that was subject to the same encumbrance as the other four, and so, practically, there was no difference between the case of that property and that of the other four.

The result is that this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*