

APPELLATE CIVIL.

1914
June 1.*Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.*

MUHAMMAD NAJIB-ULLAH (PLAINIFF) v JAI NARAIN AND ANOTHER

(DEFENDANTS)*

*Execution of decree—Sale in execution—Failure of judgment-debtor's title—
Suit for refund of purchase money—Procedure.*

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, and he is not confined to the special remedy provided by the Code of Civil Procedure. *Munna Singh v. Gajadhar Singh* (1) followed, but doubted. *Kishun Lal v. Muhammad Safdar Ali Khan* (2), *Sidheswari Prasad Narain Singh v. Goshain Mayanand* (3) and *Dorab Ally Khan v. Abdul Azeem* (4) referred to.

THE facts of this case were as follows:—

On the 14th of October, 1887, one Chattar Singh executed a mortgage in favour of Ram Saran Das, the father of Jai Narain. In 1892 a decree for sale was obtained on this mortgage. In 1910 certain property was sold in execution of this decree and purchased by Muhammad Najib-ullah. The sale was confirmed in due course and the auction purchaser put into formal possession. When, however, he applied for mutation it was found that Chattar Singh had already sold the property under two sale deeds, dated respectively the 17th of September, 1880, and the 23rd of June, 1886. Mutation was refused and the auction purchaser then sued for the recovery of the price paid. The court of first instance found that the suit lay and that the judgment-debtor had no saleable interest, and granted the plaintiff a decree. On appeal by the defendant Jai Narain the lower appellate court held that the suit was not maintainable and dismissed it. The plaintiff appealed to the High Court.

Mr. *Muhammad Ishaq Khan*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent.

*Second Appeal No. 1172 of 1913, from a decree of A. W. R. Cole, First Additional Judge of Aligarh, dated the 28th of July, 1913, reversing a decree of Banke Behari Lal, Additional Subordinate Judge of Aligarh, dated the 17th of March, 1913.

(1) (1888) I. L. R., 5 All., 577.

(3) (1913) I. L. R., 35 All., 419; 11 A. L. J., 608.

(2) (1881) I. L. R., 13 All., 283.

(4) (1878) L. J., 5 I. A., 126.

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RICHARDS, C.J., and TUDBALL J.—This appeal arises out of suit brought under the following circumstances. On the 14th of October, 1887, a mortgage was executed by Chattar Singh, the defendant No. 2, in favour of Ram Saran Das, father of the defendant Jai Narain. A decree was obtained on foot of this mortgage in the year 1892. Certain property was sold in execution of that decree on the 26th of November, 1910, and purchased by the plaintiff. How it was that the decree remained under execution for this protracted period is not explained. The sale was confirmed and plaintiff was put into formal possession. He then alleges that he applied for mutation, when it appeared from a report of the Kanungo that Chattar Singh had already sold the property under two sale deeds, dated respectively the 17th of September, 1880, and the 23rd of June, 1886. Mutation was refused and thereupon the present suit was instituted. It is not shown that the plaintiff was in any way opposed by the vendees under the two sale deeds or their representatives. Various pleas were taken. It was alleged that the judgement-debtor had "a saleable interest" and it was contended that the suit did not lie. The court of first instance found that the judgement-debtor had no saleable interest and the suit lay and granted the plaintiff a decree. Upon what ground the court of first instance came to the conclusion that the judgement-debtor had no saleable interest does not appear from the judgement beyond the fact that the two sale deeds were proved. The defendant No. 1, Jai Narain, appealed, and the lower appellate court allowed the appeal and set aside the decree of the court of first instance. It held that the suit was not maintainable, but left undecided the issue "whether or not the judgement-debtor had any saleable interest." The plaintiff has appealed and contends that the lower appellate court was wrong in deciding that the suit was not maintainable and his learned counsel relies on the Full Bench decision of *Munna Singh v. Gajadhar Singh* (1), and also on the case of *Kishun Lal v. Muhammad Safdar Ali Khan* (2), which followed with hesitation the Full Bench case. Apart from these decisions we should have some difficulty in holding that a suit like the present can be maintained. It seems to us that, apart from the provisions of the Code of Civil Procedure, a suit to

(1) (1888) I.L.R., 5 All., 577.

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

recover back the purchase money by an auction purchaser does not lie. See remarks of their Lordships of the Privy Council in *Dorab Ally Khan v. Abdul Azees* (1). In the absence of authority we should be disposed to hold that if the right is the creation of the Code of Civil Procedure the remedy ought also to be limited to the remedy provided by the Code. It is obviously most inconvenient, after the sale had taken place, that the auction purchaser should be entitled to come in and allege that the sale was bad on the ground of a defect in the debtor's title. It may well have been that the money realized by the sale of the property has been distributed amongst a number of creditors. On the other hand, if the auction purchaser's right is confined to the remedy provided by the Code, under ordinary circumstances his application to set aside the sale would be made within one month and before the distribution of the money realized by the sale. We find it, however, impossible to distinguish the present case from the case of *Munna Singh v. Gajadhar Singh* (2). The learned Additional District Judge refers to the case of *Sidheswari Prasad Narain Singh v. Goshain Mayanand* (3). The head note of this case is somewhat misleading. That case, like the present, was a suit to recover back purchase money on the ground of defect in the judgement-debtor's title. The court, no doubt, considered what was the origin of the plaintiff's right to get back his purchase money and the court expressed its opinion that such rights as he had were the creation of the Code of Civil Procedure, but it did not and could not as a Bench overrule the Full Bench decision above referred to. We as a Bench, feel ourselves bound by the decision of the Full Bench ruling in the case of *Munna Singh v. Gajadhar Singh* (2). Before deciding whether we will refer the case to a larger Bench or finally decide the appeal, we think it desirable to refer an issue as to the interest of the judgement-debtor at the time of the sale. We accordingly refer the following issue:—"Had the judgement-debtor any saleable interest in the property at the date of the sale?" In deciding this issue the court will not necessarily be bound to hold merely on proof of the sale deeds that the judgement-debtor had no saleable interest, because, if it should appear that the judgement-

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(1) L. R., 5 I. A., 126. [^]

(2) (1883) I. L. R., 5 All., 577.

(3) (1913) 11 A.L.J., 806; see also I. L. R., 85 All., 419.

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debtor was in possession or had acquired a title in any other way, he would in our opinion have a "saleable interest" and the sale could not be set aside. The parties may adduce any further evidence relevant to this issue. The case will be put up on return of the finding and the usual ten days will be allowed for filing objections.

Issue remitted.

FULL BENCH.

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June, 2.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Tudball and Mr. Justice Chamier.

KANHAIYA LAL AND OTHERS (DEFENDANTS) v. TIRBENI SAHAI AND OTHERS (PLAINTIFFS)*.

Civil Procedure Code (1908), sections 96 and 97—Partition—Appeal—Passing of final decree no bar to the hearing of an appeal against the preliminary decree.

When an appeal has once been filed and is pending against the preliminary decree in a suit for partition, the passing of a final decree does not render the appeal nugatory. The final decree depends upon the preliminary decree, and if, as the result of an appeal, the latter is set aside, the former must fall with it.

Kuriya Mal v. Bishambhar Nath (1) overruled. *Khirodamoyi Dasi v. Adhar Chandra Ghose* (2) dissented from. *Muhammad Akhtar Husain Khan v. Tasadduq Husain* (3) and *Lakshmi v. Maru Devi* (4) followed. *Abdul Jalil v. Amar Chand Paul* (5) referred to.

THE facts of the case are, briefly, as follows:—

On the 26th of April, 1912, the court made a preliminary decree in a suit for partition. An appeal was filed, but the lower court, on the 28th of June, 1912, during the pendency of the appeal, passed a final decree on the lines of the preliminary decree. No appeal was filed against the final decree. When the appeal came on for hearing a preliminary objection was raised to the effect that no appeal having been filed against the final decree the appeal could not be maintained. The lower appellate court allowed the objection and dismissed the appeal. The defendants appealed to the High Court.

* Second Appeal No. 465 of 1913, from a decree of E. C. Allen, District Judge of Mainpuri, dated the 18th of April, 1913, confirming a decree of Banke Behari Lal, Subordinate Judge of Mainpuri, dated the 26th of April, 1912.

(1) (1910) I. L. R., 32 All., 225. (3) (1912) I. L. R., 34 All., 493.

(2) (1912) 18 C. L. J., 321. (4) (1911) I. L. R., 37 Mad., 29.

(5) (1913) 18 C. L. J., 223.