1914

EMPEROR v. GAYA PRASAD.

of this matter in his defence, but we are not prepared to say that we find it proved. The other two accused, Raja Ram and Nanhe, are merely the servants of Chadammi Lal's.

[The judgement then discussed the evidence in the case and the contentions raised on behalf of the appellants and concluded as follows.]

Taking into account Nanhe's confession, along with the evidence on the record, in our opinion the learned Sessions Judge has rightly convicted the four appellants of the offence charged. The murder had been carefully premeditated and was a singularly brutal one. We are not prepared to interfere with the sentence, except as regards the order of forfeiture of Chadammi Lal's property passed under section 62 of the Indian Penal Code. It seems to us that that section should ordinarily be applied in cases of crimes against the State or affecting the safety of the public generally. Moreover, to confirm this order of forfeiture would be to punish the innocent members of Chadammi's family. We set aside this portion of the order. For the rest, we dismiss the appeals of Gaya Prasad, Chadammi Lal, Raja Ram and Nanhe and confirming their conviction and sentences direct that the latter be carried out according to law.

Appeal allowed in part.

APPELLATE CIVIL.

1914
April, 3.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

SHEO GOPAL AND ANOTHER (JUDGEMENT-DEBTORS) *v.* NAJIB KHAN (DECREE-HOLDER)*

Pre-emption—Execution of decree—Decretal amount deposited, but part taken out of court by a creditor of the decree-holder, the decree for pre-emption having been set aside—Restoration of decree on appeal—Position of decree-holder.

A decree for pre-emption conditional on the plaintiff pre-emptor depositing in court by a certain date Rs. 1,000 was duly complied with. But on appeal by the vendee the decree was set aside, and thereafter a portion of the money deposited by the pre-emptor was attached and drawn out of court by a creditor who had obtained a money decree against him. The decree was, however, restored as the result of an appeal to the High Court. *Held* that the plaintiff was entitled to execute his decree upon making good the amount which had

* Appeal No. 84 of 1913, under section 10 of the Letters Patent.

been removed by his creditor. *Held* also that the court of first instance ought not to have permitted any part of the money deposited to be withdrawn until the pre-emption suit had been finally decided. *Abdus Salam* v. *Wilayat Ali* (1) distinguished.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are fully set forth in the judgement under appeal, which was as follows:—

"The facts of the case are as follows. The decree-holder, who is the appellant before me, brought a suit for pre-emption of certain property, and on the 13th of February, 1907, he obtained a decree for possession conditional on his paying into court to the credit of the vendee the sum of Rs. 1,000 on or before the 15th of March, 1907. On the 6th of March, 1907, he deposited the money in court. On the 15th of March, 1907, the vendee appealed. The money remained in court. On the 15th of June, 1907, the appeal was allowed and the decree was set aside. On the 18th of July, 1907, one Daryao Singh, who had obtained a money decree against the pre-emptor, attached a portion of the money in execution of his decree. The pre-emptor objected to the attachment and did his best to protect the money. But the court decided against him and Daryao Singh removed the sum of Rs. 193-4-6. In the meantime on the 13th of November, 1907, the pre-emptor filed a second appeal in the High Court, and on the 14th of July, 1908, that appeal was allowed and the case was remanded to the court of first appeal for decision on its merits This decision was upheld on Letters Patent appeal on the 26th of February, 1909. The District Judge then decided the appeal on its merits on the 27th of August, 1909, and dismissed the appeal upholding the decision of the court of first instance. The decree-holder then applied to the court of first instance to be put in possession of the property in execution of the decree. Objection was taken on behalf of the vendee that the full sum of Rs. 1,000 was not in court and available to him, and that therefore the decree-holder should not be granted possession. The court of first instance dismissed the objection and granted possession to the decree-holder. The latter was put into possession. The vendee appealed to the District Judge. The District Judge has passed an order that if the pre-emptor do pay into court within a fixed time the sum of Rs. 193-4-6 plus a further sum of Rs. 100 as damages to the vendee, then order of the first court shall stand good and possession will remain with the pre-emptor: but if the aforesaid amount is not paid into court to the credit of the vendee within the time fixed, then the order of the court of first instance should be set aside and the vendee be restored to possession and the balance of Rs. 1,000 will be repayable to the pre-emptor. The pre-emptor decree-holder has appealed. The vendee has filed certain objections, one of which has clearly been made on a misunderstanding of the order of the District Judge. The vendee appears to have been under the apprehension that the District Judge ordered payment of the sum of Rs. 100 only, whereas as a matter of fact the District Judge ordered payment of Rs. 293-4-6. The other objection, however, is to the effect that in the circumstances the application for

(1) Weekly Notes, 1897, p. 31.

1914

SHEO GOPAL v. NAJIB KHAN.

execution by delivery of possession should have been disallowed *in toto*. The case for the appellant is that he is entitled to possession of the property free of all conditions. It is quite clear that the present trouble has arisen solely by reason of the appeal which the defendant vendee made on the 15th of March, 1907, to the District Judge. The final decree in the case is the decree of the 27th of August, 1909, whereby the decree of the 13th of February, 1907, was upheld. This latter decree laid down a certain condition, and nobody can deny that that condition was properly fulfilled by the plaintiff pre-emptor. It is urged that after the appeal was allowed on the 15th of June, 1907, the money was no longer pre-emption money, that it was money belonging to the pre-emptor personally and his judgement creditor Daryao Singh had every right to attach it. But the whole matter was really *sub judice*. The pre-emptor cannot be said to be guilty of any negligence whatsoever. When the money was attached he did his best to protect it. It was lying in court at the peril of that person to whom as between the parties the court would finally decide that that sum was payable. That final decision was that it was payable to the vendee, and therefore it was in my opinion clear that the money lay in court at the peril of the vendee. The situation was brought about wholly and solely by his appeal, which finally failed. It is impossible to hold that the action of Daryao Singh can be held to be the action of the pre-emptor. His removing of the money from court cannot in any wise be said to be a removal by the pre-emptor. The vendee chose to take his chance of an appeal, and the appeal was finally decided against him. The money was lying to his credit in court, and I can see no wrongful act on the part of the pre-emptor to which the loss of the sum of Rs. 193-4-6 can be ascribed. It is true that it is his duty to pay his creditor. There is nothing to show that he had no other property wherefrom to pay the small debt of Rs. 193-4-6. In the circumstances of the case, I can see no equity in forcing the pre-emptor to pay a further sum of Rs. 193-4-6, much less the additional fine of Rs. 100 which has been imposed by the District Judge. The order for payment of this latter sum seems to me to be based on no principle whatever. The decree-holder having fully carried out the condition entered in the decree and not having removed any portion of that sum wrongfully from the court is entitled to be placed in possession of the property without any restriction whatsoever. I allow the appeal, set aside the decree of the lower appellate court and restore that of the court of first instance. The objections filed by the respondent are disallowed. The appellant will have his costs in all courts."

Mr. *M. L. Agarwala*, for the appellant:—

The vendee is entitled to receive the whole of the Rs. 1,000. He cannot be compelled to part with the property for any less sum. It was due to no fault of his that a portion of the money in deposit was paid out to a creditor of the pre-emptor. At the time when the sum of Rs. 193-4-6 was attached and paid out there was no pre-emption decree extant; the amount deposited was not, at that time, at the disposal of the vendee but of the pre-emptor. The

money was not then lying at the vendee's risk. The pre-emptor was benefited by the payment of the sum of Rs. 193-4-6, as it went to satisfy a judgement-debt of his. Equity requires that he should make good the deficiency to the vendee; otherwise, he would be deriving the benefit of the same sum twice. The decree has not been complied with, as the whole of the sum of Rs. 1,000 is not available to the vendee.

Babu *Binoy Kumar Mukerji*, for the respondent :—

The pre-emptor fully complied with the decree by depositing the full amount, within the time fixed, to the credit of the vendee. Nothing more was required to be done by the decree. The court executing the decree cannot go behind it and order any further sum to be paid now. An executing court cannot vary the decree. The decree did not say that the money was not only to be duly deposited, but thereafter safeguarded by the pre-emptor till it pleased the vendee to take it. The money was deposited to the credit of the vendee, and if anything happened to it while in the custody of the court, and through no fault of the pre-emptor, the vendee must suffer the loss resulting from his negligence in not taking the money out of court. The court acted wrongly in allowing a portion of the money to be attached and taken out by a third person before a final decree had been made in the suit. The pre-emptor protested against the attachment and did his best to safeguard the interests of the vendee. He should not be punished for a fault not his own. I rely on the case of *Abdus Salam* v. *Wilayat Ali Khan* (1).

RICHARDS, C. J. and BANERJI, J :—This is a judgement-debtor's appeal. The facts are very fully stated in the judgement of the learned Judge of this Court, dated the 6th of June, 1913. It appears that on the 15th of February, 1907, Najib Khan obtained a decree in a pre-emption suit, conditional upon his paying into court the sum of Rs. 1,000 by the 15th of March, 1907. He complied with this condition. The vendee, however, appealed, and on his appeal the claim was dismissed on the 15th of June, 1907. On the 18th of July of the same year a creditor of Najib Khan attached the Rs. 1,000, which was deposited in court for the payment of the decree which he had against Najib Khan for Rs. 193-4-6, and this

(1) Weekly Notes, 1897, p. 81.

1914

SHEO GOPAL v. NAJIB KHAN.

sum was paid to the creditor. Eventually, however, the High Court remanded the case to the lower appellate court, and that court affirmed the decree of the court of first instance, that is to say, the decree for pre-emption. The plaintiff Najib Khan, the decree-holder, after the lapse of some time, applied in execution for possession. He was met by the plea that the one thousand rupees was not in court for payment to the vendee. The court executing the decree, thereupon, allowed the application. The vendee appealed and the lower appellate court modified the order of the court of first instance by directing that if Najib Khan paid Rs. 193-4-6, together with Rs. 100 damages, then he might have possession but not otherwise. On second appeal to this Court a learned Judge allowed the appeal and restored the order of the court of first instance.

In our opinion the equity of the case is clearly in favour of the vendee being paid the full amount of the consideration for his sale which was set aside as the result of the decree in the pre-emption suit. It was no fault of his that the money was paid out of court to the creditor of Najib Khan. Najib Khan clearly benefited by the payment, because the debt to one of his creditors was satisfied. Of course it was quite wrong of the court which granted the attachment of the money in court to order its payment out until a final decree had been made in the pre-emption suit. The learned Judge of this Court says:—"In the circumstances of the case I can see no equity in enforcing the pre-emptor to pay a further sum of Rs. 193-4-6, much less the additional fine of Rs. 100, which has been imposed by the District Judge." While we agree with our learned colleague about the fine of Rs. 100, we cannot agree with him in what he says about the Rs. 193-4-6. In the first place it is not paying any "further sum" *to the vendee*. The vendee never received the Rs. 193-4-6, and in the next place, whatever misfortune Najib Khan may have suffered as the result of the order for payment out to the attaching creditor, the vendee has the clearest equity to be paid back the money which he paid for the property to his vendor, which property he is now being dispossessed of. As already mentioned, the Rs. 193-4-6, went to discharge a debt of Najib Khan. The

case of *Abdus Salam* v. *Wilayat Ali Khan* (1) has been cited. It is unnecessary for us to express any opinion upon this case. It is clearly distinguishable from the present because at the date when the money in that case was attached and paid out the pre-emption decree stood good and the money was payable to the vendee. In the present case, when the money was paid over the decree of the court of first instance had been set aside by the District Judge, and the money, if it belonged to any one, belonged to the pre-emptor. We allow the appeal to this extent that we vary the decree both of this court and of the lower appellate court by directing that the plaintiff Najib Khan shall have possession upon the terms of his paying into court the sum of Rs. 193-4-6, within two months from this date. We direct that the appellants do have their costs of both hearings in this Court. In the court below each party will bear his own costs.

Decree modified.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

1914
April, 15.

AHSAN-ULLAH KHAN *v.* MANSUKH RAM.*

Criminal Procedure Code, sections 195 and 439—Sanction to prosecute—Revision—Powers of High Court.

Section 195 of the Code of Criminal Procedure does not enable the High Court to reconsider an order of a Sessions Judge, refusing under clause (6) to grant a sanction to prosecute which was refused by the Magistrate, and although the revisional jurisdiction of the High Court under section 439 of the Code of Criminal Procedure can always be exercised in order to prevent a grosss and palpable failure of justice, it should not be exercised in such a way as to practically give a right of appeal in cases where such right is definitely excluded by the Code.

IN this case one Mansukh Ram brought a criminal charge against Ahsan-ullah Khan, and others alleging the commission by them of offences punishable under sections 427 and 147 of the Indian Penal Code. The accused persons were acquitted. Thereafter Ahsan-ullah Khan applied to the trying Magistrate for sanction to prosecute Mansukh Ram, and his principal

* Criminal Revision No. 175 of 1914, from an order of L. Johnston, Sessions Judge of Meerut, dated the 7th of November, 1913.

(1) Weekly Notes, 1897, p. 31.