

second mortgagee, Shadi Ram, the first respondent, has remained in existence as the only encumbrance prior to the title of the appellant as owner of the equity of redemption.

They concur in the opinion of the learned Judges of the High Court that the decision of the Assistant Sessions Judge of Moradabad, who tried the case, was wrong.

They will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant:—*T. L. Wilson & Co.*

Solicitor for the plaintiff respondent:—*Pyke, Franklin & Gould.*

J.V.W.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

GIRDHAR DAS AND OTHERS (DEFENDANTS) *v.* SIDHESHWARI PRASAD NARAIN SINGH AND OTHERS (PLAINTIFFS)*.

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February, 26.

Civil Procedure Code (1892), section 315—Execution of decrees—Sale in execution—Auction purchaser deprived of property purchased owing to failure of judgment-debtor's title—Suit to recover purchase money.

Where property of a judgment-debtor had been sold twice over in execution of decrees against him and purchased twice by different purchasers it was held that the second purchaser took no title by his purchase, inasmuch as at the time of sale the judgment-debtor's title was extinct, and that he was entitled to recover the purchase money which he had paid, and to follow it into the hands of other creditors of the judgment-debtor amongst whom it had been rateably distributed.

THE facts of this case were, briefly, as follows:—

Certain house property in the city of Benares, belonging to a man of the name of Rajendradhari Singh, was sold by auction in execution of a decree against the owner on the 15th of February, 1906, and was purchased by Ram Prasad Singh. The same property was, however, sold a second time as the property of Rajendradhari Singh on the 18th of March, 1907, and on this occasion was purchased by Sidheshwari Prasad Narain Singh and others. This led to litigation, to begin with, between the first purchaser and the second, resulting in a decision in favour of Ram

* First Appeal No. 86 of 1916, from a decree of Udit Narain Singh, Subordinate Judge of Benares, dated the 12th of August, 1915.

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Prasad Singh. Thereafter the second set of purchasers sued to recover from other creditors of Rajendradhari Singh the purchase money which they had paid, and which had been rateably distributed amongst those creditors. The court of first instance decreed the plaintiffs' claim. Certain of the defendants appealed to the High Court.

Mr. *Jawahir Lal Nehru* and *Munshi Harmandan Prasad*, for the appellants.

Babu *Brij Nath Vyas* and *Munshi Kanhaya Lal*, for the respondents.

PIGGOTT and WALSH, JJ. :—The essential point raised by this first appeal is quite a simple one. Certain house property situated within the city of Benares belonged to one Rajendradhari Singh, who seems to have been heavily in debt. There were two auction sales of the house property in question—one on the 15th of February, 1906, resulting in a purchase by Ram Prasad Singh, and another on the 18th of March, 1907, resulting in a purchase by the present plaintiffs respondents. The latter paid their purchase money into court and that money passed under the orders of the court into the hands of a large number of creditors of Rajendradhari Singh, who had applied for rateable distribution in respect of any money which might be realized by the auction sale. Subsequently Ram Prasad Singh brought a suit, in which he impleaded the judgment-creditor on whose application the attachment resulting in the sale of the 18th of March 1907 had been made, and also the present plaintiffs, the auction purchasers at the said sale. The result of that suit was a decision, between these parties, that the same property had been sold twice over, first to Ram Prasad Singh in February, 1906, and then to the plaintiffs in March, 1907. It followed as a necessary consequence that on the date of the latter sale the judgment-debtor Rajendradhari Singh had no saleable interest in the property purchased by the plaintiffs. The latter had, therefore, obtained nothing by their purchase and became entitled to maintain a suit against all the judgment-creditors of Rajendradhari Singh to whom payments were made out of the money which the plaintiffs had paid into court. The law on this point is clearly settled, as may be

seen by referring to the cases of *Kishun Lal v. Muhammad Safdar Ali Khan* (1) and *Muhammad Najibullah v. Jai Narain* (2). The court below has accordingly decreed the plaintiffs' claim against a large number of defendants, in accordance with the sums found to be respectively due from each defendant, or group of defendants. The appeal now before us is by five of the defendants only. The question as to the maintainability of the suit must be decided against the appellants in accordance with the rulings above referred to. The question whether the present suit was or was not within limitation has already been up to this Court in appeal and has been decided in the plaintiffs' favour. The report may be found in I. L. R., 35 All., 419.

There are pleas taken in the memorandum of appeal before us which are apparently intended to suggest that the decision in the suit brought by Ram Prasad Singh has in some way been used against the present defendants improperly in this litigation. The plaintiffs were obviously entitled to prove that they had lost the benefit of their auction purchase by reason of the fact that Ram Prasad Singh had succeeded in proving that he had himself purchased identically the same property at the auction sale of February, 1906. This fact could most readily be proved by the record of the suit in which Ram Prasad Singh was the plaintiff and the present plaintiffs, along with the attaching creditor of Rajendradhari Singh, were the defendants. Beyond this we do not think that the court below has made any use of the record of this previous litigation. The contesting defendants, other than original attaching creditor, were allowed to raise every question of fact which could have been raised by them if they had been defendants in the suit brought by Ram Prasad Singh. They could not as a matter of fact have been made defendants in that suit, because it had been instituted before the order for rateable distribution of the sale proceeds of the sale of March, 1907, had been passed. This, however, we only mention incidentally. The questions of fact requiring determination at this trial were the identity or otherwise of the property purchased at the two sales, of February, 1906 and March, 1907, and, secondly, the validity or

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(1) (1891) I. L. R., 13 All., 383. (2) (1914) I. L. R., 36 All., 520.

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otherwise of the plea taken by these defendants that Ram Prasad Singh was merely a *benami* purchaser for the benefit of the judgment-debtor, Rajendradhari Singh. The identity of the properties sold at the two auction sales has been established by abundant evidence, and the point scarcely admits of argument. The truth of the matter is that Rajendradhari Singh had purchased a number of contiguous houses in the city of Benares and had then built himself a residence, with suitable out-houses and other appurtenances, situated within one single enclosure covering the sites of the various houses purchased by him. At both the auction sales everything within the enclosure, the boundaries of which were clearly specified in the sale proclamation, was put up for sale and was purchased by Ram Prasad Singh in February, 1906, and by the present plaintiffs in March, 1907. There is no force in the contention that different house numbers were mentioned in the sale proclamations of the two years. The identity of the property sold is sufficiently established by the sale proclamations and by the evidence of the court official who conducted the sales. Ram Prasad Singh was at any rate the ostensible purchaser at the sale of February, 1906. The evidence by which the defendants in this suit have sought to show that he was a *benamidar* for Rajendradhari Singh is of very little substance. Certain evidence has been produced tending to show that Rajendradhari Singh was in funds in the month of February, 1906, so that he could have made this purchase if he wanted to do so. The case for the defendants can scarcely be said to go beyond this. It is true that Ram Prasad Singh does not appear to have taken as yet effective possession of the whole of the property sold to him; but the evidence on the record supplies abundant explanation of this fact. When the time for delivery of possession came, Rajendradhari Singh was lying seriously ill inside the house, and it would seem that he died there shortly afterwards. The evidence for the defendants does not carry us beyond the fact that Ram Prasad Singh has not hitherto taken steps to evict Rajendradhari Singh's widow from the premises. This may be due to sympathetic consideration on his part, or it may be that he does not desire to contest the possible question of the widow's right of residence. Moreover, it must be remembered that Ram

Prasad Singh's position has been complicated by the subsequent auction sale of 1907 and by the litigation in which he has been involved in order to enforce his title. The decision of the High Court in his favour was not pronounced until the month of November, 1909. On the whole, there seems no valid basis for a finding that the purchase effected by Ram Prasad Singh at the auction sale of February, 1906 was *benami* on behalf of the judgment-debtor, or was anything but a *bona fide* purchase for his own benefit. The defendants have further raised another very curious plea, suggesting that the auction purchase by the plaintiffs themselves in the month of March, 1907 was also *benami*, on behalf and for the benefit of Rajendradhari Singh or his heirs. In fact this seems to have been treated as the main issue in the case. We have been taken through the evidence on the point, and it is really unnecessary for us to say more than that we find no reason for dissenting from the opinion formed by the trial court regarding that evidence. We can find no real reason for doubting that the purchase money paid in connection with the auction sale of March, 1907 was found by the plaintiffs themselves and that the purchase was effected on behalf of the plaintiffs, for their benefit, by their agent, Sheodhar Prasad.

The only remaining plea in the memorandum of appeal before us is that Ram Prasad Singh's decree invalidating the sale of March, 1907, and affirming the validity of his own purchase at the sale of February, 1906, was obtained by some sort of fraudulent collusion between himself and the then defendants. There is no basis for that contention, beyond the fact that the present plaintiffs did not choose to appeal against Ram Prasad Singh's decree; but the matter was fully fought out by the principal defendant, the attaching judgment-creditor, and the essential issues of fact were found in favour of Ram Prasad Singh after contest, as they have again been found in his favour after contest in the present litigation. There is therefore no force in this appeal. We dismiss it with costs,

Appeal dismissed.

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