

## APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Thom.

1932  
May, 27.

DEPUTY SHANKAR (DECREE-HOLDER) v. MANGAL SEN  
AND ANOTHER (AUCTION PURCHASERS).\*

*Civil Procedure Code, order XXI, rules 92, 93—Refund of purchase money on deprivation of property purchased at auction—Execution sale on mortgage decree—Suit, prior to the sale, by person with paramount title against mortgagor and mortgagee—Auction purchaser deprived of property by the person with paramount title—Application for refund of purchase money.*

In execution of a decree for sale on a mortgage the mortgaged property was sold by auction. Between the final decree and the sale a suit was instituted against the mortgagor and the mortgagee by a third party claiming paramount title to the property. This suit finally succeeded and he obtained possession. The auction purchaser being deprived of the property purchased by him applied for refund of the purchase money. Held that he was not entitled to a refund of the purchase money. Under the present Civil Procedure Code a right to refund of the purchase money arises under order XXI, rule 93, only when the sale has been set aside under rule 92. Without getting the sale set aside, there is no independent right to obtain such refund. As regards sales under a decree of a court there is no warranty of title either by the decree-holder or by the court.

Messrs. *N. P. Asthana* and *Shabd Saran*, for the appellant.

Mr. *S. K. Dar* and Dr. *K. N. Malaviya*, for the respondents.

KING and THOM, JJ.:—This defendant's appeal arises out of an application for the refund of purchase money by Mangal Sen and Ram Prasad, the purchasers of immovable property sold in execution of a mortgage decree. Briefly the relevant facts are as follows. One Mathura Prasad on April 7, 1919, mortgaged a shop at Chandausi, the mortgagee being Babu Gokul

\*Second Appeal No. 25 of 1931, from a decree of D. C. Hunter, District Judge of Moradabad, dated the 2nd of June, 1930, confirming a decree of Makhan Lal, Subordinate Judge of Moradabad, dated the 15th of February, 1930

1932

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DEPUTY  
SHANKAR  
v.  
MANGAL  
SEN.

Chand, the father of Deputy Shankar, minor, opposite party No. 1 in the application. Gokul Chand, who is now deceased, in respect of the mortgage obtained a final decree for sale on March 5, 1924. The property was put up for sale under the decree and was sold to Mangal Sen and Ram Prasad, the applicants, on the 4th of September, 1924. The proceeds of the sale were distributed eventually amongst opposite party No. 1 (the son of the mortgagee), opposite party No. 2 (the mortgagor Mathura Prasad), and opposite party No. 3 (Pandit Bhoj Raj, a creditor of No. 2, by virtue of attachment in execution of a decree against him). Between the date of the final decree and the sale one Digamber Singh filed suit No. 6 of 1924 in the court of the third Subordinate Judge of Moradabad against the mortgagor and the mortgagee for a declaration that he was the true owner of the property in question and for recovery of possession. After being successful in the first court (his suit being decreed on the 23rd of December, 1924), and unsuccessful on appeal, his suit was decreed on second appeal by the High Court on the 21st of December, 1927. He obtained possession of the property on the 19th of September, 1928. In the present application, therefore, the original purchasers Mangal Sen and Ram Prasad seek the return of the purchase money which they paid from those amongst whom it was distributed. In this appeal we are concerned only with their claim for recovery so far as directed against opposite party No. 1, the son of Gokul Chand, the mortgagee and decree-holder. As against him the applicants have been successful in both the courts below.

The trial court took the view that the final decree for sale was reversed or nullified as a result of the decree adjudging Digamber Singh the true owner of the property in question. The lower appellate court took the view that the applicants must have a remedy, as

1932

---

 DEPUTY  
 SHANKAR  
 v.  
 MANGAL  
 SEN.

considerations of equity make it right and just that they should have the purchase money refunded to them. In our opinion the applicants are not entitled to succeed upon either of these grounds.

It is argued for the appellant that under the present Code of Civil Procedure (Act V of 1908) an auction purchaser has been given a statutory right, under order XXI, rule 93, to recover his purchase money when the sale has been set aside on the ground that the judgment-debtor had no saleable interest in the property sold (in accordance with the provisions of order XXI, rules 91 and 92) and that he has no right to obtain a refund upon any other ground. In other words, the auction purchaser has no right to recover his purchase money unless the sale has been set aside under order XXI, rule 92. We have come to the conclusion that this contention is correct.

Under section 315 of the Code of 1882 the auction purchaser was given a right to receive back his purchase money not only when the sale was set aside, but also "when it is found that the judgment-debtor had no saleable interest in the property which was purported to be sold, and the purchaser is for that reason deprived of it." Under the Code of 1882 therefore the auction purchaser would in the present case have been entitled to a refund. But in the Code of 1908 the law was substantially altered. In order XXI, rule 93, the clause quoted has been deliberately omitted and the auction purchaser is only entitled to a refund when the sale has been set aside under rule 92. The deliberate omission of the clause quoted certainly suggests that the legislature did not intend that the auction purchaser could claim a refund on the ground stated therein but could only claim a refund when the sale is set aside under rule 92. This interpretation of the existing law has been adopted by most of the High Courts in India. In *Nanna Lal v. Bhagwan Das* (1) the effect of the

statutory amendment was fully discussed and it was held that under the present Code of Civil Procedure an auction purchaser who has been deprived, by means of a suit against the judgment-debtor, of the property purchased by him cannot obtain refund of the purchase money without getting the auction sale set aside. That ruling was followed by another Bench of this Court in *Ram Sarup v. Dalpat Rai* (1). It was also followed by the Bombay High Court in *Balvant Raghunath v. Bala* (2), and it may be noted that the property in that case had been sold in execution of a mortgage decree as in the present case. The Allahabad rulings cited above were also followed by the Lahore High Court in *Habib-ud-din v. Hatim Mirza* (3). The Madras High Court took the same view in *Parvahi Ammal v. Govindasami Pillai* (4). Their Lordships remarked: "The right of action to obtain a refund consequent on the want of saleable interest in the judgment-debtor is not a right inhering in a purchaser, but is the creature of a statute, and the right thus conferred can only be exercised within the limitations prescribed. Consequently, without getting the sale set aside through court, the purchaser has no right of action."

The Calcutta High Court has also held in *Rishikesh Laha v. Manik Molla* (5) that the auction purchaser cannot obtain a refund of purchase money when the sale has not been set aside under rule 92 unless he can bring himself within the equitable principles which justify a suit for money had and received to his use, e.g., by establishing fraud or breach of duty on the part of the decree-holder or collusion between the decree-holder and judgment-debtor. In the present case no such fraud, collusion or breach of duty are suggested.

As against all these authorities the respondent relies upon a Full Bench decision of the Chief Court of Oudh in *Bahadur Singh v. Ramphal* (6). Here it

1982

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 DEPUTY  
SHANKAR  
v.  
MANGAL  
SEN.

(1) (1920) I.L.R., 43 All., 60.

(2) (1922) I.L.R., 46 Bom., 833.

(3) (1925) I.L.R., 6 Lah., 283.

(4) (1915) I.L.R., 39 Mad., 803.

(5) (1926) I.L.R., 53 Cal., 758.

(6) (1929) I.L.R., 5 Luck., 552.

1932

DEPUTY  
SHANKAR  
v.  
MANGAL  
SEN.

was held by a majority of two learned Judges (SRIVASTAVA, J., dissenting) that when a person purchases immovable property at an auction sale in execution of a decree of court and subsequently loses the same under a decree passed in a suit brought by a third party against the purchaser, the decree-holder and the judgment-debtor, such a purchaser is entitled to bring a suit for recovery of his purchase money as against the decree-holder. STUART, C. J., held that as the statute law was silent on the subject, an auction purchaser who loses the property under a decree passed in favour of a third party has a right to a refund of the purchase money under the general principles of equity. This decision is based upon the view that there is a warranty by the decree-holder that the property belongs to the judgment-debtor. We think it unnecessary to discuss this proposition, as this Court at least (not to mention other High Courts) has clearly taken the view that "As regards sales under a decree of a court there is no warranty of title either by the decree-holder or by the court": See *Shanto Chandar Mukerji v. Nain Sukh* (1) and the two Allahabad rulings already cited.

The trial court relied upon the Full Bench ruling in *Bindeshri Prasad v. Badal Singh* (2), but that ruling is clearly distinguishable. In that case the decree under which the property had been sold was set aside. The auction purchaser is entitled to assume that the decree is a valid decree. He is not entitled to assume that the property sold under the decree really belongs to the judgment-debtor. The principle "*caveat emptor*" is applicable to auction sales. In the present case the decree under which the property had been sold was never set aside, so the ruling is not applicable.

It may seem hard that the auction purchaser should have no remedy when he has been deprived of property for which he paid cash. Before the confirmation of

(1) (1901) T. L. R. 23 All. 385

(2) (1923) I. L. R. 45 All. 369.

sale he did not know that the judgment-debtor's title would prove defective, although he knew that the title had been impeached. It would also be hard on the decree-holder to be deprived of his share of the sale proceeds when he believed in good faith that the property belonged to his judgment-debtor and he had advanced a loan to the judgment-debtor on the strength of his belief. However much we may sympathise with the auction purchaser, the law seems to be clear that he has no remedy. It is unnecessary to consider the subsidiary question of procedure—whether he should have proceeded by a regular suit or by an application under section 47.

In our opinion the appellant's contention is clearly supported by the Allahabad rulings on which he relies. They do not appear to have been doubted or dissented from by any Bench of this Court. They are also supported by the authority of other High Courts and we have no hesitation in following them.

We therefore allow the appeal, set aside the decree of the court below and dismiss the application with costs throughout.

1932

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DEPUTY  
SEANKAR  
v.  
MANGAL  
SEN.