

under the *wajib-ul-arz*, in respect of an auction-sale in execution of decree of a house belonging to a resident of their mohalla. The defendants-appellants were the decree-holders and auction-purchasers. Both the lower Courts decreed the claim, but in our opinion erroneously. There is no provision of the *wajib-ul-arz* under which the respondents acquired any right to one-fourth of the sale proceeds as against the auction-purchaser; on the contrary there is a provision which, if applicable, entitles them to a much less sum. The decree-holder, because he happens to have become the auction-purchaser, cannot possibly be regarded as the "seller," and it is only the "seller" who is bound to pay one-fourth of what he may realize. Indeed, it would seem moreover that the clause of the *wajib-ul-arz* upon which the respondents based their suit was only applicable to private and voluntary sales and not to those held compulsorily under process of law. The appeal must be decreed with costs, and the suit as brought dismissed.

Appeal allowed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

AJUDHIA NATH AND OTHERS (DEFENDANTS) v. ANANT DAS AND ANOTHER
(PLAINTIFFS).*

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May 11.

Insolvent—Assignment to trustees for benefit of creditors—Notice to creditors to register claims—Refusal of trustees to register claim preferred after time—Cause of action—Joinder of parties—Act X of 1877 (Civil Procedure Code), ss. 28, 31.

The creditor of an insolvent, who had assigned all his property to trustees for the benefit of all his creditors generally, sued him for his debt, joining the trustees as defendants on the ground that they had refused to register his claim. The trustees had refused to register the claim on the ground that the plaintiff had not applied for its registration within the time notified by them, and that he would not consent to abide by the order which the High Court might make on an application by the trustees for its advice regarding the claims of creditors who, like the plaintiff, had applied for the registration of their claims after such time, but before the assets of the insolvent had been distributed. The deed of trust empowered the trustees to distribute the assets of the insolvent after a certain time among the creditors who had preferred their claims within that time, and declared that they should not be liable for such distribution to creditors who had not preferred their claims within that time; but it did not empower them to refuse to register claims made after that time but before distribution of the assets. *Held that*

* Second Appeal, No. 466 of 1880, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 13th February, 1880, affirming a decree of Rai Makhau Lal, Subordinate Judge, dated the 23rd May, 1879.

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the trustees had been properly joined as defendants in such suit ; that their refusal to register the plaintiff's claim gave him a cause of action against them ; and that, inasmuch as the plaintiff had applied for the registration of his claim before the distribution of the assets, the trustees had improperly refused to register it.

THE facts relating to this suit were as follows:—By an instrument made the 30th November, 1875, one Mul Chand assigned to certain trustees all his moveable and immoveable property for the benefit of his creditors. In 1876, the Bank of Bengal, one of his creditors, instituted a suit against him and the trustees for, amongst other things, a declaration that this deed of assignment was fraudulent and void against the creditors of Mul Chand. On the 26th April, 1876, the High Court, to which the suit had been transferred for trial in the exercise of its extraordinary original civil jurisdiction, passed a decree in the suit, whereby, *inter alia*, it declared the deed of assignment to be valid and established, and that the trustees had liberty to apply for the opinion, advice, and direction of the Court (according to the provisions of Act XXVIII. of 1866) upon any question respecting the management, winding up, and division of the trust estate. On or about the 31st May, 1876, after the passing of this decree, the trustees, by a public advertisement, called upon all creditors of Mul Chand to register their claims at the office of the acting trustee in Allahabad on or before the 12th June, 1876, and notified that after that date no claims would be admitted. On the 17th December, 1878, after a portion of the assets of the trust estate had been distributed among the creditors who had registered their claims, the trustees made an application to the High Court under the decree of the 26th April, 1876, for its direction and advice respecting the claims of certain creditors of Mul Chand, who had not registered their claims within the time fixed by such public advertisement, but who notwithstanding claimed to share in a dividend about to be declared. The plaintiffs in the present suit, who were the holders of a dishonoured bill for Rs. 5,000 drawn by Mul Chand, were amongst such creditors. In January, 1879, while this application was pending, the present suit was instituted, in which the plaintiffs claimed the amount of such bill, joining as defendants the trustees, on the ground that they had refused either to pay them the amount of such bill, or to register their claim. On the 7th April, 1879, the High Court

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(Pearson, J.) made an order directing that the trustees should inquire into the claims of such creditors. The material portion of this order was as follows:—"The duty of the trustees under the trust deed is to 'pay and divide the clear residue of the said moneys unto and among *all* the creditors of the said Lala Mul Chand rateably in proportion to the amount of their respective debts.' 'These presents,' again it is said, 'are intended to operate as a trust deed for the benefit of *all* the creditors.' The distinction between registered and unregistered creditors appears to have arisen out of an arbitrary proceeding of the trustees, who on or about the 31st May, 1876, by a public advertisement, called upon all creditors of Lala Mul Chand to register their claims at the office of the acting trustee in Allahabad on or before the 12th June, 1876, and notified that after that date no claims would be admitted. To call upon the creditors to prefer their claims was quite proper; but I can hardly think that the trustees were justified in refusing to entertain any claims not preferred within twelve days. On the contrary I conceive that they are bound to entertain all claims preferred to them at any time pending the trust. They were not bound to postpone indefinitely the distribution of the assets until it was certain that every claim had been preferred. The trust deed declared that 'the trustees shall be at liberty to make a distribution equally according to their respective claims three months after the date hereof; and should all the creditors not prefer their claims within three months from the date of notice of this trust in the *Pioneer and Government Gazette, North-Western Provinces*, the trustees shall not be liable to the said creditors for having distributed the assets of the trust within the prescribed period'. Had the assets of the trust been wholly distributed before the unregistered creditors had preferred their claims after due notice given to them, the trustees might have been held blameless in the matter. But only a portion of the assets of the trust has as yet been distributed. Even before that distribution took place many of the unregistered creditors had preferred their claims, but their claims were not registered, because they were not preferred before the 12th June, 1876, or because the proofs of the claims were not simultaneously submitted, or because application was not made in express terms for the registration of the claims,

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or for some other and not always a better reason. If these persons were guilty of *laches*, I should think that they had suffered for them sufficiently by not having been allowed to share in the former dividend, at the time when it was declared, but the view that they have forfeited in any degree their rights as creditors to share equally, if possible, in the whole assets in proportion to their respective claims, or that the registered creditors have acquired by virtue of the registration of their claims a right superior in law to that of the unregistered creditors, does not seem to me to be tenable on grounds of reason or equity. In my opinion the trustees should inquire into all claims preferred to them, and should award to each claimant whose claim is proved to their satisfaction his proportionate share in the whole assets". The trustees set up as a defence to the present suit that it was improperly framed, by reason of misjoinder of causes of action; that the plaintiffs had no cause of action against them; that the claim of the plaintiffs had not been registered because they had not applied for its registration within the time fixed, and they refused for a long time to acknowledge the trust; that they (the defendants) were now prepared to register the claim, the High Court having ordered them to register all claims; and that, while their application seeking advice from the High Court was pending, they had expressed their willingness to register the claim, if the plaintiffs consented to abide by the order of the High Court, but the plaintiffs would not so consent. The Court of first instance gave the plaintiffs a decree against the defendant Mul Chand for the amount of the claim, with costs and interest, directing that they should "receive the amount of the decree proportionately along with other creditors of the insolvent judgment-debtor from the property held by the trustees." This decree was affirmed by the lower appellate Court on appeal by the trustees. On second appeal by the trustees it was contended on their behalf that the plaintiffs had no cause of action against them; that the cause of action against the trustees (if any) could not be joined in one suit with the cause of action against the defendant Mul Chand; and that there was a misjoinder of parties (defendants) in the suit.

Mr. Ross, the *Junior Government Pleader* (Babu Dwarika Nath Banarji), and Pandit Bishambhar Nath, for the appellants.

Babu *Oprokash Chandar Mukarji*, for the respondents.

The Court (STUART, C. J., and SPANKIE, J.) delivered the following

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JUDGMENT.—The plaintiff sued to recover the amount of a promissory note made by Lala Mul Chand, which the latter failed to retire when it became due. He represented that Mul Chand had become insolvent, and had assigned his property to certain persons for the benefit of his creditors: that the debt due to plaintiff was entered in the schedule of debts due by him which he made over to the assignees: on this the plaintiff called on the trustees to pay the money or enter the claim for payment in their register but they declined to pay the money or to enter the claim: the plaintiff therefore was compelled to bring this suit, and as the trustees were in possession of the assets belonging to the maker of the note, and refused to register the debt, he was obliged to make them parties to the suit along with the maker. The trustees contend that the suit was bad for misjoinder, as there is not a single cause of action against them and Lala Mul Chand: the plaint contains no cause of action against the trustees: the name of plaintiff was not entered in the register, because he had not applied for the registry within the time fixed by the trustees, and he did not acknowledge the trust for a long time: now the High Court has ordered them to register all claims, and they are prepared to do so: whilst the application of the trustees, seeking advice from the Court, was pending, the trustees had expressed their willingness to register the claim, if the plaintiff consented to abide by the Court's order, but plaintiff would not so consent. The first Court finds the plaintiff had a cause of action against the trustees, and that the suit was not barred for misjoinder. The Subordinate Judge also found that the suit would have been barred by limitation had plaintiff agreed to abide by the condition offered by the trustees, and waited until this Court had disposed of the petition pending before it. The first Court decreed the claim with costs and future interest at six per cent. against Lala Mul Chand and his property held by the trustees, but with this condition, that the plaintiff should receive the decretal amount proportionately with the other creditors from the property held by the trustees. It adjudged their own costs against the trustees. The

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trustees appealed and their grounds were similar to those urged in their reply to the suit. The Judge rejected the pleas and observed that no decree had been given against the trustees personally but only so far as they represent the trust, Lala Mul Chand having become bankrupt, and he held that they had been properly made defendants in the suit. The same objections are taken to this finding that were taken in the lower appellate Court, and it was orally contended that the trustees should not have been made to bear their own costs, and the Judge had not sufficiently tried whether their act had given any cause of action to the plaintiff. We entertain no doubt that there was no misjoinder. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities. The matter here was the liability in the first instance of the maker of the note to pay the amount due on it. There is no insolvency law here, and the defendant in effect said: "I can't pay because I am insolvent, you must go to the trustees." The trustees who have the assets belonging to the debtor refuse to pay the debt or enter the claim for future payment. The plaintiff's claim on the note would have been entirely barred if he had not brought this suit. Two days' delay would have been fatal to him. He was entitled with the other creditors to relief from the trustees, and when they refused it, we think that they were properly made parties, for the purpose of enabling the plaintiff to recover his debt from the debtor's estate. But apart from this, s. 31 of Act X of 1877 provides that no suit shall be defeated by reason of the misjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. In our opinion the trustees should not have refused to enter the claim and should not have attempted to subject the plaintiff's claim to any condition. That they did so is admitted by themselves. The Judge of this Court before whom the application referred to by the trustees was filed records that "the distinction between registered and unregistered creditors appears to have arisen out of an arbitrary proceeding of the trustees, who on or about the

31st May, 1876, by a public advertisement, called upon all creditors of Lala Mul Chand to register their claims at the office of the acting trustee in Allahabad before the 12th June, 1876, and notified that after that date no claims would be admitted.' The learned Judge did not consider the trustees justified in refusing to entertain any claims not preferred within twelve days; on the contrary he held them bound to entertain all claims preferred to them at any time during the pendency of the trust. He then shows that under the terms of the trust the trustees might distribute the assets equally within three months after the date of the trust, and if all the creditors did not prefer their claims within three months after notice of the trust, then the trustees would not be liable to the said creditors for having distributed the assets of the trust within the prescribed period. The trustees had not distributed the assets before the unregistered creditors had preferred their claims, which were not registered because they had not come in before the 12th June, 1876. The plaintiff appears to have acquiesced in the trust and to have sought registry before the distribution was made, and when he failed to obtain payment or a recognition of his claim from the trustees, they can hardly be considered blameless, and were therefore properly made parties. At the same time, if the decrees of the lower Courts are understood to make the trustees liable for costs, it must also be understood that they themselves are not personally liable, but that the trust estate is liable. We dismiss the appeal with costs, the costs of both parties being payable from the assets of the debtor in the hands of the trustees.

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Appeal dismissed.

Before Mr. Justice Spankie and Mr. Justice Tyrrell.

SEVA RAM (PLAINTIFF) v. ALI BAKRSH (DEFENDANT).*

 1881
 May 16

Estoppel—Auction-purchaser.

In 1871 *M*, the mortgagee of certain property, styling himself the owner of it, mortgaged it to *S*. In 1875 *M* became the owner of such property by purchase. In 1877 such property was put up for sale in execution of a decree against *M*, and *A* purchased it. *S* subsequently sued *M* and *A* to enforce the mortgage of such

* Second Appeal No. 1168 of 1880, from a decree of C. J. Daniell, Esq., Judge of Moradabad, dated the 1st August, 1880, reversing a decree of Maulvi Ain-ud-din, Munsif of Belari, dated the 21st April, 1880.