

STRAIGHT, J.—I am of opinion that the bond to which our attention is called by this reference, being for the due accounting for property other than money, is not within the exemption of art. 12, cl. (b), sch. ii to the Stamp Act (I of 1879.) The difficulty has been created by the introduction of the words “or the due accounting for money received by virtue thereof,” which I cannot concur with my honorable colleague Mr. Justice Oldfield should be regarded as surplusage. On the contrary, the Legislative authorities would seem to have drawn a distinction between the due execution of the duties of an office and the due accounting for moneys received by virtue thereof, as if the latter obligation were not necessarily part of the duties under the former. Supposing therefore a bond merely executed “to secure the due execution of an office,” the language of this article would preclude the construction that it covered the “due accounting for money” received by virtue of such office. If then we are to assume, and the assumption seems irresistible, that the words “due execution of an office” were considered insufficient to include “due accounting for money,” then *a fortiori* they cannot be held to cover the non-accounting for other property. The express mention of money seems to exclude any accountability for other property, and so inferentially to place a limitation upon the earlier words of the article, which, had they stood alone, need not have been applied.

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REFERRED
BY THE BOARD
OF REVENUE
N.-W. I

APPELLATE CIVIL.

1881
May 10

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BENI MADHO AND ANOTHER (DEFENDANTS) v. ZAHURUL-HAQ AND OTHERS
(PLAINTIFFS).*

Sale in execution of decree of house in Mohalla—Right of zamindars to “haqq-i-chaharam”—Wajibularz—Liability of auction-purchaser.

The zamindars of a certain mohalla claimed from the purchaser of a house situated in such mohalla which had been sold in execution of a decree one-fourth of the sale-proceeds of such house, such purchaser being the holder of such decree. Such suit was based upon the terms of the *wajibularz*. That document stated,

* Second Appeal, No. 1105 of 1880, from a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 16th July, 1880, affirming a decree of Maulvi Ahmad-ul-lah, Munsif of Gorakhpur, dated the 19th March, 1880.

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Inter alia, that, when a house in such mohalla was sold, a cess called *chaharam* was received by such zamindars "according to the understanding arrived at between the seller and the zamindars." Held that such zamindars were not entitled under the terms of the *wajibularz* to one-fourth of the sale-proceeds; that the decree-holder, because he happened to have become the auction-purchaser, could not be regarded as the "seller," and it was only the "seller" who was liable; that the terms of the *wajibularz* were applicable only to private and voluntary sales and not to execution-sales; and that under these circumstances the suit must be dismissed.

THE plaintiffs in this suit claimed Rs. 50, being one-fourth of Rs. 200, the proceeds of a sale in execution of a decree of a house belonging to one Bishan, a carpenter, situate in mohalla Kazipur Kalan, in the city of Gorakhpur. The plaintiffs were the mohalladars or zamindars of the mohalla, and founded their claim on local custom as recorded in the *wajib-ul-arz*. The original defendant in the suit was the holder of the decree in execution whereof the house had been sold and the purchaser of the house. The tenth clause of the *wajib-ul-arz* stated, amongst other things, that "when a house (in the mohalla in question) was sold, a cess called *chaharam* was received according to the understanding mutually arrived at between the seller and the mohalladar." The Court of first instance gave the plaintiffs a decree, which, on appeal by the representatives of the original defendant, who had died, the lower appellate Court affirmed.

On second appeal by such persons it was contended on their behalf that under the terms of the *wajib-ul-arz* the plaintiffs were not entitled to claim any thing from purchasers of houses; that they were not entitled to claim a fourth of the purchase-money; and that the terms of that document were not applicable to sales in execution of decrees.

Babu *Sital Prasad Chattarji* and *Maulvi Mehdi Hasan*, for the appellants.

Shaikh Maula Bakhsh, for the respondents.

The judgment of the Court (STRAIGHT, J., and TYRELL, J.) was delivered by

STRAIGHT, J.—The plaintiffs-respondents are zamindars, and their claim was for Rs. 50, out of Rs. 200, purchase price, as "*chaharam*," to which they alleged themselves to be entitled,

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).*

1881
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.