

judgment-debtors admitted themselves to be beneficially interested, or to have a right of disposal over. It is obvious that, if a sale of such a possible right or interest were to be allowed, a judgment-debtor would be seriously affected, for an interest would be sold which at the time is speculative, and which would fetch little or nothing, but which might at a future day become valuable to the judgment-debtor. This is what happened in this case, the interest in Rs. 2,200 having been sold for Rs. 160.

I must also add that the circumstances connected with the execution-proceedings are not free from suspicion of unfair dealing towards defendants in putting up to sale an unsaleable interest, considering all the facts and the relationship between plaintiff and Ismail Khan, the auction-purchaser; and I am not satisfied that plaintiff has paid the sum of Rs. 2,200 to Ismail Khan or that there was any intention that it should be paid. The evidence is not satisfactory on the point of payment, as the Subordinate Judge observes, and it is unlikely that plaintiff would pay away the money to any one until he had succeeded in getting the property conveyed to him; for, until then, there was no obligation on him to pay it. Moreover, he had been called on by the Court that ordered the attachment and sale to deposit the sum in court, but he does not appear to have done so, and had the proceedings at the sale been *bonâ fide*, it would have been expected that, instead of paying the money to Ismail Khan as he alleges, he would have complied with the order, and have deposited the money under protest, asking that its payment to Ismail Khan should await the completion of the sale-contract in his favour, until when it could not be demanded from him. I would dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Pearson and Mr. Justice Straight.

JAI RAM DAS AND ANOTHER (DEFENDANTS) v. BENI PRASAD (PLAINTIFF) *

Sale in execution of decree—Pre-emption—Act X. of 1877 (Civil Procedure Code), s. 310.

The provisions of s. 310 of Act X. of 1877 are not applicable in a case where the property sold is not a share of undivided immoveable property, but the rights and interests of a mortgagee in such a share.

* Second Appeal, No. 331 of 1880, from a decree of H. A. Harrison, Esq., Judge of Mirzapur, dated the 12th January, 1880, affirming a decree of Maulvi Mitham-mad Wajih-ul-Jah Khan, Subordinate Judge of Mirzapur, dated the 22nd July, 1879.

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ALHAMD-I
DIN KH.
v.
MAJLIS R

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RAM DAS
v.
K. PRASAD.

THIS was a suit to establish the plaintiff's right of pre-emption in respect of the rights and interests of a mortgagee in a seven-pie share of an undivided estate, and for possession of such share, the claim being based upon the provisions of s. 310 of Act X. of 1877. Such rights and interests were put up for sale in the execution of a decree against the mortgagee on the 21st January, 1878. The property was knocked down to the defendants, and as soon as this happened the plaintiffs preferred a claim to the right of pre-emption before the officer conducting the sale, and at the same time deposited the purchase-money, Rs. 160. The Court executing the decree having disallowed the claim, the plaintiffs instituted the present suit. The defendants stated in defence of the suit, *inter alia*, as follows: "The plaintiffs did not bid at the time of the auction sale as provided for in s. 310 of Act X. of 1877, and the sale was concluded in the favor of the defendants at their last bid: the Court executing the decree has held that the pre-emptors did not carry out the provisions of s. 310, which could confer on them the right to pre-emption, and therefore a suit for a thing already settled in the execution-department will not lie: the plaintiffs having failed to carry out the provisions of s. 310, have lost their right of pre-emption." The Court of first instance gave the plaintiffs a decree, holding that they had advanced at the bidding at the sale the same sum as the defendants, but the officer conducting the sale had refused to accept two equal bids. On appeal by the defendants, they again contended, with reference to s. 310 of Act X. of 1877, that the plaintiffs were bound, before the property was knocked down at the sale, to advance the same bid as the defendants, and that their doing so immediately after the fall of the hammer was not sufficient to secure the right of pre-emption. The lower appellate Court held, finding apparently that the plaintiffs had not bid at the sale, that, for the purposes of s. 310 of Act X. of 1877, it was sufficient for a co-sharer to claim immediately his right of pre-emption at the sum at which the property has been knocked down, and that it was not necessary that he should bid at the sale the same sum as the stranger; and affirmed the decree of the Court of first instance.

On second appeal to the High Court the defendants raised in their grounds of appeal the same contention as they had raised in

the lower Courts. The plaintiff-respondent objected, under s. 561 of Act X of 1877, that the finding of the lower appellate Court that the plaintiffs had not bid at the sale was directly opposed to the evidence on the record of the case.

1880

 JAIRAM
 v.
 BENI PRASAD

Lala Lalta Prasad, for the appellants.

The *Senior Government Pleader* (*Lala Juala Prasad*) and *Munshi Hanuman Prasad*, for the respondent.

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

PEARSON, J.—In disposing on the 2nd April last of Second Appeal No. 1142 of 1879 (1), we have expressed our opinion as to the proper construction of the particular terms of s. 310, Act X of 1877, in regard to which a question is raised in the present case. But the question appears to us to be irrelevant in the present case, because in reference to other terms of the same section we are compelled to hold that the plaintiff has no right of pre-emption to the property claimed by him. That property is not a share of undivided immoveable property, but the rights and interests of a mortgagee in a share. S. 310 says that, “when the property sold in execution of a decree is a share of undivided immoveable property, and two or more persons, one of whom is a co-sharer, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the co-sharer.” But the rights and interests of a mortgagee in a share are not the same thing as a share : and the provisions of the section are inapplicable in the present case. The suit must fail ; and we are relieved of the necessity of dealing with the pleas in appeal and the objection taken by the respondent. We reverse the decree of the lower Courts, but having regard to the circumstances direct that the parties each bear their own costs in all the Courts.

Appeal allowed.

(1) *Tej Singh v. Gobind Singh*, I. L. R., 2 All., 860.