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that his consent was neither asked nor given to the second agreement. The failure of the lessee to pay his rent was subsequent to the 29th May, and his defaults, in respect of which the suretyship was enforced, were all made after that date. S. 133 of the Contract Act therefore applies, and there having been a variance in the terms of the contract between the lessor and the lessee without the surety's consent, he was discharged. We think that the plaintiff appellants is not debarred from taking advantage of this objection to bring a suit for the relief she now seeks. The appeal will therefore be decreed with costs.

Appeal allowed.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

AHMAD-UD-DIN KHAN (PLAINTIFF) v. MAJLIS RAI AND OTHERS
(DEFENDANTS).*

Attachment of Property—Debt—Vendor and Purchaser—Act X. of 1877 (Civil Procedure Code), ss. 266, 268.

The right or interest which the vendor of immoveable property has in the purchase-money, where it has been agreed that the same shall be paid on the execution of the conveyance, is not, so long as the conveyance has not been executed, a debt, but a merely possible right or interest, and as such, under s. 266 of Act X. of 1877, is not liable to attachment and sale in the execution of a decree. The person who purchases such a right or interest at a sale in the execution of a decree takes nothing by his purchase.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Babu *Oprokash Chandar Mukarji*, for the appellant.

Babus *Joyindro Nath Chaudhri* and *Ratan Chand*, for the respondents.

The following judgment was delivered by the Court :

OLDFIELD, J. (PEARSON, J., concurring).—The facts are these:—Defendants claimed certain property which was also claimed by one Rahso, and had been sold by her to Umrao Begam. Defendants then sold one half of their interest to Aftab Begam, wife of plaintiff, and she joined them in a suit against Rahso and Umrao Begam to recover the property. The Court of first instance dis-

* First Appeal, No. 100 of 1879, from a decree of Maulvi Sami-ul-lah Khan, Subordinate Judge of Moradabad, dated the 26th June, 1879.

missed the claim, but an appeal was instituted to the High Court, and while it was pending defendants entered into an agreement with Aftab Begam, dated the 26th March, 1876, by which they sold to her their remaining interest in the properties, together with any costs and mesne profits they might become entitled to under the decree they might obtain in the High Court, and a plot of five yards of land; and agreed to execute a deed of sale for the same on the passing of the decree of the High Court in their favour, the consideration being Rs. 3,000, of which Rs. 800 were to be paid at once in cash, and Rs. 2,200 at the time of execution of the deed of sale. The High Court passed a decree in favour of Aftab Begam and defendants on the 16th August, 1876, and possession was given on the property, and the plaintiff in this suit, who is Aftab Begam's husband and represents her now, seeks to have specific performance of the sale-contract dated 26th March, 1876; also to recover money paid for revenue and mesne profits. Plaintiff, however, refuses to pay the balance of the consideration-money, Rs. 2,200, to defendants on the ground that one Ismail Khan (who is his brother) had the defendants' interest in this sum attached and sold at auction in execution of his decree against the defendants and became the purchaser, and plaintiff avers he has had to pay the money to Ismail Khan.

The material answer on the part of defendants is (i) that the sale-contract is void by reason of undue advantage having been taken of defendants' necessities; (ii) that Aftab Begam had never fulfilled her part by payment of Rs. 800; (iii) that the plaintiff cannot escape from the obligation to pay the balance, Rs. 2,200, without which payment he is not entitled to the relief he seeks in the suit, and that the proceedings in the execution of the decree and sale were in fraud of defendants; that plaintiff and not Ismail Khan was the real owner of the decree, and the real purchaser, and there had been no payment of Rs. 2,200 to Ismail Khan; (iv) there was no valid right for the sums claimed. The lower Court has held that there is no valid ground for setting aside the sale-contract, and that Aftab Begam did pay Rs. 800 under its terms; but the Subordinate Judge has gone on to hold that plaintiff cannot succeed in this suit as he is bound to pay Rs. 2,200.

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He holds that the sale of the debt or claim in respect of this sum in execution of the decree was illegal, and that, as a matter of fact, plaintiff never paid any of it to the ostensible purchaser who was his brother; and he dismissed the suit. Plaintiff has appealed, and defendants have filed objections in regard to the finding as to the validity of the sale-contract and payment of Rs. 800 and costs. These objections, however, are not entertainable since they were filed beyond the time allowed by law. There is, however, no reason to doubt the correctness of the finding as to the validity of the sale and payment of Rs. 800.

The appeal, however, cannot in my opinion succeed. The sale of the interest in the sum of Rs. 2,200 was illegal and cannot defeat defendants' right to receive that sum as a consideration for their fulfilling the sale-contract dated 26th March, 1876. An examination of the execution-proceedings shows that the attachment and sale in execution of Ismail Khan's decree was of the sum of Rs. 2,200 as a debt due to the defendants, the judgment-debtors; and under s. 268 the defendants were directed not to recover the sum from the plaintiff until the further order of the Court, and the plaintiff was directed to deposit the sum in Court, - see exhibits 64A, 36A, and 26. Now this sum at the time of attachment and sale was not a debt due to defendants (judgment-debtors); the obligation on the part of plaintiff to pay it to defendants could only arise when defendants conveyed the property to him. As a purchaser of a debt due to the judgment-debtor, Ismail Khan took nothing by his purchase. But if it be held that what was intended to be attached and sold was the future interest in the sum of Rs. 2,200 which the judgment-debtors might eventually obtain (and for my part I cannot consider that such was the intention), then I hold that such an interest was not liable to attachment and sale under s. 266, Civil Procedure Code, since the interest was merely a possible right or interest,—a claim which defendants (the judgment-debtors) might possibly obtain against plaintiff, if the latter succeeded in establishing a sale-contract which the judgment-debtors repudiated, and when the judgment-debtors conveyed the property to plaintiff under the sale. At the time of sale the sum represented no existing debt or any interest in which the

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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