LETTERS PATENT APPEAL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice LeRossignol.

HABIB-UD-DIN (PLAINTIFF) Appellant,

versus

HATIM MIRZA AND OTHERS (DEFENDANTS) Respondents.

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Feb. 7.

Letters Patent Appeal No. 194 of 1923.

Civil Procedure Code, Act V. of 1908, Order XXI, rule 91—Auction-purchaser's suit for a refund of the purchase-money on ground that judgment-debtor had no saleable interest in the property sold—whether competent.

In October 1919 plaintiff was declared to be the purchaser of certain immoveable property sold in execution of a decree. He applied to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. His application was accepted and he obtained a refund of the purchase money. The decree-holder H. M. preferred an appeal to the District Judge, and his appeal was accepted and plaintiff was directed to pay back the money. He then brought the present suit for a declaration that the sale in his favour was a void transaction, and that he was not liable to pay the purchase-money, *i.e.* in essence a suit for a refund of his purchase-money on the ground that the judgment-debtor had no saleable interest in the property.

Held, that while in a private sale there is, in the absence of a contract to the contrary, an implied covenant for title by the vendor—*vide* section 55, sub-section (2) of the Transfer of Property Act—there is no such covenant either by the decree-holder or by the Court in the case of a sale made in execution of a decree, and the doctrine of *caveat emptor* fully applies to such a sale.

Dorab Ally Khan v. *The Executors of Khajah Moheeoodeen* (1), followed.

(1) (1878) I. L. R. 3 Cal. 806 (P. C.).

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Held consequently, that the only remedy which the purchaser had was that provided by Order XXI, rule 91 of the Code of Civil Procedure, and that applied only where the judgment-debtor had no saleable interest at all in the property sold. An application under that rule must be made within 30 days from the date of the sale (article 166, Indian Limitation Act) and if the application is disallowed no suit can be brought by the person against whom the order is made (rule 92 (3)).

The right of the purchaser being the creation of the statute the remedy to enforce that right must be confined to that prescribed by the statute.

Held therefore, that the plaintiff's present suit could not be maintained.

Triumalaisami Naidu v. *Subramanian Chettiar* (1), *Nannu Lal* v. *Bhagwan Das* (2), and *Ram Sarup* v. *Dalpat Rai* (3), followed.

Rustomeji Ardeshir Irani v. *Vinayak Gangadhar Bhat* (4), and *Prasanna Kumar Bhattacharjee* v. *Ibrahim Mirza* (5), disapproved.

Makar Ali v. *Sarfaddin* (6), and *Asad Ullah Khan* v. *Karam Chand* (7), distinguished.

The difference between section 315 of the Code of 1882 and Order XXI, rule 93 of the present Code pointed out.

Muhammad Munir, for the appellant—The suit is not for the refund of money, but for a declaration that the decree in which the sale has taken place was not binding and therefore the sale effected in my favour was a void transaction, and therefore I was not liable to pay the money. In any case I submit that the auction-purchaser can file a suit for refund under the circumstances of the present case. See *Munna Singh* v. *Gajadhar Singh* (8), *Rustomeji Ardeshir Irani* v. *Vinyak Gangadhar Bhat* (4), *Prasanna*

(1) (1916) I. L. R. 40 Mad. 1009.
(2) (1916) I. L. R. 39 All. 114.
(3) (1920) I. L. R. 43 All. 60.
(4) (1910) I. L. R. 35 Bom. 29.
(5) (1917) 36 Cal. L. J. 205.
(6) (1922) 36 Cal. L. J. 132.
(7) (1923) I. L. R. 4 Lah. 354.
(8) (1883) I.L.R. 5 All. 577 (F.B.).

Kumar Bhattacharjee v. *Ibrahim Mirza* (1), and *Asad Ullah Khan* v. *Karam Chand* (2).

The point is now clear from *Asad Ullah Khan* v. *Karam Chand* (2), which is binding on us. Hence the view of the learned Judge in Chambers to the effect that the suit does not lie is wrong and the appeal should be accepted.

Sardha Ram (with him Shamair Chand) for the respondents—There is an important difference between the language of section 315 of the Civil Procedure Code of 1882 and the wording of Order XXI, rule 91 of the present Code. Under the present Code no suit lies if after the sale the purchaser finds that the judgment-debtor had no saleable interest. Order XXI, rule 91 provides a special remedy to which the auction purchaser is entitled to have recourse, if he finds that the judgment-debtor has no saleable interest and that remedy becomes time-barred if not exercised within 30 days, and no separate suit lies.

Where a statute creates an obligation and provides for its performance a special remedy in a particular way, the performance must be obtained in that particular manner and no other. See the case of *Lingappa* v. *Esudasan* (3). This ruling has been followed in the case of *Lakhmi Chand* v. *Chaturbhuj* (4).

There is no warranty of title in a Court sale as opposed to a private sale. See *Dorab Ally Khan* v. *The Executors of Khajah Moheeooddeen* (5), *Annavajhula* v. *Ramagirjee* (6), *Baijnath Prasad* v. *Narandra Bhadurpal* (7) and *Bipin Behari* v. *Hari Charan* (8).

(1) (1917) 41 I. C. 924: 36 Cal. L. J. 205.
(2) (1923) I. L. R. 4 Lah. 354.
(3) (1903) I. L. R. 27 Mad. 13, 15.
(4) (1921) 65 I. C. 230, 234.
(5) (1878) I. L. R. 3 Cal. 806 (P. C.).
(6) (1917) 43 I. C. 685.
(7) (1920) 61 I. C. 74.
(8) (1920) 64 I. C. 628.

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The doctrine of *caveat emptor* applies unless the purchaser chooses to adopt the remedy given to him by Order XXI, rule 91—See *Parvathi Ammal* v. *Govindasami Pillai* (1). Under the present Civil Procedure Code no suit lies for refund of price even if the judgment-debtor is found to have no saleable interest—See *Nannu Lal* v. *Bhagwan Das* (2), *Triumalaisami Naidu* v. *Subramanian Chettiar* (3), *Ram Sarup* v. *Dalpat Rai* (4), *Prasanna Kumar Bhattacharjee* v. *Ibrahim Mirza* (5) and *Krishnaji* v. *Ladhuram Ghasiram* (6).

Muhammad Munir, replied.

Appeal under clause 10 of the Letters Patent from the judgment of Mr. Justice Broadway, dated the 17th April 1923.

The judgment of the Court was delivered by—

SIR SHADI LAL C. J.—The facts material for the determination of the question of law arising in this appeal are no longer in controversy and may be shortly stated. In October 1919, the plaintiff, Habib-ud-Din, was declared to be the purchaser of certain immoveable property sold in execution of a decree obtained by the defendant Hatim Mirza on the strength of a mortgage. Within 30 days from the date of the sale the purchaser applied to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. His application was granted by the Court of first instance, with the result that he at once applied for and obtained a refund of the purchase-money paid by him into Court. Hatim Mirza preferred an appeal to the District Judge against the order setting aside

(1) (1915) I. L. R. 39 Mad. 803, 806.
(2) (1916) I. L. R. 39 All. 114.
(3) (1916) I. L. R. 40 Mad. 1009.
(4) (1920) I. L. R. 43 All. 60.
(5) (1917) 36 Cal. L. J. 205.
(6) (1917) 42 I. C. 440.

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the sale, and his appeal was accepted, and the auction-purchaser was directed to pay back the money.

The unsuccessful purchaser has now brought the present action for a declaration that the sale effected in his favour was a void transaction, and that he was not liable to pay the purchase-money. The suit has been rightly held to be, in essence, a suit by an auction-purchaser for a refund of his purchase-money on the ground that the judgment-debtor had no saleable interest in the property; and the question for determination is whether the law allows an auction-purchaser to bring a suit of this description. It is necessary to point out at the outset that, while in a private sale there is, in the absence of a contract to the contrary, an implied covenant for title by the vendor—*vide* section 55, sub-section (2), Transfer of Property Act—there is no such covenant either by the decree-holder or by the Court in the case of a sale made in execution of a decree. The Court does not profess to sell anything more than the 'right, title and interest' of the judgment-debtor, and it is the duty of the purchaser to satisfy himself as to the nature and extent of the interest possessed by the judgment-debtor in the property proposed to be sold. The doctrine of *caveat emptor* fully applies to a purchaser at a Court sale who buys the property with all risks and all defects in the judgment-debtor's title. If there was any doubt on the subject, it has been set at rest by the pronouncement of the Privy Council in *Dorab Ally Khan* v. *The Executors of Khajah Moheeooddeen* (1) in which their Lordships made the following observations :—"Now it is of course perfectly clear that when the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judg-

(1) (1878) I. L. R. 3 Cal. 806 (P. C.).

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ment-debtor, he has no remedy against either the Sheriff or the judgment-debtor." They further pointed out that the Court having jurisdiction to sell the property " does not in any way warrant that the judgment-debtor had a good title to it, or guarantee that the purchaser shall not be turned out of possession by some person other than the judgment-debtor."

On general principles, therefore, the purchaser is not entitled to any relief even if the judgment-debtor had no interest whatever in the property sold. The Civil Procedure Code has, however, created a special remedy which enables the purchaser to apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold—*vide* Order XXI, rule 91. It must, however, be borne in mind that this remedy, which has been created by the statute, can only be enforced subject to the conditions and limitations imposed by the law. For instance, the remedy is confined to those cases in which it is found that the judgment-debtor had no saleable interest in the property at all. It does not embrace cases in which he had some interest in the property, however small that interest may be. It is also necessary that the application must be made within 30 days from the date of the sale as prescribed by Article 166 of the first schedule to the Indian Limitation Act.

If an application is made under Order XXI, rule 91, and is allowed, the Court is empowered to set aside the sale, and rule 93 provides that the purchaser shall be entitled, in the event of the sale being set aside, to an order for repayment of his purchase-money, with or without interest, as the Court may direct, against any person to whom it has been paid. Where no application is made under rule 91, or where such application is made and disallowed the Court shall

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make an order confirming the sale; and rule 92, sub-rule (3), expressly forbids any person against whom the order is made to bring a suit to set it aside. Apart from this statutory provision, there is no principle of law or equity which would entitle an auction-purchaser to recover the purchase-money in the event of his discovering after the sale that the judgment-debtor had no saleable interest in the property.

Under the Civil Procedure Code of 1882, it was no doubt held that a purchaser at a Court sale was not limited to the special remedy prescribed above; and that he was entitled to bring a suit for the recovery of the purchase-money on the ground that the judgment-debtor had no saleable interest in the property sold to him. This view was based upon the language of section 315 of that Code which materially differed from the corresponding provision (Order XXI, rule 93) of the present Code. Section 315 ran as follows :—

" When a sale of immoveable property is set aside under section 310-A, 312 or 313, or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid.

The repayment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money."

Order XXI, rule 93, of the present Code merely provides that " Where a sale of immoveable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid."

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It will be observed that the second and fourth paragraphs of section 315 are not reproduced in the aforesaid rule; and that the phrase " shall be entitled to receive back " which occurred in the third paragraph of section 315, has now been replaced by the words " shall be entitled to an order for repayment of."

It is by no means clear that the framers of section 315 intended to confer upon the auction-purchaser the right of recovering the purchase-money by a regular suit; but there can be no doubt that the phraseology, which alone was invoked in support of that right, is not to be found in the present Code.

The learned Vakil for the plaintiff has invited our attention to the judgment of the Bombay High Court in *Rustomeji Ardeshir Irani* v. *Vinayak Gangadhar Bhat* (1) which lays down the rule that even under the present Code an auction-purchaser can maintain a suit for the recovery of the purchase-money on the ground that the judgment-debtor had no interest in the property sold by the Court. The judgment, however, does not make any reference to the change introduced in the law by the Code of 1908, and proceeds upon the assumption that under the Civil Procedure Code ' an implied warranty of some saleable interest when the right, title and interest of a judgment-debtor is put up for sale, is implied and the purchaser's right based thereon to a return under certain conditions of the purchase-money which has been received by the judgment-creditor is recognised ". This assumption is not warranted by any provision of the Code, and it has been expressly negatived by the Privy Council in *Dorab Ally Khan's* case (2). It appears that the action, which led to the appeal in

(1) (1910) I. L. R. 35 Bom. 29. (2) (1878) I. L. R. 3 Cal. 806 (P. C.).

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which the judgment was delivered by the Bombay High Court, was brought before the enforcement of the new Civil Procedure Code, and the conclusion could therefore be supported, not upon the grounds stated in the judgment, but upon the interpretation which had been placed upon section 315 of the old Code.

The Madras High Court as well as the Allahabad High Court have adopted the rule that a suit for a refund of the purchase-money does not lie under the present Code, *vide*, *Triumalaisami Naidu* v. *Subramanian Chettiar* (1), *Nannu Lal and others* v. *Bhagwan Das* (2) and *Ram Sarup* v. *Dalpat Rai* (3). A Division Bench of the Calcutta High Court has, however, affirmed in *Prasanna Kumar Bhattacharjee* v. *Ibrahim Mirza and others* (4) the view taken by the Bombay High Court; but here again the learned Judges did not notice the change effected in the law by the new Code, which was examined by another Division Bench of the same Court in a later judgment in *Makar Ali* v. *Sarfaddin and others* (5). The decision in Makar Ali's case, however, proceeded upon the law as it obtained under the old Code, and it was not considered necessary to express any definite opinion upon the question as to how far that law had been altered by the Code of 1908.

On behalf of the plaintiff reliance has also been placed upon a judgment of a Division Bench of this Court in *Asad Ullah Khan* v. *Karam Chand and Wadaya Ram* (6) which decides that an auction-purchaser who had paid the full price can bring a suit to recover that money on being dispossessed of the property by a successful claimant who had lodged an unsuccessful objection under Order XXI, rule 58 of

(1) (1916) I. L. R. 40 Mad. 1009.
(2) (1916) I. L. R. 39 All. 114.
(3) (1920) I. L. R. 43 All. 60.
(4) (1917) 36 Cal. L. J. 205.
(5) (1922) 36 Cal. L. J. 132.
(6) (1923) I. L. R. 4 Lah. 354.

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the Code of Civil Procedure and subsequently brought a suit and established his right to the property. The facts of this case were peculiar in so far as the auction-purchaser had no opportunity whatever to make an application to set aside the sale, because the claim made by the objector had been negatived by the Court executing the decree, and any application which the purchaser might have made after the objector had established his title by a regular suit would have been dismissed on the ground of limitation. The learned Judges preferred to follow the judgment in *Prasanna Kumar Bhattacharjee* v. *Ibrahim Mirza and others* (1), but it appears that their attention was not invited to the later judgment in *Makar Ali* v. *Sarfaddin and other* (2) or to the judgment of the Madras High Court in *Triumalaisami Naidu* v. *Subramanian Chettiar* (3). The purchaser was in equity entitled to recover his money, but we do not think that the law gave him any right to bring a suit for that purpose.

That there is no warranty of title in respect of a Court sale can no longer be disputed, and it is also clear that apart from statute, there is no principle of law which would allow an auction-purchaser to maintain a suit for the recovery of the purchase-money even when it is found that the judgment-debtor had no saleable interest at all in the property sold. The statute, however, allows the purchaser to recover his purchase-money provided that he can show that the judgment-debtor had no saleable interest and the Court sets aside the sale on that ground. The right of the purchaser being the creation of the statute, the remedy to enforce that right must be confined to that prescribed by the statute. Now, as pointed out above, it was decided upon the language of section 315 of the

(1) (1917) 36 Cal. L. J. 205. (2) (1922) 36 Cal. L. J. 132.
(3) (1916) I. L. R. 40 Mad. 1009.

old Code that the purchaser could proceed, not only by an application to the Court executing the decree, but also by a regular suit for a refund of the purchase-money. It is unnecessary to consider the correctness of the interpretation placed upon section 315, because it is manifest that Order XXI, rule 93 of the new Code is substantially different from the section which it has replaced, and that under this rule the only remedy available to a purchaser, after the sale in his favour has been set aside, is to obtain an order from the Court executing the decree that the purchase-money be refunded to him. Neither this rule nor any other provision of the Code confers upon him the right to bring an action to recover the money.

Holding as we do that the suit brought by the plaintiff cannot be maintained, we dismiss the appeal, but in the circumstances we direct the parties to bear their own costs in this Court.

A. N. C.

Appeal dismissed.