

accepting both appeals, set aside the decrees of the Court below and decree both suits with costs throughout.

P. S.

Appeals accepted.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

AZIZ-UL-RAHMAN (PLAINTIFF) Appellant

versus

FAZAL-UL-RAHMAN AND OTHERS (DEFENDANTS)

Respondents.

Civil Appeal No.902 of 1932.

Execution of Decree — One of the joint decree-holders purchasing in his own name property put up to sale — other decree-holder — whether entitled to a share in the purchase — Civil Procedure Code, Act V of 1908, section 66 — whether applicable.

Held, that where one of two joint decree-holders purchases a property of the judgment-debtor at a Court sale held in execution of the decree, the purchase money being payable out of the decretal amount, he must be held to have made the purchase for the benefit of both decree-holders, though made in his own name, and the other decree-holder is entitled to recover a share of the purchased property; section 66 of the Civil Procedure Code has no application to such a case.

Lal Singh v. Mst. Chotey Beti (1), *Ganga Sahai v. Kesri* (2), and *Khud Chand v. Todar Mal* (3), followed.

First Appeal from the decree of Lala Chiranjiv Lal, Subordinate Judge, 1st Class, Delhi, dated 8th March, 1932, dismissing the plaintiff's suit.

(1) 1933 A. I. R. (All.) 855. (2) (1915) I. L. R. 37 All. 545 (P. C.).

(3) 1924 A. I. R. (All.) 813.

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S. D. KITCHLEW and NIAZ ALI, for Appellant.

SHUJA-UD-DIN, for *Mst.* RAFIQ-UL-NISA, Respondent.

MOHAMMAD AMIN KHAN, for *Mst.* ANWAR-UL-NISA, Respondent.

The judgment of the Court was delivered by—

ADDISON J.—*Sheikh* Aziz-ul-Rahman sued his brother, Zikar-ul-Rahman, for possession by partition of one-half of the suit property. During the pendency of the suit Zikar-ul-Rahman died and his legal representatives, who were a son, two daughters, two widows and his father, *Haji* Fazal-ul-Rahman, were brought on the record as his representatives. It was added in the plaint that if the plaintiff was not entitled to a one-half share in the suit property, a decree should in any case be given to him with respect to a 6/16th share. The suit has been dismissed and the plaintiff has appealed.

The two brothers, Aziz-ul-Rahman and Zikar-ul-Rahman, were mortgagees of the property in suit. The mortgagor was Mohammad Ibrahim. The mortgage consideration was Rs.4,000 of which Rs.2,500 were contributed by Zikar-ul-Rahman and Rs.1,500 by Aziz-ul-Rahman. They sued on this mortgage on the 3rd February, 1921, and obtained the usual preliminary decree for Rs.7,820, on the 18th April, 1921. The two brothers executed a joint power of attorney in favour of *Chaudhri* Narain Singh, *Vakil*. This is dated the 7th November, 1921. The money was not paid under the preliminary decree and on the 7th November, 1921, the two brothers (decree-holders) applied through *Chaudhri* Narain Singh for a final decree. This was granted on the 22nd November, 1921.

On the 28th November, 1921, the two brothers jointly presented an application for execution of their decree by sale of the mortgaged property. The application is signed by both brothers and by their counsel Narain Singh. The auction of the property was delayed, because of a suit instituted by the Mian Jan with respect to a portion of the mortgaged property. On the 29th November, 1923, the two brothers put in another application for execution by sale of the mortgaged property. On the 23rd January, 1924, they put in another joint application to the Judge which is signed by both of them. In this they asked for permission to bid at the auction sale which was to take place shortly afterwards and this was granted. The whole property was not sold at this first auction sale on account of the dispute mentioned, but 13/27ths of one lot and 16/27ths of the other lot were put up to sale on the 17th April, 1924. This sale was sanctioned on the 20th May, 1924. The sale certificate was given by the Court on the 16th day of October, 1924, and is to the effect that both brothers were declared the purchasers. This sale certificate is signed by the Judge. Below his signature there is a note initialled by some person, who is not the Judge, to the effect that this sale had been concluded in the name of *Sheikh* Zikar-ul-Rahman only.

It is obvious that this unauthorised note can have no effect on the sale certificate which is clearly to the effect that both brothers were the purchasers. Besides, their application was joint, they jointly applied for permission to bid at the auction, Aziz-ul-Rahman started the bidding, but towards the end of the bidding, he ceased to bid and his brother, Zikar-ul-Rahman, who did not bid to start with, continued the bidding. It must be held that though

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the last bid was in his name, the bid was on behalf of the two brothers as clearly set out in the sale certificate. Nothing was paid into Court. The property was knocked down very cheaply, namely, for a sum of Rs.950 and there is no doubt that this is the real cause of the dispute between the two brothers. The trial Court has erred in stating that this certificate is in the name of Zikar-ul-Rahman alone. If he had taken some care and read the certificate, he would have seen that it is in the name of the two brothers. With respect to this portion of the property, there can be no question that the suit must be decreed, not of course, with respect to one-half, but with respect to 6/16ths, the share of the mortgage amount to which the plaintiff was entitled.

Probably because of the cheap price paid for the first lot, Zikar-ul-Rahman, who was himself a Pleader, applied on the 30th October, 1924, for the sale of the remaining 14/27ths share of the first lot and 11/27ths share of the second lot of the property. By that time the dispute had been settled and the sale had become possible. This application for execution is signed by Zikar-ul-Rahman alone. But he clearly showed that the decree was in favour of himself and his brother and that Rs.950 had been realized towards it by means of the first auction sale. No order was passed by the Court under Order 21, rule 15, Civil Procedure Code, but this does not seem to be an important matter, for under sub-clause (1) of the rule where a decree has been passed jointly in favour of two persons, one may apply for the execution of the decree for the benefit of the two, but he cannot apply for execution of the decree for the benefit of himself. Under sub-rule (2) of the same rule, the Court may take steps to safeguard the interests of the absent decree-holder, but it need

not do so. It follows that the application made by Zikar-ul-Rahman must be held to have been on behalf of the two brothers.

No notice was issued to the other decree-holder who was not in Delhi when the auction took place. Zikar-ul-Rahman, under the same sanction granted originally jointly to the two brothers to bid, himself bid for the property and obtained it for Rs.975. The certificate of the Court was this time given in the name of Zikar-ul-Rahman alone. It is dated the 24th March, 1925. Nothing was paid into Court by Zikar-ul-Rahman, the decretal amount being merely reduced by the sum bid.

It was held by a Division Bench in *Lal Singh v. Mst. Chotey Beti* (1) that in the absence of anything definite to show the contrary, the purchase made by a joint decree-holder, though in his own name, would undoubtedly be in favour of all the persons interested in the joint fund which had been utilized in the acquisition of the property. All these persons would be beneficially interested in the purchase and would be entitled to recover a share of the properties purchased at auction. To such a case section 66 of the Civil Procedure Code would not apply. That also was a suit arising out of a mortgage. In it only one of the mortgagees sued and made the other mortgagee a defendant. Even then it was held that the purchase by the sole decree-holder was on behalf of both mortgagees. This is a case which goes much further than the present, because the two mortgagees were both plaintiffs in the present case and were shown as the decree-holders even in the second application made by Zikar-ul-Rahman for auction. It seems perfectly

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clear that what he did must be held to have been done for both.

Their Lordships of the Privy Council held in *Ganga Sahai v. Kesri* (1) that in a case like the present, the decree-holder who did not bid would be entitled to a share of the property purchased by the decree-holder who did so. The only distinction between that case and the present is that the decree-holder who took out execution did so subject to the rights of the heirs and representatives of the other decree-holder. In view of the wording of Order 21, rule 15, Civil Procedure Code, this does not seem to make any difference. The application is in law an application on behalf of all, though the Court may protect the interests of the absent decree-holder by insisting upon security from the decree-holder who takes out execution or in some other manner. Another case of the same nature is *Khub Chand v. Todar Mal* (2). Following these decisions we hold that even in respect to the second sale the plaintiff is entitled to his 6/16th share.

There was a dispute between the parties with respect to the suit property. It was contended by Zikar-ul-Rahman that he had privately purchased a portion of what was claimed in the suit by his brother, the plaintiff. This matter was settled before the trial Judge on the 8th April, 1931, when the counsel for the plaintiff stated that the portion marked A. B. C. D. and enclosed in red pencil on the plan, Ex. D.W.10/4, was the exclusive property of the heirs of the deceased *Sheikh* Zikar-ul-Rahman and that he agreed that this was purchased by the deceased and should be separated from the present partition suit. The portion A. B. C. D., therefore, must be excluded.

(1) (1915) I. L. R. 37 All. 545 (P. C.). (2) 1924 A. I. R. (All.) 813.

There was some dispute before the trial Judge as to who spent money on repairs and some improvements to the property. This question was not raised before us by counsel appearing for the respondents. As early as the 20th July, 1925, that is, four months after the second sale certificate, Aziz-ul-Rahman approached his brother for division of the property and the present suit was instituted quite early, namely, on the 9th March, 1926. Any improvements, therefore, effected by Zikar-ul-Rahman were at his own risk. The evidence on the point is also not convincing. We see no reason, therefore, to make any allowance for improvements.

In the result we accept the appeal and grant the plaintiff a preliminary decree for possession by partition of a $\frac{6}{16}$ ths share in the property in suit, minus the portion A. B. C. D. already referred to. The case will now go back to the trial Court for the necessary proceedings in connection with the final decree. As neither party has succeeded to the full extent claimed, we give the plaintiff $\frac{2}{3}$ rds of his costs in the trial Court only. These costs should be adjusted at the time of the final partition.

A. N. C.

Appeal accepted;
Case remanded.

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