

a longer route which offered far more opportunity for the loss to occur, they were bound to give notice to the consignor so as to give him an opportunity of deciding whether he should sign the risk note in Form B or not. The evidence also shows that the route via Dhond and Manmad would be the usual route for goods coming from Southern India via Raichur, and that as a matter of fact, the charges were recovered from the plaintiff as if the goods had travelled via Dhond and Manmad. It seems to us, therefore, that the Company by carrying the goods via Kalyan went outside the terms of the contract and could no longer rely on the protection afforded by the risk note so as to be absolved from liability for the loss which occurred. Therefore the decree dismissing the suit must be set aside and there must be a decree for the plaintiff with costs throughout.

*Rule made absolute.*

J. G. R.

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## APPELLATE CIVIL.

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*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.*

BALVANT RAGHUNATH (ORIGINAL PLAINTIFF), APPELLANT *v.* BALA VALAD MALU AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS<sup>a</sup>.

*Civil Procedure Code (Act V of 1908), Order XXI, Rules 91, 93—Civil Procedure Code (Act XIV of 1882), section 315—Execution of decree—Auction sale—Setting aside of sale—Refund of purchase money.*

Where a person purchases property at a Court-sale but does not succeed in obtaining possession thereof he must get the sale set aside under Order XXI, Rule 91 of the Civil Procedure Code, before he can obtain the right to ask for a refund of the purchase money.

<sup>a</sup> Second Appeal No. 392 of 1921.

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*Nannu Lal v. Bhagwan Das*<sup>(1)</sup> and *Parvathi Ammal v. Govindasami Pillai*<sup>(2)</sup>, followed.

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*Rustomji Ardeshir v. Vinayak Gangadhar*<sup>(3)</sup>, considered.

SECOND appeal from the decision of C. V. Vernon, District Judge of Ahmednagar, reversing the decree passed by B. G. Phatak, Subordinate Judge at Nevasa.

In Suit No. 696 of 1910, defendant No. 4 obtained a decree on a mortgage against defendants Nos. 5 and 6. The property in dispute was sold in execution of the decree at a Court-sale to the plaintiff in 1917; and the certificate of sale was issued in due course.

Defendants Nos. 1, 2 and 3, who claimed to be in possession of the property in their own right, obstructed the plaintiff in taking possession of the property.

To remove the obstruction, the plaintiff filed a suit in the Mamlatdar's Court; but the suit was unsuccessful.

The plaintiff filed the present suit in September 1917 to recover possession of the property from defendants.

The trial Court held it proved that defendants Nos. 1 and 2 were in possession of the property in their own right for upwards of twelve years. It therefore dismissed the suit against defendants Nos. 1 and 2. At the same time, the Court passed a decree against defendant No. 4 for a refund of the purchase money to the plaintiff; and against defendants Nos. 5 and 6 for expenses of the sale.

On appeal, the District Judge was of opinion that the plaintiff could not maintain a suit against defendants Nos. 4, 5 and 6 in absence of allegation of fraud. The suit was accordingly dismissed *in toto*.

The plaintiff appealed to the High Court.

<sup>(1)</sup> (1916) 39 All. 114.

<sup>(2)</sup> (1915) 39 Mad. 803.

<sup>(3)</sup> (1910) 35 Bom. 29.

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*J. G. Rele*, for the appellant:—I submit that though the claim for possession of property cannot stand on the finding recorded by the lower Court, the alternative claim for the return of the purchase money will lie against the judgment-creditor (defendant No. 4). In execution of a decree when property is sold, the judgment-creditor guarantees that the judgment-debtor has some saleable interest in the property sold (Order XXI, Rule 91) and when it is subsequently found that the judgment-debtor had no interest in the property, the auction-purchaser can, on the strength of the guarantee, sue to recover the purchase money. This was the view taken by this Court in *Rustomji Ardeshir v. Vinayak Gangadhar*<sup>(1)</sup>. This decision was given after the new Act came into force and it is observed therein "there can be no objection to treating the relations of the parties, namely the judgment-creditor and the Court-sale purchaser, as relations in the nature of contract." See also *Mahomed Kala Mea v. Harperink*<sup>(2)</sup>.

It is no doubt true that by the change in the wording of Rule 93 of Order XXI, which corresponds with section 315 of the old Code, the law as to the right to recover purchase money is altered. Rule 93 makes it a condition precedent to the recovery of purchase money, that the sale is to be set aside and this is the interpretation put upon the section in the recent decisions of the Allahabad and Madras High Courts in *Nannu Lal v. Bhagwan Das*<sup>(3)</sup> and *Parvathi Ammal v. Govindasami Pillai*<sup>(4)</sup>. I, however, submit, that the right of action to obtain a refund consequent on the want of saleable interest in the judgment-debtor is a right inhering in a purchaser and his cause of action arises out of the misrepresentation made by the creditor that saleable interest continues though in fact there was none. If

<sup>(1)</sup> (1910) 35 Bom. 29.<sup>(3)</sup> (1916) 39 All. 114.<sup>(2)</sup> (1908) L. R. 36 L. A. 32.<sup>(4)</sup> (1915) 39 Mad. 803.

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the purchaser is not allowed to exercise this right, it would lead to great hardship in cases where it is found after the confirmation of the sale that there was no saleable interest. The purchaser would not get the property and would also lose the purchase money.

*A. G. Desai*, for respondent No. 4 not called upon.

MACLEOD, C. J.—The plaintiff brought this suit to recover possession of the suit land from the first three defendants, or, in the alternative, to recover Rs. 417-9-0 from the 4th defendant. The 4th defendant had obtained a mortgage decree on the 15th August 1913 in Suit No. 696 of 1910 against defendants Nos. 5 and 6, Sakharam and Tukaram. In the execution of that decree, the suit land was sold by auction on the 3rd March 1917. The plaintiff purchased it for Rs. 401, and his sale was confirmed on the 23rd May 1917. He says that he got possession of the land unobstructed, but the defendants allege that only symbolical possession was obtained and the plaintiff was never in actual possession or Vahivat of the land. On the 28th August 1917, defendants Nos. 1 and 2 asserted their right to be in possession of the land, whereupon the plaintiff filed Suit No. 28 of 1917 in the Mamlatdar's Court which he lost. So he had to bring this suit.

In the trial Court it was found that defendants Nos. 1 to 3 had been in possession as owners for more than twelve years and therefore the plaintiff could not succeed as against them. The learned Judge passed a decree for Rs. 407-6-0 and costs against the 4th defendant relying on the decision in *Rustomji Ardeshir v. Vinayak Gangadhar*<sup>(1)</sup>.

In appeal this decision was reversed by the District Judge who considered that the rule laid down in

<sup>(1)</sup> (1910) 35 Bom. 29.

*Rustomji Ardeshir v. Vinayak Gangadhar*<sup>(1)</sup> had no application to a sale in pursuance of a mortgage decree under Order XXXIV, that there was no allegation of fraud, and that, therefore, there was no basis for the claim to recover the purchase money.

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Now under Order XXI, Rule 91, an auction-purchaser at a Court-sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold, and the period of limitation for such application is thirty days. If the order is made to set aside the sale, then the purchaser under Rule 93 is 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. The corresponding section in the Code of 1882 to Order XXI, Rule 93 was section 315 which directed :—

“When a sale of immoveable property is set aside under section 310A, 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.”

It will, therefore, be noticed that a considerable change has been made in the law by the Code of 1908, for the statutory right to file a suit for recovery of the purchase money has been taken away. If it is found that the judgment-debtor had no saleable interest when the property was sold, the purchase money cannot be recovered until or unless the sale is set aside. That is the construction placed on Order XXI, Rules 91 and 93 by the decision of the Allahabad High Court in *Nannu Lal v. Bhagwan Das*<sup>(2)</sup>. The learned Judges remarked at page 119 : “It is only necessary to point out that there is a marked difference in the

(1) (1910) 35 Bom. 29.

(2) (1916) 39 All. 114.

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terms of the present Code of Civil Procedure and the Civil Procedure Code of 1882. Section 315 of the latter Act provided that the purchaser might get back the purchase money when a sale had been set aside under sections 310 (a), 312 or 313, or when it was found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser was for that reason deprived of it. We have already pointed out that, under the provisions of the present Code, it is only when the sale has been set aside that the purchase money can be returned... 'As regards sales under a decree of a Court, there is no warranty of title either by the decree-holder or by the Court'. In the case of *Dorab Ally Khan v. Abdool Azeem*<sup>(1)</sup>, their Lordships remarked: 'Now it is, of course, perfectly clear that when the property has been sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the sheriff or the judgment-creditor.'

The same point was dealt with in *Parvathi Ammal v. Govindasami Pillai*<sup>(2)</sup>. In that case the Court-sale was set aside on account of irregularities in its conduct perpetrated by the decree-holder. The purchaser thereupon filed a suit for a return of the poundage fees not returned to him and interest on the purchase money paid by him. It was held that a suit was maintainable for the recovery of the same. The argument for the appellant was that the plaintiff should have sought redress in execution and that a separate suit did not lie. Their Lordships said:—

"The present Code contains no provision regarding the right of the purchaser to obtain a refund of his purchase money without applying to set aside the sale when it is subsequently found that the judgment-debtor had no saleable interest in the property. It may be as suggested by Mr. Ramachandra Ayyar

(1) (1878) L. R. 5 I. A. 116.

(2) (1915) 39 Mad. 803 at p. 805.

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for the respondent that unless the purchaser seeks the aid of the Court to set aside the sale, he has no remedy against the decree-holder. It was laid down by the Judicial Committee in *Dorab Ally Khan v. Abdool Azeez*<sup>(1)</sup> that there was no warranty of title in Court-sales : see also *Sundara Gopalan v. Venkatavarada Ayyangar*<sup>(2)</sup>. The right of action to obtain a refund consequent on the want of saleable interest in the judgment-debtor is not a right inhering in a purchaser, but is the creature of a statute, and the right thus conferred can only be exercised within the limitations prescribed. Consequently without getting the sale set aside through Court, the purchaser has no right of action."

The case relied upon by the appellant in *Rustomji Ardeshir v. Vinayak Gangadhar*<sup>(3)</sup>, was a case under the Code of 1882 being Second Appeal No. 472 of 1909. His Lordship the Chief Justice said :—

"We think, however, that the right of the plaintiff to maintain a suit is made clear by the provisions of the Civil Procedure Code in the manner indicated in *Sundara Gopalan v. Venkatavarada Ayyangar*<sup>(2)</sup>. 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 recognized."

I doubt very much whether there was any necessity to base the right given by the Legislature under the old Code of 1882 to a purchaser to file a suit to recover his purchase money on a warranty. But for the purpose of this case we are bound by the provisions of the Code of 1908, and it seems to me we should follow the cases *Nannu Lal v. Bhagwan Das*<sup>(4)</sup> and *Parvathi Ammal v. Govindasami Pillai*<sup>(5)</sup>, which decide that an auction-purchaser, at a Court-sale, should he get nothing from his purchase, must get the sale set aside under Rule 91 before he can obtain the right to ask for a refund of the purchase money. He can undoubtedly maintain a suit against the judgment-debtor on any ground which

<sup>(1)</sup> (1878) L. R. 5 I. A. 116.

<sup>(3)</sup> (1910) 35 Bom. 29 at p. 33.

<sup>(2)</sup> (1893) 17 Mad. 228.

<sup>(4)</sup> (1916) 39 All. 114.

<sup>(5)</sup> (1915) 39 Mad. 803.

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is open to him in law such as fraud or misrepresentation ; but such a claim would depend on different evidence, and would be entirely of a different character to the present suit. No fraud or misrepresentation was alleged in the plaint, and the only ground on which the plaintiff sought relief was that after he purchased the property he discovered that other persons were entitled to it. Therefore the decision of the District Judge is right and the appeal must be dismissed with costs.

COYAJEE, J. :—I agree.

*Appeal dismissed.*

R. R.

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## APPELLATE CIVIL.

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*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.*

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January 12.

ANNA NARAYAN PAVGI (ORIGINAL PLAINTIFF), APPELLANT v. THE MADHYAMA STHITITILA PARASPARA SAIKARI MANDALI (ORIGINAL DEFENDANTS), RESPONDENTS<sup>o</sup>.

*Court Fees Act (VII of 1870), Schedule I, Article 1, Schedule II, Article 17—Memorandum of appeal—Court-fee stamp—Suit on promissory note—Decree against one defendant—Appeal for a decree against remaining defendants—Valuation of claim in appeal.*

In a suit to recover the amount due on promissory notes from several defendants, the plaintiff obtained a decree against one of them. The plaintiff having appealed to obtain a decree against the remaining defendants, a question arose as to the valuation of the claim in appeal for purposes of Court-fee:—

*Held*, that the claim in the appeal should be valued at the amount for which the remaining defendants are sought to be made liable.

*Ramasami v. Subbusami*<sup>(1)</sup>, followed.

<sup>o</sup> Second Appeal No. 694 of 1920.

(1) (1890) 13 Mad. 508.