

*Before Mr. Justice Kemp and Mr. Justice Glover.*

BISSESWAR PANDAY (ONE OF THE DEFENDANTS) v. BHAGWAN  
DAS (PLAINTIFF)\*

1869  
July 16.

*Suit for Refund of Purchase-money paid for Property bought in Auction-Sale  
in Execution of a Decree—Act VIII. of 1859, ss. 258 & 269.*

The plaintiff purchased at an auction-sale in execution of a decree, the right, title, and interest of a judgment-debtor in certain property. The Sale was confirmed on 30th November 1866. On proceeding to take possession he was opposed by the defendant, who asserted that he was in possession of the property as his own. In a suit under section 258, Act VIII, of 1859, for a refund of the purchase-money, the sale still remaining uncanceled, *held*, the suit must be dismissed; that section 258 of Act VIII. of 1859 only applied to cases where the auction-sale had been cancelled; that the proper course for the plaintiff to have pursued was to have brought a suit under section 269 of Act VIII. of 1859, for a declaration of the judgment debtor's right, title, and interest in the property.

Baboo *Kali Krishna Sen* for appellant.

Mr. *R. T. Allan* and Baboo *Bhowani Charan Dutt* for respondent.

THE facts of the case and points urged in appeal sufficiently appear in the judgment of the Court, which was delivered by

GLOVER, J.—This was a suit by the purchaser in execution of a decree of the rights and interests of Mussamut Sheoraj Kunwar, to recover from the decree-holder the amount of the purchase-money paid to him, on the ground that the party whose rights and interests the plaintiff purchased has been found in reality to have no rights, and that therefore he, the plaintiff, has got nothing by his purchase, and is entitled to receive back the purchase-money. It appears that after the sale was confirmed, which took place on the 30th November 1866, the plaintiff went to take possession of his purchase, and was then obstructed by one Deonarayan, who claimed to hold the land as his own pro-

\* Special Appeal, No. 1071 of 1869, from a decree of the Subordinate Judge of Sarun, dated the 17th February 1869, reversing a decree of the Moonsif of that district, dated the 3rd September 1868.

1869

BISSE-WAR  
PANDAY  
v.  
BHAGWAN  
LAL.

perty ; on this, the purchaser filed a complaint before the Civil Court under section 269 of the Code of Civil Procedure, claiming its assistance to get possession of his purchased property. The Sudder Ameen called upon the party in possession, and as between him and the purchaser found that as Deonarayan was in possession of the disputed land, and had been so for a long time, it was not proper to eject him on the petition of the auction-purchaser ; he added however that his decision confirming Deonarayan in possession would not be a proof in any subsequent suit that might be brought of that party's right and title to retain possession.

The Court of first instance considered that the plaintiff was not entitled to get back his purchase-money ; that he had bought with his eyes open the right, title, and interest of Mussamut Sheoraj Kunwar ; and that if that right, title, and interest turned out to be nothing, he had only himself to blame. The Principal Sudder Ameen, however, considered that the plaintiff was entitled to get back his money from the decree-holder, on the ground that the decree-holder had included what was the right of other parties in the schedule of properties said to be his judgment-debtor's, and that the plaintiff had no opportunity and no means of detecting this fraudulent entry, and that therefore the decree-holder ought to refund the purchase-money. It appears to us that the decision of the Principal Sudder Ameen was wrong under section 269, under which section the plaintiff applied to the Sudder Ameen. The Court had power to enquire into the matter of the complaint, and pass "such order as was proper under the circumstances of the case ;" now the Sudder Ameen taking all these circumstances into consideration refused to give the purchaser possession of the land, on the ground that the objector had been for a long time in possession of it : whether this order was a correct order or not, and whether the Sudder Ameen ought not to have gone further and looked also into the objector's right to retain possession, it is not for us to inquire. The order whether right or wrong was a final one, and was not open to appeal ; but the purchaser was not left without a remedy ; he might, if he chose, have brought a suit against the party obstructing his entrance into the purchased property to establish the

title of the judgment-debtor to that property; and as he did not choose to do so, it appears to us that he has shut himself out from any other remedy. The order of the Sudder Ameen, as we already observed, decides nothing as to the right and title of the judgment-debtor in this particular property; so that for all that appears on the record it may be that there is some right still existing to that property in the judgment-debtor, and that the purchaser might, if he had chosen to institute a suit under section 269, have established that right, and have got possession of what he had purchased. Instead of taking that course he has sued to recover his purchase-money. Now there is no section of the law that we know of that enables him to recover it; section 258, which has been quoted in support of the plaintiff's contention, refers, we are inclined to think, solely to causes in which a sale of immoveable property has been reversed on the ground of irregularity, but even if this section were applicable to all sales that have been reversed, whether for irregularity or any other cause, it is clear that it cannot apply to the present case, inasmuch as here the sale has not been reversed; it remains uncanceled to this day.

We have been referred to certain cases of *Rajib Lochan v. Bimalamani Dasi* (1) and *Brojendar Roy Chowdhry v. Jugurnath Roy* (2); but these decisions refer to causes in which sales have been set aside, and therefore have nothing in common with the present case. It seems to us therefore that as the plaintiff had by law a remedy, and did not choose to take advantage of that remedy, and as there is no special provision in the law (the sale remaining uncanceled,) by which he can recover his purchase-money, his suit must necessarily fail. We therefore reverse the decision of the Appellate Court, and decree this appeal with costs.

(1) 2 B. L. R., A. C., 82

(2) 6 W. R., 117.

1869

---

 BISSESWAR  
 PANDAY  
 v.  
 BHAGWAN  
 DAS.