CIVIL RULE.

Before Mr. Justice Tottenham and Mr. Justice Trevelyan.

1891
January 27.

HAFEZ MAHOMED ALI KHAN AND ANOTHER (OBJECTORS), PETITIONERS, *v.* DAMODAR PRAMANICK (DECREE-HOLDER), OPPOSITE PARTY.*

Civil Procedure Code (Act XIV of 1882), s. 295: "Whenever assets are realized," meaning of—Sale in execution of a decree—Deposit of twenty-five per cent. of purchase-money—Assets.

The words "whenever assets are realized" in section 295 of the Code of Civil Procedure really mean "whenever assets are so realized as to be available for distribution among the decree-holders."

The twenty-five per cent. of the purchase-money deposited at a sale in execution of a decree is not "assets" within the meaning of section 295, but a mere deposit, and therefore not immediately available for payment to the decree-holder.

Vishvánath Máhesvar v. *Virchand Pándchand* (1) distinguished. *Jogendro Nath Sircar* v. *Gobind Chunder Addi* (2) distinguished and commented upon.

THE petitioners, Hafez Mahomed Ali Khan and Aysa Khanu, had each obtained several decrees against one Moulvie Abdul Hye: and in execution of two of these decrees certain properties belonging to Abdul Hye were sold on the 16th June 1890 in the Munsif's Court of Serajgunge: twenty-five per cent. of the purchase-money was deposited in Court on the day of sale, and the balance paid on the 1st July 1890. Damodar Paramanick (the opposite party), who had also obtained a decree against Abdul Hye, on the 23rd June 1890, applied for rateable distribution of the sale-proceeds. The petitioners objected to the application on several grounds, but especially on the ground that it was not in time. On the 23rd September 1890 the objections were all overruled by the Munsif, who held that the purchase-money had not been realized at the time the opposite party had put in his application, and that therefore it was in time. Accordingly, the Munsif passed an order under section 295 of the Code, allowing the opposite party a rateable distribution in the entire purchase-money.

* Civil Rule No. 1812 of 1890, against the order of Baboo Nalini Nath Mitra, Munsif of Serajgunge, dated the 23rd of September 1890.

(1) I. L. R., 6 Bom., 16. (2) I. L. R., 12 Calc., 252.

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Thereupon the petitioners moved the High Court and obtained a rule calling upon the opposite party to show cause why the order of the 23rd September should not be set aside.

On the rule coming up for argument,

Baboo *Srinath Das* and Baboo *Jogesh Chunder Roy* for the petitioners.

Baboo *Mohini Mohun Roy* and Baboo *Debendra Nath Banerjee* for the opposite party.

The Court (TOTTENHAM and TREVELYAN, JJ.) delivered the following judgments:—

TOTTENHAM, J.—This was a rule to show cause against an order passed by the Munsiff of Serajgunge allowing rateable distribution of the proceeds of a sale held in execution of decree to the opposite party under section 295 of the Code of Civil Procedure.

The petitioners, having obtained a decree against the judgment-debtors, caused certain properties to be sold in execution thereof. Twenty-five per cent. of the purchase-money was deposited at the time of the sale. Before the balance of the purchase-money was paid in, the opposite party, who had also obtained a decree against the same judgment-debtors, applied for rateable distribution of the proceeds; and the present petitioners objected to his being allowed to participate, upon the ground that he had not applied in time. The Court below held that the application of the opposite party was in time, inasmuch as it held that the purchase-money had not been realized at the time he put in his application, and it allowed him rateable distribution in respect of the whole of the purchase-money.

The rule was granted because the Bench before whom the motion was made had some doubt as to whether the opposite party was entitled to a share in the twenty-five per cent. of the purchase-money deposited before the petition for rateable distribution was filed. As to the balance of the purchase-money, the Judges, who granted the rule, had not much doubt that the opposite party was entitled to share in that; but the whole matter has been argued at the hearing of this rule.

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The pleader for the petitioners has asked us to read the first clause of section 295 as if the words "prior to realization" meant prior to the sale, and to hold that any petition for rateable distribution not filed before the sale took place would be too late. We do not think that we should be justified in construing the words of the section as suggested by the learned pleader. It is true that in a subsequent portion of the same section, which relates to a different state of circumstances, the words are, "rateably among the holders of decrees for money against the judgment-debtor, who have, prior to the sale of the said property, applied to the Court," &c. We were asked to hold that the words in the two parts of the same section, although different, mean precisely the same thing. We do not feel at liberty to hold that this is so. As regards, therefore, the three-fourths of the purchase-money paid in after the filing of the petition of the opposite party for rateable distribution, it is quite clear from the words of the section that he was entitled to participate in those assets.

The question still remains whether the opposite party was entitled to participate in the twenty-five per cent. of the purchase money paid in before his petition was filed.

Our attention has been called to the case of *Vishvánath Máhesvar* v. *Virchand Pánáchand* (1) decided in the Bombay High Court, in which it was held that a decree-holder, who had filed an application under section 295 after the sale had taken place, was not entitled to take a share in any of the sale-proceeds. In that case, however, the whole of the sale-proceeds had been realized before the application was made. The application was made before the sale was confirmed, and upon that ground the first Court in that case had allowed the second decree-holders to participate. The High Court held that he could not participate in any.

The question before us seems to depend in a great measure upon what is meant by the words in section 295: "Whenever assets are realized by sale or otherwise in execution of a decree."—If the deposit of twenty-five per cent. upon the date of sale is a realization of assets within the meaning of section 295, then no doubt the opposite party in the present case would not be entitled

(1) I. L. R., 6 Bom., 16.

to a share in it, his petition having been filed after it. The Bombay case already mentioned and a case decided in this Court, the case of *Jogendro Nath Sircar* v. *Gobind Chunder Addi* (1) were cited as showing that the deposit in question should be regarded as assets. The case of *Jogendro Nath Sircar* v. *Gobind Chunder Addi* did not raise the same point as that now before us; but incidentally the Judges expressed an opinion that the sale-proceeds might be paid away to the decree-holder before the sale was confirmed; and in that view it would appear that the Judges were of opinion that the purchase-money, or any part of it, as soon as paid into Court, became assets within the meaning of section 295. That, however, was not the particular point upon which that case turned; and, as I have already said, the Bombay case was different in this respect, that all the purchase-money had been paid in, at any rate, before the second decree-holders had applied for rateable distribution. We think that the words "whenever assets are realized" in section 295 really mean "whenever assets are so realized as to be available for distribution among the decree-holders." It appears to us clear upon the reading, not only of section 295, but also of the other sections of the Code, that the twenty-five per cent. deposited at the time of the sale is not immediately available for payment to the decree-holders, because it is merely a deposit; and by section 308 it is provided that should the purchaser not pay the balance within the time allowed, that deposit, after deduction of the expenses of the sale, shall be forfeited to Government. Until, therefore, the balance is paid in, and the sale confirmed, the deposit is not at the disposal of the decree-holder in any sense.

In this view, we hold that the lower Court was right in saying that inasmuch as the other decree-holders had filed their petitions before the purchase-money had been paid into Court, they were entitled to rateable distribution in respect of the whole sum.

We, however, note that by the last clause of section 295, if all the assets be paid to persons not entitled to receive the same, any person so entitled may sue and obtain a refund of the assets.

We think, therefore, there is no ground for interference by this Court under section 622. We accordingly discharge the rule with costs.

(1) I. L. R., 12 Calc., 252.

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TREVELYAN, J.—The only difficulty I have felt at any time during the argument of this case, arises from the decision of the Bombay High Court, *Vishvánath Máhesvar* v. *Virchand Pánáchand* (1), and the decision of this Court, *Jogendro Nath Sircar* v. *Gobind Chunder Addi* (2). Both these cases are, there is no doubt, authorities on the question argued before us, although the cases are not exactly the same, and the point argued is not exactly the same. If the point were the same, I feel it would be necessary for us to refer the matter to a Full Bench; but the point being somewhat different, it is not necessary to do so. It is unfortunate that our decision is to some extent inconsistent with the decision of this Court, although not so inconsistent as to justify a reference. I think that in the Bombay case there is the distinction which Mr. Justice Tottenham has pointed out, namely, in that case the whole purchase-money was paid; so that there was no question there under section 308. Section 308 seems to me to be the real difficulty in the way of the petitioners in this case. Although we may be inclined to hold, and although in another case I have held, that the "assets realized" within the meaning of section 295 mean assets available for distribution, it is unnecessary in this particular case to go quite so far. In the Bombay case section 308 did not apply. But in the Calcutta case, speaking with the greatest possible respect, it seems to me that the learned Judges, who decided that case, omitted to consider the effect of section 308, to which their attention does not seem to have been called, and which is not referred to in any portion of their judgment. As is frequently the case in the Law Reports, the absence of a report of the argument and of the cases cited inconveniences us in consideration of the decision, but we must take the decision as we find it. If the learned Judges had fully considered the effect of section 308, I cannot help thinking that they might have arrived at another conclusion. Be that as it may, the view I take is, that the effect of section 308 is to show that until, at any rate, the whole purchase-money is paid in, neither the decree-holder, nor any other attaching creditor, has any interest whatever in the twenty-five per cent. It is paid in as a mere deposit, and if the rest of the money

(1) I. L. R., 6 Bom., 16.

(2) I. L. R., 12 Calc., 252.

is not paid in within the time allowed, this one-fourth does not go back to the person who paid it, but is forfeited to Government. That section seems to me to conclude the case.

The rule is discharged with costs.

Rule discharged.

C. D. P.

CRIMINAL MOTION.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

IN THE MATTER OF THE PETITION OF J. WILSON.*

1891 *January* 5.

Sonthal Pergunnahs—European British subject—Jurisdiction of High Court to transfer—Grounds for transfer—Criminal Procedure Code (X of 1882), s. 526—Act XXXVII of 1855.

The Court of a Magistrate in the Sonthal Pergunnahs is, as regards the trial of an European British subject, subordinate to the High Court, and the High Court has power under s. 526 of the Criminal Procedure Code to direct the transfer of a case in which such subject is concerned.

The transfer of a case should be ordered when there are circumstances which may reasonably lead the petitioner to believe that the Magistrate has to some extent prejudged the case against him, and will in consequence be prejudiced in the trial.

THIS was an application for the removal of a case from the Court of Mr. Ainslie, Subdivisional Officer of Rajmehal, in the Sonthal Pergunnahs, to that of some other Magistrate. The applicant, a European British subject, was charged under s. 447 of the Indian Penal Code and with abetment of offences under ss. 352 and 426 of the same Code, alleged to have been committed by his co-accused. He alleged in his petition that the subdivisional officer was prejudiced in favour of the prosecutor, and had himself instigated the institution of these proceedings, and that he would in consequence be unable to obtain a fair trial in Mr. Ainslie's Court. The Magistrate denied the applicant's allegations and stated that

*Criminal Miscellaneous Case No. 34 of 1890, against the order passed by W. R. Bright, Esq., Officiating Deputy Commissioner of Sonthal Pergunnahs, dated the 23rd of September 1890, affirming the order passed by E. F. Ainslie, Esq., Subdivisional Officer of Rajmehal, dated the 8th of August 1890.