

CALCUTTA HIGH COURT

Bajnath Sahai

Vs

Moheep Narain Singh

(Tottenham and Banerjee, JJ.)

28.03.1889

JUDGMENT

Tottenham and Banerjee, JJ.

1. The first point should, we think, be decided in favour of the appellant. Section 293 of the Code of Civil Procedure enacts, amongst other things, that the deficiency of price happening on a re-sale shall be recoverable by the decree-holder from the defaulting purchaser under the rules contained in Chapter XIX for the execution of a decree for money. Questions like the one disposed of by the Court below in this case, must, therefore, be taken to be of the nature of questions arising between the decree-holder and the judgment-debtor relating to the execution of decrees, such as are contemplated by Clause (c) of Section 244. And as an appeal is allowed from the decision of any of these questions, there is no reason why an appeal should not lie against the decision of the Court below in this case, This view is in accordance with the decisions of this Court in the cases of *Sree Narain Hitter v. Mahtab Chund*¹ *Sooruj Buksh Singh v. Sree Kishen Doss*² *Joobraj Singh v. Gour Buksh*⁴ *Bisokha Moyee Chowdhrain v. Sonatun Doss*³ and with the Full Bench ruling of the Allahabad High Court in the case of *Ram Dial v. Ram Das*⁵, with reference to the corresponding provisions of Acts VIII of 1859 and XXIII of 1861. It is true that the point has been considered open to doubt in two later cases *Huree Ram v. Hur Per shad Singh*⁶ and *Ramdhani Sahai v. Rajram Kooer*⁷ Lut in both these cases the appeal was heard and dismissed upon other grounds: and we see no reason to dissent from the earlier rulings by which an appeal is expressly allowed.

2. The second contention raised by the respondent is, however, in our opinion, perfectly valid, and this appeal must, therefore, fail. We think the re-sale contemplated by Section 293 of the Code of Civil Procedure must be a sale of the same property that was first sold, and under the same description and any substantial difference of description at the sale and the re-sale in any of the matters required to be specified by Section 287 to enable intending purchasers to judge of the value of the property, should disentitle the dicree-holder to recover the deficiency of price under Section 293. No doubt it is quite possible that, between the two sales, the value of the property

may be changed by causes such as diluvion and the like, which are beyond the control of anybody; and, in such cases, it might fairly be urged that the decree-holder should not suffer for the purchaser's default. But in the first place that is not the case here. In this case the two encumbrances notified at the re-sale were in existence, either wholly or partially, at the time of the first sale; and one of them must have been known to the decree-holder since it was in his favour; and the other he was bound to enquire into, as the rules made by this Court under Section 287 of the Civil Procedure Code throw upon him the duty of ascertaining and notifying to the Court the encumbrances upon any property advertised for sale in execution of decree. In the second place, even if the difference of description were due to any such cause as is above referred to, although the decree-holder may, under certain circumstances, be entitled to recover damages from the defaulter, that must be by a regular suit and not by an application under Section 293. A claim to recover the deficiency of price by way of compensation would involve inquiry into difficult questions which must be decided before the proper amount of damages could be ascertained; and, the Legislature by leaving it to the officer holding the sale (who is generally a ministerial officer) to certify to the Court the amount that is to be recovered under 3. 293, has sufficiently indicated that cases involving questions like these were never intended to be covered by that section, and that the only cases to which that section was intended to apply, are cases where the same property is sold under the same description at both the two sales. In the present case, after the decree-holder has succeeded in misleading the defaulting purchaser to bid a high price, by withholding information as to encumbrances which it was his duty to notify, if he were allowed to recover the deficiency of price at there-sale, it would be allowing him to take advantage of his own neglect of duty. That would be so manifestly inequitable that we are unable to hold that the Legislature could have ever intended such a result.

3. As the appeal fails upon this ground, it is unnecessary to say anything upon the other two points raised by the respondent.

4. As regards one of the five properties (it is one of very small value), it was urged that the encumbrances were not notified at the re-sale, just as they had not been notified at the first sale, and that the appellant was consequently entitled to succeed in regard to that property in any case. But the decree-holder's petition, before the re-sale, stated that that was subject to the same encumbrance as the other four, and so, practically, there was no difference between the case of that property and that of the other four.

5. The result is that this appeal must be dismissed with costs.

Cases Referred.

13 W.R. 3

26 W.R. Mis. 126

316 W.R. 14

47 W.R. 110

5I.L.R. 1 Ail. 181
620 W.R. 397
7I.L.R. 7 Cal. 337