

(1929) 02 CAL CK 0038
In the Calcutta High Court

Gowal Das Sidany

APPELLANT

Vs

Luchmi Chand Jhawar

RESPONDENT

Date of Decision : 22-02-1929

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 86
Contract Act, 1872 — Section 78

Citation : AIR 1930 Cal 324

Hon'ble Judges : Lort-Williams, J; Lord Williams, J

Bench : Division Bench

Judgement

Lort-Williams, J.—In this case, the petitioner instituted a suit for the recovery of a sum of money due under a deed of charge and, obtained a decree, under which the property charged was put up for sale by the Registrar and one Khagendrahath Sen was declared the highest bidder and purchaser and paid Rs. 7,500 as deposit under the conditions-of sale. Subsequently, he failed to pay the balance of the purchase money. The petitioner now asks that the deposit of Rs. 7,500 be declared forfeited. He states that he decided to treat the contract as rescinded and does not, therefore, ask for an order against the purchaser to pay any deficiency arising on a resale.

2. My attention has been drawn to Order 21 Rule. 86, Civil P.C., which provides that in sales of immovable property by the Court, any deposit made u/s 84 may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to Government and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold. But Section 129 of the, Code provides that, notwithstanding anything in the Code, the High Court may make such rules not inconsistent with the Letters Patent to regulate its own procedure in the exercise of its original civil jurisdiction. Reading that rule and the section together, I am of opinion that the rule does not apply when a High Court has made rules regulating its own procedure in the exercise of its original civil jurisdiction which are not inconsistent with the Letters Patent. In coming to this conclusion, I am

not in any way disagreeing" with the judgment of Mookerjee Ag. C.J., in *Virjiban Dass Moolji v. Biseswarlal Hargovind* AIR 1921 Cal. 169. That case dealt with Rule 89 and it was held that that rule applied to sales under a mortgage decree on the original side of the High Court. The rules of the High Court did not provide for the matters contained in Rule 89 and, as the Code itself, except for specific sections, applied to all the Courts of British India, obviously Rule 89 applied. The position as to Rule 86 is different, because provision has been made in rules, which are not inconsistent with the Letters Patent, for the conduct of sales by the Registrar. Those rules are contained in Chap. 27, of the rules of this Court. Under those rules the mortgagee has the carriage of the proceedings relating to the sale which is regulated by conditions in writing, under which the purchaser must make a deposit of 25 per cent, of the purchase-money with the Registrar at the time of the sale. Rule 19 provides that the attorney of the party having the carriage of the proceedings shall be present at the sale, and under Rule 23, if the deposit, to which I have referred, is not made, the bid of the purchaser shall be rejected and the property again immediately put up for sale unless the party having the carriage of the proceedings decides that the bid shall be accepted and time allowed to the purchaser to pay the amount payable by him. Rule 37 specifically provides that, where a sale is set aside, owing to defect in title or other similar cause, the purchaser shall receive back his deposit. Under Rule 38, the purchaser may apply for leave to pay the balance of his purchase-money into Court i.e., to pay the difference between the amount of his deposit and the total amount of his bid.

3. Under Rule 39, any party interested may apply to compel the purchaser to pay his purchase-money and comply with the conditions of sale, and Rule 65 provides the form which must be used under this chapter. That form is contained in Appendix J, which sets out the conditions of sale. Condition 5 provides for the deposit of 25 per cent. Condition 8 provides for the payment of the purchase-money after deducting the amount paid as a deposit. Condition 13 provides that, where the purchaser makes default in paying the balance of his purchase-money, an order may be made by a Judge in Chambers for the resale of the property and for payment by the purchaser of the amount of the deficiency, if any, in the price which may be obtained upon such resale and all costs and expenses occasioned by such default. Presumably "deficiency" means the difference between the amount of the original bid and the amount paid on the resale. The condition is silent as to whether in calculating that deficiency credit for the amount of the deposit must be allowed.

4. Condition 14 provides that where such a resale is directed, if for want of bidders the property cannot be resold, the purchaser at the former sale shall pay the whole amount of his purchase-money into Court and where the property is resold and the price obtained at the resale is less than the purchase-money payable by the original purchaser he shall pay the amount of the deficiency and the costs occasioned by the default. Thus under the first part of condition 14, in the event of inability to resell the property, the purchaser must pay the whole of

the purchase-money without any allowance for the deposit which he has already made, but where there is a resale he shall pay only the amount of the deficiency. It will be seen that under these conditions there is no definite rule providing for forfeiture of the deposit and whether my decision on this matter be right or wrong I think it would be much better if a definite statement were made in the conditions of sale about what is to happen to the deposit in case of default by the original purchaser.

5. In sales by the Sheriff, which are dealt with in Chap. 25 of the rules, this question about the deposit is specifically provided for. Under Rule 7, the second condition is that a deposit of 25 per cent of the amount of the bid must be made. Under Condition 3 the balance of the purchase-money shall be paid within a certain time and, in default of payment within such time, the deposit, after defraying expenses of the sale, may be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may subsequently be sold and where the proceeds of the resale are less than the price bid by such defaulting purchaser the difference shall be leviable from him. It will be noted that the word used in the latter part of this condition is "difference" and not "deficiency," i.e., upon such resale the purchaser is liable for a sum equal to the difference between the price obtained on the resale and the price which he originally bid, thus disregarding altogether any question of the deposit or its forfeiture.

6. The conditions in a Registrar's sale, with regard to the deposit and resale, are conditions which are usually found in an ordinary vendor and purchaser contract for sale of land and, in my opinion, the ordinary rules of English Law which apply to such contracts must be applied in the present Case, and that they have been so applied in India is clear upon reference to the cases mentioned under the heading "Earnest" in the notes to Section 78, Contract Act, in Pollock and Mulla's Text Book (5th Edn., p. 454), and to the notes under "Return of Deposit" (and cases therein mentioned) to Section 18, Specific Relief Act, in the same book at p. 858, where the English and Indian Cases are discussed. Moreover, in the case of *Natesa Aiyar v. Appavu Padayachi* (1913) 38 Mad. 178, it was held, by a majority of the Court, that the law of India on this subject does not differ from the English Law.

7. Thus, to put it shortly, if the vendor, on default by the purchaser, chooses to treat the contract as rescinded, the deposit is forfeited. If, on the other hand, he chooses to treat the contract as subsisting, in order that he may proceed under the condition as to resale, then, in calculating deficiency which may arise thereunder, he must give credit for the amount of the deposit. A deposit paid under a contract of sale serves two purposes. If the sale is earned out, it goes against the purchase money, but primarily it is a security for the performance of the contract. Often it is expressly provided in the contract that, in the event of default, the deposit shall be forfeited, but such express provision is not, in my opinion, necessary and unless the contract read as a whole shows an intention to

exclude forfeiture, the vendor is entitled to retain it as forfeited. The position is the same if the deposit has been paid to a stake-holder or as in this case to the Registrar.

8. The authorities for this proposition are *Ex parte Parnell*, *In re Parnell* (1875) 10 Ch. 512; *Howe v. Smith* (1884) 27 Ch.D. 89; *Collins v. Stimson* (1883) 11 Q.B.D. 142; *Decree v. Bedborough* (1863) 33 L.J.Ch. 134; *Hall v. Burnell* (1911) 2 Ch. 551. If the vendor chooses to treat the contract as rescinded, he cannot, of course, take advantage of the condition which gives him a right to any deficiency arising on a resale, nor can he recover damages for breach of the contract, but he can retain the deposit as forfeited. If subsequently he resells the property, he does so as absolute owner and has no further recourse against the defaulting purchaser. The vendor can treat the contract as rescinded if the purchaser has expressly-repudiated it, or if there has been implied repudiation, such as failure to complete on the due date : *Howe v. Smith* (1884) 27 Ch.D. 89. If the vendor decides not to treat the contract as rescinded but to enforce it by resale and, by having recourse to the defaulting purchaser for any deficiency upon resale, then, in calculating that deficiency, he must give credit for the amount of the deposit : *Ockenden v. Henley* (1858) E.B. & E. 485; *Howe v. Smith* (1884) 27 Ch.D. 89; *Shuttleworth v. Clews* (1910) 1 Ch. 176; *Vellore Taluk Board v. Gopalasami Naidu* (1914) 38 Mad. 801. That being in my opinion the legal position as to the deposit in this case and in view of the fact that the mortgagee who had the carriage of the proceedings decided to treat the contract as rescinded, he is entitled to forfeit the deposit, and to take it in part payment of the mortgage debt. I make an order against the mortgagor for resale of the mortgaged properties. The mortgagee is entitled to the costs of this application to be paid by the purchaser.