

(1933) 07 AHC CK 0010
In the Allahabad High Court

Ramchand

APPELLANT

Vs

Sher Singh

RESPONDENT

Date of Decision : 17-07-1933

Acts Referred:

Citation : (1933) 07 AHC CK 0010

Hon'ble Judges : Niamatullah, J

Bench : Single Bench

Judgement

Niamatullah, J.—This is a plaintiff's appeal and has arisen out of a suit for recovery of Rs. 1,510 together with interest. Both the Courts below dismissed it. The plaintiff-appellant and the defendant-respondent obtained two separate simple money decrees against one Kunwar Balbir Singh. The respondent applied for execution of his decree by attachment of the villages, Jarkhi and Nagla Raiya, belonging to the judgment-debtor. An attachment was made on 6th May 1927. The appellant also applied for execution of his decree, and obtained attachment of one of the two aforesaid villages, namely, village Jar-khi. The appellant made an application on 3rd April 1928, to the Subordinate Judge of Agra, before whom the respondent had taken execution proceedings, that the sale proceeds be rateably applied in satisfaction of the two decrees. The Court granted the application. In the meantime the respondent's decree was transferred to the Collector for execution, as the villages sought to be sold were the judgment-debtor's ancestral property. The order of the Court allowing rateable distribution to the appellant was not communicated to the Collector. It does not appear from the record whether the respondent was aware of this order. Village Jarkhi, was sold by the Collector and purchased by the respondent himself" on 20th April 1923. He was allowed to set off the purchase money against the decretal amount then due to him. The respondent has since obtained the sale certificate and is in possession of village Jarkhi. The appellant instituted the suit, which has given rise to this appeal, on 19th April 1929, for the relief already referred to on the allegation that the defendant-respondent was liable to pay, in cash, the amount which would have fallen to the share of the appellant on a rateable distribution of

the purchase money being made.

2. The Court of first instance dismissed the suit by a judgment which, we consider to be too summary, having regard to the nature of the controversy between the parties. The only ground on which the judgment proceeds is that the plaintiff-appellate did not apply for execution of his decree and that all he did was to make an application for rateable distribution. No attempt has been made before us to support the decree appealed from on that ground. It is not disputed that village Jarkhi had been attached at the instance of the appellant. The lower appellate Court has mentioned the fact that the appellant applied for execution of his decree and that, in pursuance of his application, an attachment of village Jarkhi was made. It is clear from these facts that the appellant's claim was not liable to be thrown out on the short ground that he had never applied for execution of his decree. The lower appellate Court (the Additional Subordinate Judge of Agra) held, in appeal by the plaintiff-appellant, that:

the respondent purchased the property in good faith and he is not bound to pay any sum to plaintiff for rateable distribution nor has plaintiff obtained any lien on the property purchased by defendant.

3. No reference has been made to the relevant sections of the CPC or the case-law bearing on the point. In second appeal, before us the learned advocate for the appellant has relied on Section 73, Order 21, Rule 72, (Civil P.C.), read with Schedule 3, Rule 9, Civil P.C, and Rule 988(2), of the Manual of the Revenue Department, U.P., Vol. 1, (Rules framed by the Local Government for sale of ancestral property). Reference has also been made to a number of decided cases which will be presently considered. Section 73 provides:

Where assets are held by a Court and more persons than one have, before the receipt of such, assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons,

4. It would appear that the essential conditions for the application of the rule are: (1) that the decree-holder claiming rateable distribution should have applied for execution of his decree before the assets are received, and (2) that assets are held by the Court for satisfaction of the decree. That the plaintiff applied for execution of his decree before village Jarkhi was sold can admit of no doubt. We have already referred to that aspect of the case and no question has been raised before us in regard to that matter. The only important question which we are called upon to decide is whether, in the circumstances of this case, the Court should be deemed to have held assets belonging to the judgment-debtor within the meaning of Section 73, Civil P.C. It is argued that the respondent did not in fact, deposit the purchase money and that neither the Collector nor the Court which had transferred the decree to him for execution can be said to have had physical control over the purchase money. In this view, it is said no assets were

"held" by the Collector or the Court, as contemplated by Section 73, Civil P.C.

5. The question has been considered by almost all the High Courts both before and after the passing of the present Civil Procedure Code. Section 295 of Act 14 of 1882, which corresponds to Section 73 of the present Code, was somewhat differently worded. It provided that whenever assets are "realized" by sale or otherwise in execution of a decree and more persons than one have, prior to the "realization," applied to the Court by which such assets are held for satisfaction of decree for money against the same judgment-debtor and have not obtained satisfaction thereof, the assets after de-ducing the costs of the realization shall be divided rateably amongst all such persons. There was more room for contention under the old Code, that, unless money is actually deposited and is in the custody of the Court, a claim to rateable distribution should not be entertained u/s 295. Even under that section it was held in several cases that, where purchase money is set off against a decree, the transaction in substance is one of payment in and withdrawal from Court: see *Taponidi Hardanund Bharati v. Mathura Lal Bhagat* (1886) 12 Cal 499, and *Madden v. Chap-pant* (1886) 11 Mad 356. In Section 73 of the Code of 1908, the words "realized" and "realization" have not been used and rateable distribution is permissible where "assets are held by a Court." We think that Section 73, Civil P.C, of 1908, has been so worded as to include cases in which it is possible that the purchase money may not be actually deposited. Order 21, Rule 72, Civil P.C, which corresponds to Section 294 of the Code of 1882, has made the right of the decree-holder to have the purchase money set off against the decretal amount subject to the provisions of Section 73: a condition which did not appear in Section 294 of Act 14 of 1882. It is clear to us that the right of the decree-holder to have, and the power of the. Code to allow set off of the purchase money against the decretal amount where decree-holder himself is the auction-purchaser is subject to the right of any other decree-holder who may be entitled to rateable distribution u/s 73, Civil P.C.

6. Where a case of rateable distribution exists, the Court should not allow a set off except possibly to the extent of the purchaser's own share of rateable distribution. In our opinion, Order 21, Rule 72, and a similar provision in the rules framed by the Local Government for sale of ancestral property meant that the purchase money and the amount due on the decree can be set off against each other with due regard to the rights of another decree-holder who is entitled to rateable distribution. It has been held in a number of cases arising after the passing of the CPC of 1908 that the Court should be deemed to be holding the assets of the judgment-debtor where the purchase money is set off against the decretal amount see *Bindeshwari Narain Singh Vs. Raja Kirtyanand Singh Bahadur and Others*, and *Navaj Bhavdu Patil v. Totaram Govind Patil* AIR 1931 Bom. 252.

7. The learned advocate for the respondent contended that assuming the assets were held by the Collector, they were not, at any rate, held by the civil Court to

whom the appellant applied for rateable distribution and obtained an order therefor. His contention appears to be that assets held by the Collector cannot be considered to amount to assets held by the Court. It is pointed out that, where the purchase money is paid in cash by the auction-purchaser, it is to be applied by the Court

in discharging rateably the claims of the original decree-holder and any other decree-holders whose claims were included in the amount ordered to be recovered: Schedule 3, Rule 9(3)(c)(3).

8. The contention implies that no rateable distribution is permissible, except where purchase money is in the custody of the Collector and he places it at the disposal of the Court. A reference to Rule 988, of the Manual of the Revenue Department, U.P., Vol. 1 (Rules framed by the Local Government for sale of ancestral property) will show that:

where a decree-holder purchases with such permission (i.e., the permission of the Collector), the purchase money and the amount due on the decree may, subject to the provision of Section 73 of the Code, be set off against one another, and the Collector executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

9. It is clear that rateable distribution is contemplated not only where the Collector receives the purchase money in cash but also where the decree-holder is declared to be the purchaser and the purchase money is to be set off against the decretal amount. Like Order 21, Rule 72, Rule 988 makes the right of the decree-holder to have and the power of the Collector to allow set off of the purchase money against the decretal amount subject to the right of any other decree-holder to rateable distribution. Set off cannot be allowed to the extent that the latter decree-holder is entitled to a rateable distribution u/s 73, Civil P.C. It is clear that Section 73, Civil P.C, is applicable not only where sale is made by the Court but also to cases in which execution of a decree is transferred to the Collector and sale is made by him. In the case before us, if the Collector's attention had been drawn to the circumstances that the appellant had previously applied for execution of his decree and that the Court had passed an order allowing rateable distribution, he would have disallowed set off, at any rate, to the extent: of the amount due to the appellant on rateable distribution. It was obviously to the interest of the appellant to have done so. The question is whether his omission to invite the attention of the Collector to his own right deprives him of his own right to claim rateable distribution in a regular suit. It has not been contended before us that a regular suit of the kind instituted by the appellant is not maintainable. Assuming such a suit is maintainable, there can be no doubt that the appellant had a right to obtain a rateable distribution of the purchase money and the respondent had no right to have that portion of the purchase money set off against the decretal amount, which was due to the appellant. We see no reason why the equities between the parties should not be worked out at this stage. If a stranger had been the auction-purchaser and had

deposited the price and if the money had been allowed to be withdrawn by the respondent in disregard or ignorance of the right of the appellant to rateable distribution, the former would have been made to refund what was due to the appellant. The case is not materially different where in payments by the auction-purchaser to the Court or the Collector and by the latter to the decree-holder in satisfaction of his decree; money does not change hand, but has nevertheless the same effect in law. It has been pointed out that satisfaction of the respondent's decree has been noted and the result of allowing rateable redistribution at this state will be to reopen the decree to the extent of the sum claimed by the appellant. We do not think such a result affords any ground for taking a different view. It will be open to the respondent to execute his decree for the amount he is now called upon to pay if he has not allowed the limitation to run out.

10. One of the issues raised in the trial Court related to the amount to which the appellant is entitled on a rateable distribution. This issue has not yet been decided. The case has been decided on the preliminary ground that the appellant has no right to claim rateable distribution. In view of the case we have taken he has this right. The judgments and the decrees of the Courts below are accordingly set aside and the case is remanded to the Court of first instance the disposal of the case after deciding the remaining issues. The appellant shall have his costs incurred in the lower appellate Court and in this Court. Costs incurred in the Court of first instance shall abide the result.