

Referred Case.

ESSA'JI A'DAMJI v. BEJIMJI PURSHOTAM.

*Immoveable Property—Sale by Auction—Conveyance—Deposit—Stakeholder.*1867.
August 9.

In a suit by a purchaser of immoveable property to recover a deposit, paid by him on account of the purchase-money to the auctioneer; the vendor having refused to convey to the purchaser, save by a deed, which should describe the premises by reference to another deed, not shown to the purchaser at the auction, and of the contents of which he had not then any notice:—

Held (1) that the purchaser was not bound to have tendered a conveyance engrossed to the vendor for execution, together with the residue of the purchase-money, before suing to recover the deposit; and (2) that the money, having been deposited with the auctioneer as a stakeholder, and being in his hands, the action to recover it lay against the auctioneer, and not against the vendor.

CASE stated for the opinion of the High Court of Judicature, pursuant to the provisions of Sec. 55 of Act IX. of 1850 and Sec. 7 of Act XXVI. of 1864, by John O'Leary, Acting First Judge of the Bombay Court of Small Causes:—

“This was a suit to recover the sum of Rs. 775, with interest, paid by the plaintiff to Messrs. Crawford and Co., auctioneers, at the request of the defendant, as a deposit on account of the purchase-money of certain premises sold by the defendant to the plaintiff, but which the defendant refused to convey to the plaintiff.

“The case was tried by me on the 9th of January 1867. Mr. Marriott was counsel for the plaintiff. Mr. Carter was attorney for the defendant.

“It appeared that on the 17th of January 1866, certain premises were, by the order of the defendant, put up to auction by Messrs. Crawford and Co. At this sale the plaintiff was declared the purchaser of a portion of those premises, at the price of Rs. 3,100.

“The conditions of sale (with translation of Gujaráti portion annexed) are herewith sent up marked L. The property purchased by the plaintiff was that described in this document as ‘Lot Number 2.’

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“The plaintiff having been declared purchaser, as aforesaid, paid to the auctioneer Rs. 775 as a deposit, in compliance with the second condition of sale (L); and that sum was, on the day of the hearing, still held by the auctioneer.

“After the sale, the correspondence contained in the letters hereunto annexed, marked A to K inclusive, took place.

“On December the 6th, 1866, the defendant caused the property to be sold to a third person.

“The defendant pleaded:—1st, That the money having been paid to the auctioneer as a stake-holder, the plaintiff, even if entitled to recover the sum claimed, should have proceeded against the auctioneer, and not against the present defendant. 2nd, That he did not refuse to execute a conveyance in the form required by the plaintiff. 3rd, That the plaintiff never called on the defendant to execute a conveyance of the property. 4th, That, at the sale on 17th January 1866, a certain deed dated 22nd July 1864, and referred to in letter marked H and in the draft conveyance D, was produced; and that the plaintiff then had notice that the property would be described in the conveyance in the words in which it was described in the said deed of 22nd July 1864.

“In addition to the documentary evidence the following facts were proved:—

1st.—The auction was held on or near the premises, and at the sale the premises were actually pointed out to plaintiff by metes and bounds, but no one on the part of the defendant ever afterwards pointed them out to the plaintiff.

2nd.—At the auction the auctioneer, after a communication with the defendant, erased the figures ‘198’ from the Gujaréti handbill describing the property, and wrote in the margin ‘ground as per boundary’ (see L), and read it out in that way, and not as printed, and did not state that any particular number of yards were contained in Lot 2.

3rd.—The deed of 22nd July 1864, recited in draft conveyance D, was not shown to plaintiff at the auction, nor was any notice of its contents then given to him, nor

was he then informed that the property would be conveyed to him only as described in the said, or any other, deed.

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4th.—No engrossment of the conveyance was ever tendered by the plaintiff to the defendant for execution, nor was the residue of the purchase-money tendered to him.

5th.—It was not proved that the boundaries in draft conveyance D were identical with those given by the auctioneer at the sale.

“On the correspondence taken in connection with the above facts, I was of opinion—

1st—That the vendor had refused to convey the premises to the plaintiff, save by a deed which should describe them as described in the deed of July 22nd, 1864, and should refer to that deed;

2nd—That the vendor was not entitled to import the deed of 22nd July 1864 into his conveyance to the plaintiff, so as to restrict the operation of his conveyance to such premises as might be comprised in the said deed of July 1864;

3rd—That by refusing to execute any other conveyance than that described, the defendant had released the plaintiff from the obligation (if any) of tendering the engrossment of the conveyance and the residue of the purchase-money; and

4th—That the plaintiff might recover in this action from the defendant, although the money had been deposited, and remained, with the auctioneer.

• “At the request of Mr. Carter, for the defendant, I reserved the following questions for the opinion of the High Court:—

I. Whether the plaintiff was bound to have tendered a conveyance engrossed to the defendant, for execution, together with the residue of the purchase-money, before bringing this action.

II. Whether, the money having been deposited with the auctioneer as a stake-holder, and now being in his hands, the plaintiff can recover against the defendant.

“Subject to the opinion of the High Court on the above

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questions, I gave a verdict for the plaintiff for Rs. 775, with Rs. 121-8-6 interest thereon, and costs; and I certified Costs of Counsel Rs. 85."

The case was heard before COUCH, C.J., and WESTROPP, J.

Marriott (with him *Green*), for the plaintiff:—The Judge found that the defendant had refused to convey by a deed containing the description of the premises, which the plaintiff was entitled to have: *Sugd. Vend.*, 13th ed., 22, Chap. 5. Sec. iv., plac. 25. He also found that, on the 6th of December 1866, the defendant caused the property to be sold to another person. This was before the suit was brought. *Dart, Vend.*, 3rd ed., 617; *Franklyn v. Lamond* (a); *Lovelock v. Franklyn*. (b) As to the second point, an auctioneer is not a mere stakeholder; *Ballard v. Way*. (c)

Mayhew, for the defendant, cited *Johnson v. Roberts* (d); *Fenton v. Browne* (e); *Simmons v. Heseltine* (f); *Boyman v. Gutch* (g); *Duncan v. Cafe* (h); *Gray v. Gutteridge* (i); *Sugd. Vend.*, 13th ed., 40. No point was made in *Ballard v. Way* that the auctioneer ought to be sued.

Dunbar, on the same side, cited *Barnford v. Shuttleworth* (j); and referred to *Sugd. Vend.*, Ch. 17, Sec. 1., 38, where it is said that the purchaser cannot recover interest from the auctioneer.

Marriott was heard in reply.

Cur. adv. vult.

COUCH, C.J.:—As to the 1st question, I am of opinion that there was such a refusal by the defendant, that the plaintiff was not bound to go through the useless form of tendering an engrossment of conveyance to the defendant for execution, together with the residue of the purchase-money, before bringing his action.

(a) 4 C. B. 637; 16 Law J., C. P. 221.

(b) 8 Q. B. 358; 15 Law J., Q. B. 145.

(c) 1 M. & W. 520.

(d) 24 Law Times 234.

(e) 14 Ves. 144.

(f) 28 Law J., C. P. 129.

(g) 7 Bing. 379.

(h) 2 M. & W. 244.

(i) 1 M. & R. 614.

(j) 11 A. & E. 926.

As to the 2nd point, the auctioneer, although for many purposes an agent, is for this purpose a stakeholder: *Burrough v. Skinner (k)*. And the money having been deposited with him as a stakeholder, and being in his hands, the plaintiff could not recover against the defendant, but should have sued the auctioneer.

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I am, therefore, of opinion that judgment should be entered for the plaintiff in the Court of Small Causes; but that as the decision is not on the merits, each party should bear his own costs.

WESTROPP, J., concurred.

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LAKHMIDA'S HIRA'CHAND v. THE GREAT INDIAN
PENINSULA RAILWAY COMPANY.

Aug. 17.

Silk—Dhotra—Value of Silk—Evidence, question of—Act XVIII. of 1854, Sec. 10—Act IX. of 1850, Sec. 55—Act XXVI. of 1864, Sec. 7.

Whether or not cotton fabrics bordered with silk, or having a portion of silk otherwise used in their manufacture, are "silks in a manufactured or unmanufactured state, wrought up or not wrought up with other materials," within the meaning of Act XVIII. of 1854, Sec. 10, is a question of fact, to be decided on the evidence, not a question of law, to be reserved for the opinion of the High Court, under Act IX. of 1850, Sec. 55, and Act XXVI. of 1864, Sec. 7.

Brunt v. The Midland Railway Company (33 L. J., Ex. 137) followed.

Semle: The proper test for a Judge to apply in such cases, is to determine whether or not the value of the silk wrought up with other materials is more than half the value of the fabric. If it be not, the fabric cannot be considered to be silk, within the meaning of the Act.

CASE stated for the opinion of the High Court of Judicature, pursuant to the provisions of Sec. 55 of Act IX. of 1850, and Sec. 7 of Act XXVI. of 1864, by John O'Leary, Acting First Judge of the Bombay Court of Small Causes:—

"This suit was instituted to recover from the defendants the sum of Rs. 794-14-3; being damages for non-delivery of a bale of piece goods, intrusted to the defendants, to be carried on the defendants' railway for hire.

"At the trial, Mr. Hurrell, for the defendants, admitted that the Company had received the bale; that they had

(k) 5 Burr. 2639.