

[APPELLATE CIVIL.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

1878.
April 8.

ANANDRA'V BA'PUJI (ORIGINAL PLAINTIFF), APPELLANT, v. SHEKH BA'BA' AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Code of Civil Procedure (Act VIII. of 1859), Section 254—Re-sale in execution of decree—Rights of judgment-creditors.

Where property has been sold under a decree, and the purchaser at the execution-sale has made default in paying the purchase-money, the remedy of the judgment-creditor is not limited by section 254 of Act VIII. of 1859 to a suit against the defaulting purchaser.² He is entitled to recover the balance of his debt from his judgment-debtor, who may, perhaps, have his remedy against the defaulting purchaser.

Joobráj Singh v. Gour Buksh Lál (1) dissented from.

THE facts of the case are fully stated in the judgment.

The only question argued was, whether the judgment-creditor was bound to proceed against the defaulting purchaser, and not against the judgment-debtor, for the recovery of the balance of money due on the decree.

Maneksháh Jehangirsháh appeared for the appellant.

Raghnáth Shivráam Tipnis appeared for the respondents.

The judgment of the Court was delivered by

MELVILL, J. :—This is an application to set aside an order of the District Court of Khandesh, by which the applicant, a judgment-creditor, is debarred from proceeding further against the property of the judgment-debtors.

The applicant obtained a decree for Rs. 343-7-11 against Shekh Bába and others, under which certain immoveable property was put up for sale. One Baksu bid Rs. 350 for the property, and made the usual deposit of 25 per cent.; but on the fifth day he failed to make good the full amount of purchase-money, and the property was, consequently, again put up for sale, and purchased for Rs. 151. The judgment-creditor made an application to the Subordinate Judge, in which he stated that Baksu had been acting in collusion with the judgment-debtors, and without any real intention of purchasing; that he was a man without means, from

* Extraordinary Jurisdiction No: 89 of 1877.

(1) 7 Calc. W. R. Civ. Rul. 110.

whom nothing could be recovered ; and he, therefore, asked that, instead of proceeding against Baksu, he might be allowed to attach other property of the judgment-debtors in satisfaction of the balance still due under his decree. This application was granted by the Subordinate Judge ; but on appeal the District Judge reversed his order, on the ground that the judgment-debtors were entitled to credit for the full amount bid at the first auction-sale, that their debt was consequently extinguished, and that the judgment-creditor's only remedy was against the defaulting purchaser.

A decision of the High Court at Calcutta (*Joobráj Singh v. Gour Buksh Lál* (1)) certainly supports the view taken by the District Judge. In that case the Court said : "The judgment-debtor is entitled to credit for the full amount bid for the property at the time of the first sale, and if he pay up any balance due to the decree-holder in excess of the sum so bid, he must be considered as having liquidated his debt, and cannot be held responsible for any further sum. The difference between the first and second sale must be realized, not from the judgment-debtor, but, as provided by section 254, from the defaulting auction-purchaser."

But we regret that we feel unable to concur in this view. We can see no reason why a mere bid at an auction-sale should be held to have the same effect in discharging the judgment-debtor as the payment of the debt. If such were the effect, it is obvious that such fraud as is alleged in the present case would be very common. The judgment-debtor would only have to put forward a man of straw, who would bid the full amount of the debt, deposit 25 per cent., and then make default, and the judgment-debtor would thus get rid of his liability by paying 4 annas in the rupee. The judgment-creditor has nothing to do with the selection of a purchaser at an auction-sale, and we fail to see on what principle he can be compelled, when he has lent his money to a man of his own choosing, to accept as debtor in his place a person of whom he knows nothing, and who is worth nothing.

We think that the applicant in this case was not bound to proceed against the defaulting purchaser, and that he is entitled to

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recover the balance of his debt from his judgment-debtors, who may, perhaps, have their remedy against the defaulting purchaser. We, therefore, reverse the order of the District Judge, and restore that of the Subordinate Judge, with costs on the respondents throughout.

Order accordingly.

[APPELLATE CRIMINAL.]

Before Sir M. R. Westropp, Knt., Chief Justice, Mr. Justice Melwill, and Mr. Justice Kemball.

April 29.

IMPERATRIX v. DONGA'JI ANDA'JI.*

*The Code of Criminal Procedure (Act X. of 1872), Sections 280 and 297—
Death of appellant—Abatement of appeal—Revision.*

The Code of Criminal Procedure gives no right to the heir, devisee, executor, or any other representative of a deceased convict, to lodge an appeal, or continue and prosecute an appeal already lodged.

(*Kemball, J., diss.*)—The appeal lodged by a convict abates on his death.

The High Court, nevertheless, may call for and examine the record of the case with a view to revision and rectification, and may make such order thereon as it may consider just.

THE accused Dongáji was convicted by S. H. Phillpotts, Session Judge of Puna, of forgery by altering a copy of a summons from the civil Court at Vadgám. On the 19th of November 1877 he was sentenced to four years' rigorous imprisonment, and to pay a fine of Rs. 1,000. On the 14th of January following, an appeal was lodged in his behalf in the High Court by his vakil. The High Court on the 30th January decided to hear the appeal, and notified to the Magistrate and Public Prosecutor of the Puna District that the appeal would be heard on or after the 14th of February 1878. On the 19th of February the superintendent of the Puna Jail reported that the convict Dongáji had died on the morning of that day.

On the 8th April, *Máhádev Chimmnáji Apte* and *Vináyak Pandit* claimed to be heard in support of the appeal.

Nánábhái Haridás (Government Pleader) objected, and urged that the appeal abated on the convict's death.

* Appeal No. 13 of 1878.