

APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice Pinhey.

VISHVANATH MA'HESHVAR, APPLICANT, v. VIRCHAND
PA'NA'CHAND AND OTHERS, OPPONENTS.

Civil Procedure Code (Act X of 1877), Section 295—Decree—Sale—Assets
—Distribution.

1881
October 3.

Moneys paid into Court by sale or otherwise in execution of a decree are assets from the moment of their payment into Court, and are available, under section 295 of the Code of Civil Procedure (Act X of 1877), for rateable distribution only amongst decree-holders who have applied for execution prior to that time.

THIS was an application, in the Court's extraordinary jurisdiction, for reversal of an order of Ráo Sáheb K. Atmárám, Subordinate Judge of Vagra.

On the 16th of June, 1879, the applicant Vishvanath obtained a decree against Madhavsang and Vajubhai.

On the 12th September, 1879, he applied for its execution.

On the 12th July, 1880, the judgment-debtor's *gámtya* lands were sold for Rs. 99-8-0 in execution of the applicant's decree, and with the permission of the Court the applicant himself became the purchaser, and paid in Rs. 99-8-0 into Court.

On the 6th of August, 1880, Virchand, another decree-holder, applied for execution of his decree.

On the 1st of September, 1880, the judgment-debtor's *bhágdári* lands were sold for Rs. 1,752 which was paid into Court the same day.

On the 28th September, 1880, three other decree-holders applied for execution of their decrees against the same judgment-debtor.

On the 4th of October, 1880, two other decree-holders applied for execution.

On the 5th of November, 1880, the sales of the *gámtya* and *bhagdari* lands were confirmed by the Court.

The Subordinate Judge, professing to act under section 295 of the Code of Civil Procedure (X of 1877), allowed all those decree-holders who made their application for execution within sixty

* Extraordinary Civil Application, No. 20 of 1881.

days of the dates of the respective sales to take the proceeds realized with the applicant,—sixty days being the period allowed for the confirmation of a sale.

The applicant applied to the High Court.

Shantaram Narayan and Shivram V. Bhandarkar for the applicant.—The Subordinate Judge has construed section 295 of the Code wrongly. Assets are realized as soon as the purchase-money is paid in. Before the date of the sale of *gamtya* lands and the payment into Court of the proceeds of that sale none of the other decree-holders had made their application, and, therefore, none were entitled to share with the applicant in the amount realized. Nor are they entitled to share in the proceeds of the *bhagdari* lands except Virchand, who alone applied prior to the realization of those proceeds.

Nanabhai Haridas, Government Pleader, for the opponents.—The sales did not become absolute till they were confirmed. Probably only one-fourth of the purchase-money was paid on the day of the sale and the rest on the day it was confirmed. Assets are not said to be realized by sale till the sale has been confirmed, and become absolute. Till then the price is merely a deposit in the hands of the holders, and is liable to be returned to the bidders.

KEMBALL, J.—In execution of a decree obtained by the present applicant, certain *gamtya* and *bhagdari* lands were at his instance attached and caused to be sold by public auction. Subsequently to these sales, several other persons having decrees for money against the same judgment-debtor, applied for the execution of their decrees. These applications bore different dates. All of them were made subsequently to the payment of the purchase-money in the case of the *gamtya* sale, and all but one subsequently to a similar payment in respect of the *bhagdari* land. Most of the applications, however, were made prior to the confirmation of the sales, and in those instances the Subordinate Judge held that the respective applicants were entitled to share rateably with the applicant at whose instance the properties were attached and sold, on the ground, presumably, though he does not say so, that the purchase-moneys were not “assets” within the meaning of section 295, Act X of 1877, until the confirmation

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of the sales : at least that is the ground on which three of the judgment-creditors, who claim a rateable division, base their argument in showing cause against the rule. It is contended that the purchase-money held by the Court cannot be regarded as "assets" realized until such time as the sale becomes absolute, because, until the happening of that event, such money is liable under certain contingencies to be refunded to the purchaser. But there is nothing in the aforesaid section to show that such was the intention of the Legislature, and we see no reason for placing so forced a construction on the word "assets." Under the old law, (section 270 of Act VIII of 1859,) the attaching creditor was entitled to be first paid out of the proceeds of property attached and sold, the surplus only being liable to distribution rateably among subsequent attaching creditors : whereas by the new law it is immaterial at whose instance an attachment is placed, or, indeed, how assets are realized,—whether by sale or otherwise. So long as assets are in the hands of, and held by, the Court, every creditor who has, prior to such realization, applied for execution of his money decree is entitled to a rateable division ; and the circumstance that such money may, under some possible contingency, have to be refunded to the person paying them in, cannot be held to affect their character, while within the control of the Court, as assets realized in execution of a decree. With these remarks I concur in the order which my brother Pinhey has written, and which he has read to me disposing of the particular case before us.

PINHEY, J.—In this case the assets were realized as soon as the purchase-money for the properties sold was paid into Court by the auction-purchaser. The fact that it was possible that, under certain circumstances, the sale might be set aside by the Court, and the purchase-money returned to the purchaser, does not make the payment of the money into Court less a realization of the assets, within the meaning of section 295 of the Code of Civil Procedure.

The *gamtya* property of the judgment-debtors was sold on the 22nd July, 1880, for Rs. 99-8-0, and their *bhagdari* property was sold on the 1st September, 1880, for Rs. 1,752. The purchase-moneys of both the said properties were paid into Court by the

purchasers on the dates of the respective sales. The sales were held in execution of the decree obtained by the applicant to this Court, Vishvanath Maheshwar.

None of the other decree-holders, mentioned in the Subordinate Court's judgment, applied to the Court for execution prior to the realization of the proceeds of the sale of the *gamtya* property on the 22nd July, 1880, and, therefore, none of them are entitled to share in the proceeds of that sale, and, therefore, the whole sum of Rs. 99-8-0 realized by the sale of the *gamtya* property must be paid to the applicant, Vishvanath Maheshwar, after deducting the costs of the realization.

The only decree-holder, other than the applicant, who applied to the Subordinate Court for execution prior to the realization of the proceeds of the sale of the *bhagdari* property on the 1st September, 1880, was Virchand Panachand, who applied for execution on 6th August, 1880. He is entitled under section 295 of the Code of Civil Procedure, to share rateably with the applicant in the Rs. 1,752 realized by the sale of the *bhagdari* property after deducting the costs of the realization.

The Subordinate Court's order must be amended accordingly. The applicant Vishvanath Maheshwar to receive his costs from the opponents, who will bear their own costs in both Courts.

APPELLATE CRIMINAL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

IMPERATRIX *v.* VITHAL BHA'ICHAND.*

November 17.

Gambling—Coin—Bombay Act III of 1866, Section 11.

A coin is not an instrument of gaming within the meaning of section 11 of Bombay Act III of 1866. An instrument of gaming means an implement devised or intended for that purpose.

THIS was an application for the revision of the order of J. M. Campbell, Magistrate of Kheda, confirming the sentence passed on the applicant by Vishnu Ramchandra, Magistrate (Second Class) at Kheda.

Application for Revision, No. 227 of 1881.

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