APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and C. C. Ghose J.

KALYANEE DEBI

v.

HARI MOHAN GHOSH.*

1928.

April 23.

Mortgage—Sale—Registrar of High Court, sale by—Setting aside sale—Procedure—Civil Procedure Code (Act V of 1908), O. XXI, r. 89.

Order XXI, rule 89 of the Code of Civil Procedure, though well adapted to *mofussil* practice, is not in terms applicable to the practice of the High Court on its Original Side as regards sales held in execution of mortgage decrees, inasmuch as no amount is specified in any proclamation of sale as that for the recovery of which the sale was ordered, nor are sales ordered for recovery of the amount of costs before they are taxed.

A mortgagor can, therefore, apply to set aside the sale on deposit of a sum equal to five per cent. of the purchase-money and the amount of the decree.

Quære, whether the rules and orders of the High Court relating to such sales require amendment.

APPEAL from a judgment of Pearson J. by the auction purchaser.

The material facts were that after certain property had been sold, the mortgager applied for setting aside the sale under Order XXI, rule 89 of the Code of Civil Procedure on deposit of the balance of the decretal amount and 5 per cent. of the purchase-money. Objection was taken on behalf of the purchaser on the ground *inter alia* that the applicant had not paid the costs of the suit and that, in the circumstances of the case, the provisions of the Code had not been complied with.

Mr. Justice Pearson allowed the application of the mortgagor, holding that in a sale like this by the Registrar, Order XXI, rule 89 of the Code was not strictly applicable. As regards costs of the suit, he held that they had not been taxed and nobody was in a position to say what amount would be ascertained and

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payable under that head. He held further that there was an undertaking on behalf of the applicant to pay the amount of the costs after taxation and that that was sufficient to dispose of the application, inasmuch as the question of the costs of the suit was really a matter which arose between the mortgagee and the mortgagor and, as long as the mortgagee was satisfied, it was not a matter of importance for the present application.

Sreemati Kalyanee Debi, purchaser of one of the mortgaged properties, thereupon preferred this appeal, making the mortgagor, the mortgagees and the purchasers of the other mortgaged properties parties respondents.

Mr. H. D. Bose (with him *Mr. B. K. Ghosh*, *Mr. S. C. Mitter*, *Mr. N. C. Mitter* and *Mr. N. C. Chatterji*), for the appellant.

Sir B. L. Mitter (with *Mr. J. C. Hazra*), for the mortgagor.

Mr. S. Ghosh, for the mortgagees.

RANKIN C. J. In this case an appeal is brought by the purchaser at a sale held in a mortgage suit. It appears that the appellant purchased the property that was put up for sale and thereafter, within thirty days from the sale, the mortgagor judgment-debtor applied under Order XXI, rule 89, Code of Civil Procedure, to have the sale set aside on paying the amount due to the decree-holder mortgagee and five per cent. compensation to the purchaser for the loss of the property. It appears that the auction purchaser thinks so highly of his bargain that he is not content with the five per cent. and this appeal is brought to set aside or vary the order of Mr. Justice Pearson permitting Order XXI, rule 89, to take effect.

The main difficulty arises by reason of the fact that that rule is framed in language, which though well adapted to *mofussil* practice, is not in terms applicable to the practice of the High Court on its Original Side

as regards sales held in execution of mortgage decrees. The amount to be deposited for payment to the decree-holder, it is said by the rule, is the " amount specified " in the proclamation of sale as that for the recovery of " which the sale was ordered," and it is expressly provided by the last clause of the rule that nothing in rule 89 shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale. There are authorities which say that as this rule is a concession to judgment-debtors it is to be applied strictly; and there can be no doubt of the correctness of this in cases to which the rule can be applied strictly. When by reason of the fact that no amount is specified in any proclamation of sale as that for the recovery of which the sale was ordered, it is impossible to apply those words strictly, it appears to me that in a matter of this kind what this Court has to do is to apply those words as fairly as possible to the circumstances of the sale on the Original Side.

Now, in the present case, the position is this: There had been a preliminary and a final decree. Those decrees were adjusted by an arrangement scheduled to an order made on the 23rd of March, 1926, and under that arrangement the plaintiffs were to accept a certain sum—Rs. 36,000, in full satisfaction. The defendant was also to pay all costs. The amount of Rs. 36,000, however, was to be adjusted and satisfied as to a part by the sum of Rs. 17,000 in the hands of one Mohini Mohan Ray; the balance being a sum of Rs. 19,000 and costs and a sum of Rs. 1,000 which was to be paid by the plaintiffs to one Jokhiram was to be realised by sale of the properties comprised in the mortgage. As regards this Rs. 1,000 it seems that one Jokhiram was a creditor—creditor, as I understand, of the defendant—and the sum of Rs. 1,000 was to be paid by the plaintiffs and was to continue to remain a charge on the properties comprised in the mortgage in favour of the plaintiffs—to be realised by the plaintiffs out of the sale-proceeds thereafter. In these circumstances,

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the defendant applied to the learned Judge and obtained an order which directed him to pay a sum of Rs. 582, being the compensation to go to the purchasers and a sum of Rs. 13,082 for payment to the plaintiffs of the balance of the amount of principal and interest payable to them under the decree. Nothing was said in the order about the costs of the suit. It appears that thereupon the defendant, instead of paying that money to the Registrar of the Court in his capacity as Accountant-General, paid it to the Registrar of the Court as such and it appears that no commission became at any time payable to the Accountant-General. The order had directed it to be paid to the Registrar to be by him paid to the Controller of Currency with the privity of the Accountant-General and had also directed the commission of the Accountant-General to be deposited. So far as the deposit with the Registrar was not in terms of that order it is a variation which we have ascertained results in no harm to the present appellants because they can without any deduction take the sum of money which was intended for them out of Court if the order of the learned Judge stands. In these circumstances I dismiss that question from our consideration.

It appears next that as regards the actual amount to go to the plaintiffs the dispute centres upon two points only: The first complaint is that no sum was paid as costs and the second complaint is—it is not a very meritorious complaint—that the Rs. 1,000 to go to Jokhiram was not paid into Court.

As regards the question of costs what we have to consider is what is the amount for the recovery of which the sale was ordered; and, in my judgment, it is wrong to say that on the Original Side of this Court a person desiring to take advantage of rule 89 is obliged to pay in a lump sum making a guess of the amount or to go to the attorneys for the plaintiff and find out from them how much they are prepared to consider as correct. In my judgment, sales are not ordered for recovery of the amount of costs before they are taxed and

it would be unreasonable and unfair in applying this rule to say that a person intending to take advantage of rule 89 has to pay into Court an amount which is not yet ascertained. In this respect it may well be that the Rules and Orders of this Court—now that it has been decided that rule 89 of Order XXI applies to mortgage suits—require some further consideration and amendment. Speaking for myself I will have nothing to do with any doctrine which involves paying in an amount arrived at either by guess or by agreement with either side's attorneys or by getting an order for taxation in the absence of other side's attorneys. I do not, therefore, think that the learned Judge, in the circumstances, was wrong in failing to include a direction as to costs.

The remaining question is the question of this Rs. 1,000. It does not appear that the plaintiffs had paid the sum of Rs. 1,000 to Jokhiram or anybody. In these circumstances, I do not think that the learned Judge was wrong in refusing to hold that that was a sum for the recovery of which the sale was ordered.

This disposes of the appeal. In my opinion, the appeal must be dismissed with costs—two sets—the plaintiffs' costs being limited to one counsel only. The plaintiffs and the purchasers are at liberty to take their respective moneys out of Court.

GHOSE J. I agree.

Attorneys for the appellants: *R. M. Chatterjee & Co.*

Attorneys for the respondents: *H. P. Dutt* (for mortgagor), *B. N. Basu & Co.* (for mortgagees) and *M. M. Chatterjee* (for other purchasers).

Appeal dismissed.

S. M.