ORIGINAL CIVIL.

Before McNair J.

1937

April 15.

NATIONAL INSURANCE CO., LTD.

v.

EZEKIEL AARON DAVID.*

Sale in execution—Application by judgment-debtor to set aside sale—Agreement with decree-holder without cash deposit in Court, if sufficient—Code of Civil Procedure (Act V of 1908), O. XXI, r. 89.

The principles laid down in O. XXI, r. 89 of the Code of Civil Procedure have always been observed in dealing with applications for setting aside sales by the Registrar of the Original Side of the High Court.

In dealing with such an application by the judgment-debtor, it is unnecessary to insist on a cash deposit in Court of the amount specified in the sale proclamation.

An agreement between the applicant (judgment-debtor) and the decree-holder outside Court for satisfaction of the decree is sufficient compliance with the provisions of O. XXI, r. 89 of the Code of Civil Procedure.

APPLICATION.

The material facts and the arguments in this application appear sufficiently in the judgment.

Sudhish Roy for the applicant.

S. R. Das for the auction purchaser.

P. N. Ghose (attorney) for the decree-holder.

MCNAIR J. This is an application under O. XXI, r. 89 of the Code of Civil Procedure to set aside a sale.

The property concerned was subject to a mortgage. The mortgagee sued to enforce his security. There was a preliminary and a final decree, and pursuant to those decrees the Registrar of this

*Original Suit No. 805 of 1934.

Court on March 6, 1937, put up the mortgaged property for sale by public auction. Messrs. Dutt Estates, Limited, were declared the highest bidders at that sale and purchasers of the property for a sum of Rs. 70,000. The mortgage debts, calculated up to May 2, 1934, were altogether over Rs. 86,000.

The applicant, who is the mortgagor, alleges that the sale was at a gross under-valuation, and, he states in his petition that the property is scheduled as part of one of the Calcutta Improvement Trust Development schemes and will shortly appreciate in value.

He seeks to bring into Court a sum equal to 5 per cent. of the purchase money for payment to the auction purchaser, and in para. 12 of his petition he states that the plaintiff-company, that is to say, the mortgagee decree-holder, is convinced that the property has been sold at a gross under-value, and has agreed, at the petitioner's request to consent to have the sale set aside without insisting on the amount of its claim being deposited in Court.

The plaintiff-company is represented on this application and, although no affidavit has been put in on its behalf, the learned attorney who appears for the company informs me that the mortgagee has entered into an arrangement with the mortgagors for adjustment of its claim, that that arrangement has in fact been put into writing, and that he is willing, if the Court so directs, to state on affidavit that this arrangement has been made and that the plaintiff-company is satisfied with the arrangement.

On behalf of the auction-purchaser Mr. Das contends that the provisions of O. XXI, r. 89, (1) (*b*) must be strictly observed and that in the present instance they have not been so observed. Rule 89, (*1*) (*b*) directs that the sale may be set aside on deposit in Court for payment to the decree-holder of the amount specified in the proclamation of sale, less any

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amount which may, since the date of the proclamation, have been received by the decree-holder.

It has been pointed out, both on this application and in previous decisions of the Court, that the provisions of this rule are not strictly applicable to sales by the Registrar on the Original Side, for in such sales held in execution of mortgage decrees no amount is specified in the proclamation of sale, as the amount for the recovery of which the sale was ordered. It has, however, been suggested that a mortgagor can apply to set aside the sale on deposit of a sum equal to 5 per cent. of the purchase money and the amount of the decree. In any event, whether the provisions of this rule do in terms apply to sales on the Original Side or not, the principles laid down in this rule have always been observed in dealing with applications of this nature on the Original Side of this Court.

Mr. Das for the auction-purchaser has relied on the case of *Janki Prasad* v. *Lekhraj* (1) for the proposition that there must be a payment to the decree-holder in terms of O. XXI, r. 89, (*1*) (*b*). The learned Judge who decided that case is reported as making the following statement:—

> The question, whether the amount has been actually received by the decree-holder, is one of fact. Obviously a mere compromise or admission of the decree-holder would not be sufficient.

It is clear, and it has been pointed out in reported cases, that these words of the learned Chief Justice were not necessary for the decision of the case before him; for in that case there was a definite finding not merely that an adjustment or compromise of the decree has been made out of Court between the decree-holder and judgment-debtor, but that the judgment-debtor paid to the decree-holder the amount specified in the proclamation of sale. This question was dealt with on the Appellate Side of this Court by a Bench

(1) (1933) I. L. R. 55 All. 697.

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consisting of S. K. Ghose J. and myself, *Jotish Chandra Ghose* v. *Bireswar Haldar* (1), and we held that it was unnecessary, in an application under O. XXI, r. 89, to insist on a cash deposit in Court of the amount specified in the sale proclamation. There the decree-holder and judgment-debtor filed a joint application under O. XXI, r. 89, stating that the judgment-debtor had paid to the decree-holder the amount specified in the sale proclamation. It was contended that the application did not comply with the conditions laid down in O. XXI, r. 89, inasmuch as there was no cash deposit of the amount specified in the proclamation of sale and that the payment had not been made before the date of sale. It was further contended that the expression "received by "the decree-holder" means "received through the "Court." Both these contentions were negatived, and it was pointed out in the judgment that there is no express provision which requires a judgment-debtor to make a payment to the decree-holder through the Court. Reliance was placed on the decision of the Privy Council in *Seth Nanhelal* v *Umrao Singh* (2), but it was held that it would be stretching the meaning of that decision too far to say that in every case there must be a cash deposit of the amount specified in the proclamation of sale, when in fact there was no such amount due at the time of the application by reason of previous payments since the date of the proclamation.

The same question arose in Madras in the case of *Subbayya* v. *Simha Venkata Subba Reddi* (3). The learned Chief Justice says :—

"It was contended very strenuously here that the words of the rule" (O. XXI, r. 89) "must be strictly read and that the rule permits of no receipt by the decree-holder other than of an amount in cash. I am entirely unable to see any reason for such a construction being placed upon these words. It is a rule which gives very special indulgence to judgment-debtors or persons interested in the property sold to satisfy the decreed amount as stated in the proclamation which is owing to the decree-holder so that he can go away with that amount."

(1) (1935) 39 C. W. N. 829. (2) (1930) L. R. 58 I. A. 50.
(3) [1935] A. I. R. (Mad.) 1050, 1051.

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The learned Chief Justice points out that, under cl. (*a*) of r. 89, the auction-purchaser receives 5 per cent. of the purchase-money as compensation and considers that he has no cause for complaint if the decree-holder chooses to come to such an arrangement with his judgment-debtor by which his own claim is satisfied.

"I am quite unable to see" he says "why a decree-"holder cannot be permitted to receive anything which "to him is an adequate equivalent of the amount "which is owing to him under the decree by the "judgment-debtor." In the event the learned Judge held that the mortgage, which in that case was accepted by the decree-holder in satisfaction of his decree, could be taken as something which the decree-holder regarded as a reasonable equivalent for the amount owing to him by the judgment-debtor under the decree. The learned Chief Justice in the course of his judgment referred to the case of *Janki Prasad* v. *Lekhraj* (1) and pointed out that the observations of the learned Chief Justice of the Allahabad High Court on which Mr. Das relies were *obiter*.

Mr. Das for the auction-purchaser finally contends that there is no material on which the Court can say that the decree-holder has received satisfaction, even if such satisfaction may be accepted as equivalent to payment. As I have already pointed out, the decree-holder is represented before me on this application, and he has stated that he is satisfied and that he supports this application to have the sale set aside. In the circumstances it does not seem to me necessary to put the parties to the further cost of having that statement made on affidavit.

I am satisfied that the provisions of O. XXI, r. 89 have been substantially complied with and the sale will be set aside.

(1) (1933) I. L. R. 55 All. 697.

On payment by the defendant of the Registrar's commission, the Registrar is to return Rs. 17,500 and Rs. 3,500 to the purchaser or his attorney without deducting any commission. The defendant must pay to the purchaser the costs of this application certified for counsel. The defendant must also pay the costs occasioned by the purchaser bidding at the sale and of his investigation of title, also interest at 6 per cent. per annum on Rs. 17,500 from the date of deposit till return. The plaintiff may add his costs to his claim.

Application allowed.

Attorney for applicant: *M. K. Ray Chaudhuri.*

Attorney for auction-purchaser respondent: *A. K. Day.*

Attorney for decree-holder: *P. N. Ghose.*

A. K. D.