

afterwards raising the question. To hold that he would not only be applying the rule of *res judicata* in a way not provided for by the Code, but would be also seriously extending the authorities cited. In the present case the question as to how far the decree remained unsatisfied was never raised or decided. It is only by calling to his aid explanation IV that the decree-holder can contend that the question has already been decided. The judgement-debtor had very little reason for taking exception to the earlier applications for execution. A large sum was then due on the decree, and he knew that his property must be attached and sold in order to realize what was beyond question due. The judgement-debtor could not well take exception to the application for execution without employing a pleader and incurring expense. When the decree was practically satisfied the question as to how much (if any) remained due for the first time became really important. If it is considered expedient (we do not say it is) to make all the provisions of section 11 of the Code applicable to execution proceedings it should be done by Legislature and not by the judges. We think that the view taken by the learned Judge of this Court was correct and ought to be affirmed. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Chamier and Mr. Justice Piggott.

MUNNA LAL (JUDGEMENT-DEBTOR) v. RADHA KISHAN (DECREE-HOLDER) AND PARBHU DAYAL (OPPOSITE PARTY)*

Civil Procedure Code (1908), order XXI, rule 89—Execution of decrees—Application to set aside the sale within limitation—Money tendered but not received through Treasury officer's action.

The judgement-debtor made an application under order XXI, rule 89, of the Code of Civil Procedure to set aside a sale held in execution of a decree on the last day of limitation. The money required to be paid was tendered to the Treasury Officer shortly before 3 p. m., but he refused to take it because there was not sufficient time to count it and also because he thought that it could be paid at any time within three days of the tender. The judgement-debtor paid it the next day which was beyond thirty days after the sale. *Held* that the judgement-debtor having done all that lay in his power to deposit the money in time and having been prevented by the action of the Treasury Officer, should be taken to have made the payment within the time allowed by law. *Mahomed Akbar Zaman Khan v. Sukhdeo Pande* (1) referred to.

* First Appeal No. 13 of 1915, from an order of B. C. Forbes, Subordinate Judge of Muttra, dated the 3rd of November, 1914.

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THE facts of the case are as follows :—

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The property of one Munna Lal was sold in execution of a decree on the 7th of August, 1914. Application to set aside the said sale was made on the 7th of September, 1914, the 6th of September, 1914, being a Sunday. As required by the rules of the Court the applicant presented the form in triplicate duly filled in before the munsarim of the court, who gave one part of it to the applicant for presentation to the Treasury Officer. The said form contained an order directing the Treasury Officer to receive the money if paid, within three days. The applicant presented the said form to the Treasury Officer with a sum of Rs. 12,735-9-0, out of which over Rs. 10,000 were in rupees, a little before 3 p.m. The Treasury Officer finding that it was impossible to count and test the money that day directed the applicant to bring the money the next day. The applicant accordingly deposited the money the next day, *i. e.*, on the 8th of September, 1914. The Subordinate Judge refused to set aside the sale on the ground that the deposit was not made within the time allowed by law. The judgement-debtor appealed to the High Court.

Mr. *Jawahar Lal Nehru*, (for The Hon'ble Pandit *Moti Lal Nehru*) for the appellant.

The appellant did all that he could have done to deposit the money within time. If the Treasury Officer did not receive the money on the 7th it was not the appellant's fault. The Treasury Officer was the officer of the Court, and if he refused to receive the money within time that could not prejudice the appellant. *Mahomed Akbar Zaman Khan v. Sukhdeo Pande* (1).

Babu *Lalit Mohan Banerji*, (with him Pandit *Shiam Krishna Dar*) for the respondent.

The appellant waited till the last day and on the 31st day he presented the tender to the Treasury Officer at such a late hour that it was impossible for him to receive the money. The appellant was guilty of gross laches, and so it cannot be said that the money was deposited in time. Under the circumstances the Subordinate Judge was right in refusing the application.

Mr. *Jawahar Lal Nehru*, was heard in reply.

CHAMIER and PIGGOTT, JJ.:—This is an appeal by a judgement-debtor against an order of the Subordinate Judge of Muttra, refusing to set aside a sale held in execution of a decree. The sale took place on the 7th of August, 1914. As September 6th was a Sunday, the judgement-debtor was entitled to make an application under order XXI, rule 89, and pay the sum specified in that rule on September 7th. The evidence shows that the judgement-debtor was not able to raise the money required for the purpose until about 2 o'clock on the afternoon of September 7th. According to the evidence, on September 7th he made an application to the court with a tender in the prescribed form No. 43 duly filled in, and obtained thereon an order of the court that the money should be deposited in the Treasury. He took the money to the treasury shortly before 3 p.m., the hour at which the Treasury is closed so far as the public are concerned. The Treasury Officer looked at his watch and said that it was too late to count the money (Rs. 12,735-9-0) on that date, and he observed that the money could be paid at any time within three days of the tender. He was probably referring to words on the duplicate tender "receive and credit the above sum if tendered to you within three days." But these words cannot be used for the purpose of extending the period of limitation allowed by law. They are intended to facilitate the checking of the accounts kept by the court. The judgement-debtor says that he accepted the statement of the Treasury Officer as correct, and as the Treasury Officer declined to take the money, he took it away and paid it into the Treasury on the following day. The Subordinate Judge has held that it is not proved that the money was tendered before 3 p.m. on September 7th, and has accordingly declined to set aside the sale. The evidence that the money was tendered to the Treasury Officer before 3 p.m. is, however, uncontradicted and should, we think, be accepted. The question, however, is whether under the circumstances, the payment required by order XXI, rule 89, of the Code of Civil Procedure should be taken to have been made within the time allowed by law. The learned counsel for the judgement-debtor relies upon the decision of the Calcutta

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High Court in *Mahomed Akbar Zamrin Khan v. Sukhdeo Pande* (1), in which it was held, in accordance with the principle *actus curiæ neminem gravabit*, that the payment must be taken to have been made in time where the judgement-debtor had applied to the court under rule 89, order XXI, on the 30th day from the sale, and was ready to deposit the required sum in court, and the *challan* to the treasury had been duly filled up and placed in the hands of the proper officer, but the signature of the presiding officer of the court could not be procured on that day as he had left the court. The result was that the *challan* was signed on the following day and on the authority of it the money was received by the Treasury Officer. The Calcutta High Court held that the application of the judgement-debtor to have the sale set aside should under the circumstances have been allowed. The present case is not on all fours with the Calcutta case. In the latter it was quite clear that the court by its own action had prevented the judgement-debtor from paying the money into court within time. In the present case the question is what the Treasury Officer ought to have done when the money was tendered to him shortly before 3 p.m. on September 7th? We are not satisfied that the Treasury Officer could not have arranged for the safe custody of the money until it could be counted in the presence of the judgement-debtor; and we think that it is probable that he would have made some such arrangement if he had not been under the impression that the judgement-debtor was entitled to three days from the date of the tender within which to pay the money into the treasury. Under the circumstances we think that it should be held that the judgement-debtor in this case did all that it was possible for him to do to pay the money into the treasury on September 7th, *i.e.*, within time, and that he was prevented from paying the money by the action of the Treasury Officer, who for this purpose must be regarded as an officer of the court. We, therefore, allow this appeal, set aside the order of the Subordinate Judge, and direct the application be disposed of according to law. We make no order as to the costs of this appeal.

Appeal allowed.