

REVISIONAL CIVIL.

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Parmada
Charan Banerji.*

FAZAL RAB (APPLICANT) *v.* MANZUR AHMAD AND OTHERS
(OPPOSITE PARTIES).*

1918
March, 5.

*Civil Procedure Code (1908), order XXI, rules 89 and 92—Execution of decree—
Application to set aside sale in execution—Decree sent to Collector for
execution—Tender of money to the Collector, the Civil Courts being
closed—"Court."*

The word "Court" as used in rules 89 and 92 of order XXI of the Code of Civil Procedure means the Civil Court, and not, in the case of a decree being transferred to the Collector for execution, the Collector.

THE facts of this case were as follows :—

In execution of a simple money decree against him, certain non-ancestral zamindari property of the judgment-debtor was sold by the Collector on behalf of the Civil Court. The sale was held on the 20th of September, 1916. The Civil Courts being closed on account of the long vacation in October, 1916, the applicant made an application to the Collector for leave to deposit the sum necessary for getting the sale set aside under order XXI, rule 89, and on such leave being granted, deposited the requisite amount in the treasury on the 16th of October, 1916. On the 11th of November, 1916, the day on which the Civil Courts re-opened, he applied to the Munsif under order XXI, rule 89, of the Code of Civil Procedure and stated that he had already deposited the money in the treasury. The Collector also sent an intimation of the said deposit to the Civil Court and asked for further instructions. In December, the Munsif directed the Collector to transfer the said amount to the Civil Court account in the treasury. The auction purchaser opposed the application of the judgment-debtor on the ground that as the money had not been deposited in court along with the application, the application could not be allowed. The Munsif set aside the sale. On appeal, the Subordinate Judge reversed the order, and confirmed the sale. The judgment-debtor applied to the High Court in revision.

Pandit *Kailas Nath Katju* (with him *Babu Piari Lal Banerji*), for the applicant, submitted that the applicant was in

* Civil Revision, No. 190 of 1917.

1918

FAZAL RAB
v.
MANZUR
AHMAD.

fact being punished for his abundant caution and diligence. He had deposited the money well within time with the Collector, who was an officer of the court, and the money was in deposit in the treasury at the disposal of the court. The view taken by the lower appellate court that the applicant should have withdrawn the money from the treasury and re-presented it in the Civil Court on the 11th of November, was too narrow and technical and calculated to defeat the ends of justice. Even in that case the money would have been actually deposited in the treasury where it already was. Moreover, the court had received an intimation of the deposit from the Collector within time, and a direction as to transfer in the account-books was a pure formality. It was true that the provisions of order XXI, rule 89, of the Code of Civil Procedure were by way of an indulgence to the judgment-debtor and must be strictly complied with, but in this case the judgment-debtor had acted *bonâ fide* and with due diligence and the sale had been rightly set aside by the court of first instance. As to the jurisdiction of the High Court to interfere in revision, it was submitted that the lower appellate court had acted without jurisdiction, inasmuch as the provisions of order XXI, rule 89, were mandatory, and as they had been duly complied with, the court had no discretion in the matter but was bound to set aside the sale. A refusal on the part of the court to do so was in effect a refusal to exercise jurisdiction, and in any event the court had acted in the exercise of its jurisdiction illegally and with material irregularity. Reference was made to *Brij Mohun Thakur v. Rai Uma Nath Chowdhry* (1), and to the judgment of WOODROFFE, J. in *Shew Prosad Bungshidhur v. Ram Chunder Haribux* (2). It was further submitted that the auction purchaser had no right of appeal to the lower appellate court against the order of the primary court. He had got his money back *plus* five per cent. as a compensation and was not a party to the execution proceedings. He had bought subject to the contingency of the sale being set aside on payment by the judgment-debtor under order XXI, rule 89.

Dr. S. M. Sulaiman (with him Mr. T. N. Chadda), for the auction purchaser, submitted that the provisions of order XXI,

(1) (1892) I. L. R., 20 Cal., 8.

(2) (1913) I. L. R., 41 Cal., 323 (341).

rule 89, were stringent and must be strictly complied with to the letter. The money was not deposited in court. The Collector was only a sale officer and not the court.

Pandit *Kailas Nath Katju*, was heard in reply.

RICHARDS, C. J., and BANERJI, J. :—The facts connected with this application may be stated very shortly. There was a decree for about Rs. 1,000. Certain property of the judgment-debtor was directed to be sold. The sale was held by the Collector on behalf of the Civil Court. The sale took place on the 20th of September, 1916. The property was put up to the sale and fetched Rs. 850. On the 15th of October, the judgment-debtor came to the Collector and stated that he was anxious to have the sale set aside and to save the property; that he could not deposit the decretal amount *plus* five per cent. compensation to the auction purchaser as the Civil Court was closed, but he was anxious to lodge the money in the Treasury. The money was accepted by the Collector. On the 11th of November, which was the day on which the Civil Court opened, the judgment-debtor applied to have the sale set aside and stated how the money had been already deposited in the treasury. There was a *rubkar* from the treasury to the effect that the money had been deposited. In December following the Civil Court directed that the money should be transferred to the account of the Civil Court. The court of first instance, thereupon, set aside the sale holding that the money had been deposited within thirty days. The auction purchaser appealed, and the lower appellate court held that the money had not been deposited within thirty days or on the 11th of November, which was the day on which the Civil Court opened, and accordingly the rule had not been complied with and the auction purchaser was entitled to the benefit of his purchase. The judgment-debtor has applied in revision. There is no appeal from the orders of the lower appellate court refusing to set aside the sale. It is contended in the first place that the money was in fact deposited within the meaning of the rule and that consequently the lower appellate court had no jurisdiction to refuse to set aside the sale, and in the second place that the court of first instance having set aside the sale no appeal by the auction purchaser lay to the lower appellate court.

1918

FAZAL RAB
D.
MANZUR
AHMAD.

1918

FAZAL RAB
v
MANZUR
AHMAD.

Rule 89 provides "where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in court, (a) for payment to the purchaser a sum equal to five per cent of the purchase money, and (b) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder."

Rule 92, clause 2, provides "that where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of the sale, the court shall make an order setting aside the sale."

The question which the court below had to decide was whether or not the money had been deposited in court. It is quite clear that "court" means the Civil Court. This was a question which admittedly the lower appellate court had not only jurisdiction but was bound to decide. It is somewhat difficult to say whether the court was not technically right in holding, unfortunate though the judgment-debtor may have been, in strictness that the money was not deposited in court within thirty days or on the 11th of November, which was the first day the court opened. It was not until December following that the money was accepted in the Civil Court by ordering the transfer of the deposit to the Civil Court account. It has been decided by their Lordships of the Privy Council that the High Court is not entitled to create what are really appeals put forward in the shape of revisions, and accordingly, even if we thought that under the exceptional circumstances of this case the lower appellate court might very well have upheld the court of first instance, this would not justify us in interfering with the decision of the lower appellate court in revision.

In this connection it must be remembered that the deposit of the purchase money *plus* 5 per cent. compensation of the decretal amount to the auction purchaser is an indulgence to the judgment-debtor. The auction purchaser is entitled to the benefit of his purchase unless the section has been strictly and completely

complied with. We think that the question whether or not the section has been complied with completely was clearly a question which the court below had jurisdiction to decide, that it exercised its jurisdiction, and that, even if we thought it had come to an erroneous conclusion, we would not have been entitled to interfere in revision.

As to the second contention, namely, that an auction purchaser has no right to appeal. The Code undoubtedly gives a right of appeal against an order setting aside the sale. The party mainly affected by the setting aside of the sale is the auction purchaser, and the Code provides that the sale should not be set aside without notice to him. We think it would be most unreasonable to hold that the Code restricts the right of appeal to the decree-holder or judgment-debtor. We think the application fails and we accordingly dismiss it with costs.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Abdul Kacof.

MITHAN LAL (PLAINTIFF) v. CHHAJU SINGH (DEFENDANT).*

*Usufructuary mortgage—Lease of mortgaged property by mortgagee to mortgagor
—Sale of equity of redemption to a third party in execution of a decree for arrears of rent—Liability of thekadar for rent.*

Defendant, being the owner of a zamindari share, made a usufructuary mortgage of it in favour of the plaintiff. On the same date the plaintiff executed a lease of the same property for the term of the mortgage. Defendant fell into arrears with his rent, and plaintiff sued him and obtained a decree, in execution of which he brought to sale defendant's equity of redemption under the mortgage and it was purchased by a third party; the purchaser, however, did not obtain mutation of names in his favour.

Held, on a fresh suit brought by the lessor for arrears of rent accruing due since the sale of the equity of redemption, that the defendant was still liable for payment of rent as *thekadar*.

The facts of this case were as follows:—

The defendant usufructuarily mortgaged his zamindari to the plaintiff on the 23rd of July, 1908. On the same day the

* Second Appeal No. 757 of 1916, from a decree of L. Johnston, District Judge of Meerut, dated the 23rd of February, 1916, modifying a decree of Brij Krishna Rama, Assistant Collector, First class, of Bulandshahr, dated the 15th of November, 1915.

1918

FAZAL RAB
v.
MANZUR
AHMAD.

1918.
March, 6.