

Before Justice Sir Cecil Walsh and Mr. Justice Banerji.

MADHURI SARAN (JUDGEMENT-DEBTOR) *v.* BISHAMBHAR NATH AND OTHERS (AUCTION-PURCHASERS).*

1927
April, 13

Civil Procedure Code, order XXI, rule 89—Execution of decree—Application to set aside sale—Deposit of the amount by judgement-debtor and his mortgagee—Validity of.

Certain judgement-debtors whose property had been sold in execution of a decree executed a mortgage of the property, and then the mortgagees and themselves, by means of separate applications, paid into court the amount needed to get the sale set aside, one party tendering approximately two-thirds and the other one-third.

Held, that there was nothing illegal in payment being made in this way; the two payments should be treated as one and as being the payment of the judgement-debtors. *Sarvi Begum v. Haider Shah* (1), distinguished.

THE facts of this case are fully stated in the judgement of the Court.

Dr. *Surendra Nath Sen* and Pandit *Uma Shankar Bajpai*, for the appellants.

Dr. *Kailas Nath Katju* and *Munshi Shambhu Nath Seth*, for the respondents.

WALSH and BANERJI, JJ.:—This is a judgement-debtor's appeal. Certain property was advertised for sale and the estimated value of that property, as entered in the sale proclamation by the court, was Rs. 8,000. On the 20th of April, 1926, the property was actually sold for Rs. 14,000 and the decree-holder purchased the property at the auction. The amount which was due to the decree-holder, as entered in the sale proclamation, was Rs. 13,671-6-4. On the 17th of May, 1926, the judgement-debtors executed a mortgage in favour of

* First Appeal No. 148 of 1926, from an order of Sarup Narain, Subordinate Judge of Cawnpore, dated the 14th of June, 1926.

(1) (1911) 9 A.L.J., 12.

1927

MADHURI
SARAN
v.
EISENHILAR
NATH.

Ram Kumar and others of the share sold at auction on the 20th of April, 1926, for a sum of Rs. 10,000. On the 18th of May, 1926, two applications were presented to the Subordinate Judge. One was by Ram Kumar and others as mortgagees, who tendered and deposited a sum of Rs. 10,000 and in their application stated that if the judgement-debtor did not deposit the balance payable and if the sale was not set aside, this sum might be returned to Ram Kumar. The judgement-debtors in their application stated that a sum of Rs. 10,000 had been deposited by the mortgagees under a tender and that they were depositing a sum of Rs. 4,810 and prayed that the sale be set aside and also stated that the total amount was more than the amount payable under the law to the decree-holder. They, therefore, prayed that the remaining amount might be returned to them. The office reported for the information of the Judge that the amount deposited was correct and that out of the total amount Rs. 10,000 had been deposited by the mortgagees and Rs. 4,810 by the judgement-debtors. On notice of this application of the judgement-debtor's having been served on the decree-holders, they objected on the ground, among others, that there was no compliance with order XXI, rule 89, inasmuch as the whole amount had not been deposited by the judgement-debtors and that the mortgagees had no *locus standi* to make any deposit. They further urged that the deposit being a conditional deposit could not be treated as a valid deposit. The learned Subordinate Judge has declined to set aside the sale by his order of the 14th of June, 1926, which is under appeal. He has held that "if there had been a joint application on behalf of the judgement-debtor

and the mortgagees, then there would not have been any difficulty." He has also held that the deposit made by the mortgagees was not on behalf of the judgement-debtors. We are of opinion that the two applications must be treated on the whole as one. The application of the judgement-debtors clearly referred to the fact of the deposit having been made in the name of the mortgagees. The mortgagees independently may not have been able to apply to have the sale set aside, but we are of opinion that the transactions must be treated as one and that the judgement-debtor complied with the provisions of order XXI, rule 89, by depositing the whole amount within thirty days. The plea that the deposit was a conditional deposit is really without any force as the condition only related to what would happen in case the learned Subordinate Judge did not set aside the sale, and we think that it was not a condition precedent to anything to be done by the court. The case of *Sarvi Begum v. Haider Shah* (1), is clearly distinguishable. In that case there was no application by the judgement-debtor at all. The amendment of the rules by the rule-making powers has made the point raised in this case clear. We think, however, that the costs of this appeal should be paid by the appellant.

We, therefore, set aside the sale of the 20th of April, 1926. The decree-holders will be paid the amount due to them by the court.

Appeal allowed.

1927

MADRURI
SARAN
v.
EISHAMBHAR
NATH.