APPELLATE CIVIL

Before Mr. Justice Bennet and Mr. Justice Bajpai

1932
November, 18.

AHMADI BEGAM (DECREE-HOLDER) *v.* ISHAQ MUHAMMAD (JUDGMENT-DEBTOR)*

Civil Procedure Code, order XXI, rule 89—Whether deposit by judgment-debtor is tantamount to "receipt" by decree-holder—Auction purchaser, even if he is the decree-holder, is entitled to 5 per cent. of purchase money.

When money has been deposited in court by the judgment-debtor for the decree-holder and that money is available to the decree-holder without any obstacle of law, then that deposit amounts to receipt by the decree-holder within the meaning of order XXI, rule 89 of the Civil Procedure Code. So, where a sum of money had been deposited in court by the judgment-debtor towards the decretal amount before the auction sale, it was *held* that such sum could be taken into account to supplement the deposit actually made at the time of an application under order XXI, rule 89, by the judgment-debtor, in order to find out whether the requirements of that rule regarding the amount were complied with.

The auction purchaser is entitled to 5 per cent. of the purchase money under order XXI, rule 89, even where he is the decree-holder himself.

Mr. *A. M. Khwaja*, for the appellant.

Messrs. *P. L. Banerji* and *M. A. Aziz*, for the respondents.

BENNET and BAJPAI, JJ. :—This is an execution first appeal by the auction purchaser decree-holder against an order of the court below setting aside a certain sale under the provisions of order XXI, rule 89 of the Code of Civil Procedure. It is not necessary to state the facts in greater detail than is necessary to make our judgment intelligible. It appears that Bibi Ahmadi Begam obtained a decree against Ishaq Muhammad for a large sum of money and in execution of that decree certain properties belonging to the judgment-debtor

* Execution First Appeal No. 14 of 1932, from a decree of Muhammad Aqib Nomani, Subordinate Judge of Agra, dated the 24th of October, 1931.

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were advertised for sale. On the 23rd of June, 1931, the judgment-debtor brought a sum of Rs.5,000 in court and under the orders of the court the said sum was received towards the decretal amount. We have on the record of this case the tender evidencing such a deposit. The sale, however, was held on that very date, because certain communications that were intended to reach the Amin could not reach in time. On the 22nd of August, 1931, however, this sale was set aside and a fresh sale was ordered to be held on the 24th of August, 1931. In spite of the efforts of the judgment-debtor to get the sale postponed, the sale was held on that date and the property was purchased by the decree-holder for Rs.39,000. On the 14th of September, 1931, the judgment-debtor applied under order XXI, rule 89, for setting aside the sale and tendered in court the sum of Rs.71,597-4-9. On receipt of this amount the court below set aside the sale.

It is true that the provisions of order XXI, rule 89, are by way of indulgence to the judgment-debtor and they should therefore be strictly complied with, and the question that we have got to decide is whether this sum coupled with the prior sum of Rs.5,000 deposited at an earlier date is sufficient under the provisions of the above order for the setting aside of the sale. A subsidiary question also arises whether the sum of Rs.5,000 can at all be taken into account. It is conceded by the learned counsel for the appellant that if the earlier sum of Rs.5,000 is taken into account the deposit is full. It is, however, argued on his behalf that the aforesaid sum should not be taken into consideration inasmuch as that sum had not been *received* by the decree-holder. In support of his contention he has cited the case of *Totaram Chunilalshet* v. *Chhotu Motiramshet* (1). The judgment in that case does not state the facts but it simply follows an earlier decision

(1) A.I.R., 1923 Bom., 299.

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reported in *Trimbak Narayan* v. *Ramchandra Narsingrao* (1). The facts of that case were that two properties were sold in different lots and the judgment-debtor applied to have the sale of one item of property set aside and he wanted to have the sale proceeds of the other lot to be taken into account along with the deposit that he actually made for setting aside the sale of the property for which he had applied, and it was held by the learned Judges that this could not be done inasmuch as mere payment of sale proceeds into court was not a sufficient compliance with the requirements of section 310A of the Code of Civil Procedure. It is true that towards the end of their judgment they say that "what the section contemplates is evidently an *actual receipt* by the decree-holder, and we think that nothing less than that will satisfy its requirements", but in an earlier portion they say: "It cannot be said that the decree-holder has received the sale proceeds of the *Munjari* property when in point of fact they have only been paid into court, and the decree-holder may never receive them at all, because the purchaser may become entitled to receive the money back under the provisions of section 315." It is thus clear that the learned Judges based their decision on the ground that the sale proceeds in court might not become available to the decree-holder if the sale was ultimately set aside. The learned counsel for the appellant also relies on the case of *Karunakara Menon* v. *Krishna Menon* (2). The facts of that case were different and it was held therein that a judgment-debtor who applies under order XXI, rule 89, cannot take credit for any amount paid by a co-judgment-debtor who has not joined him in the application. At page 431 their Lordships say: "If the monies had been deposited by the applicants themselves, such monies can be taken to supplement the deposit actually made at the time of the application to set aside the sale." It is clear, therefore, that a

(1) (1899) I.L.R., 23 Bom., 723. (2) (1915) I.L.R., 39 Mad., 429.

distinction has been drawn in that case between 'actual receipt' and 'deposit' in court. We are of the opinion that when money has been deposited in court and that money is available to the decree-holder without any obstacle of law, then that deposit amounts to receipt by the decree-holder. In the case of *Kripa Nath Pal* v. *Ram Lakshmi Dasya* (1) Mr. Justice AMEER ALI says: "As at present advised I am of opinion that the word 'received' in section 310A ought to be construed to mean sums of money either actually received by the decree-holder or which he is in a position to credit to his account." We are in perfect agreement with this view of the law.

Another point taken by the appellant is that he is entitled to a sum equal to 5 per cent. of the purchase money. The court below repelled this contention of the decree-holder on the ground that he, being the auction purchaser, is not entitled to the 5 per cent. It is well settled that if the decree-holder be the purchaser he is entitled to the 5 per cent. on the purchase money; *vide* the Full Bench case of *Chundi Charan Mandal* v. *Banke Behary Lal* (2), and indeed it was conceded before us that the judgment of the court below on that point was wrong. The result is that we allow the appeal to this extent that we hold that the decree-holder is entitled to obtain from the amount deposited in court a sum equal to 5 per cent. of the purchase money also. As the amount deposited, together with the Rs.5,000 tendered on an earlier date, is sufficient to meet every claim, the sale will be set aside. The judgment-debtor and the mortgagee are entitled to withdraw any surplus after the above calculation.

(1) (1897) 1 C.W.N., 703. (2) (1899) I.L.R., 26 Cal., 449.