

us. This is a case which in our judgment is governed by the rule laid down in section 94 of the Evidence Act. If the mortgagees had, in the suit filed by them for the enforcement of their mortgage, asked for the sale of the entire property of the mortgagor in this mahal, namely "five shares", instead of "five pies" as given in the mortgage deed, and had made the allegations which they have now made in their application for correction, the court could not, in view of section 94 of the Evidence Act, have allowed evidence to be produced to prove their allegations. We are of opinion that the mortgagees cannot be allowed to obtain by this application, made after the passing of the decree, what they could not have obtained in the suit itself.

For the reasons given above we allow this petition in revision, set aside the order of the learned Additional Munsif, dated 31st July, 1937, and dismiss the application made by the mortgagees decree-holders for amendment praying that the description of the property be changed from "five *pies* share" situated in mahal No. 4 with all rights appurtenant to that share situated in mauza Barwa Ratanpur, into "five *shares*" situated in mahal No. 4 with all rights appertaining to the said share situated in village Barwa Ratanpur. The petitioner before us shall have his costs of these proceedings in this Court as well as in the court below.

*Before Mr. Justice Bennet and Mr. Justice Verma*

MAHBOOB KHAN (JUDGMENT-DEBTOR) *v.* MAJID HUSAIN  
(AUCTION PURCHASER)\*

1938

December, 22

*Civil Procedure Code, order XXI, rule 89—Setting aside auction sale on deposit—Application by tender for deposit of the decretal amount and 5 per cent. of purchase money—Separate application "to set aside the sale" whether necessary.*

Where, within 30 days after a sale in execution, the judgment-debtor made an application, in the form of a tender, for the deposit of the decretal amount and also the 5 per cent. of the purchase money as required by order XXI, rule 89 of the Civil Procedure Code and deposited the money in the treasury, and

1938

UMA  
SHANKAR  
RAI  
v.  
RAM AGYAN  
THAKUR

1938

MAHBOOB  
KHAN  
v.  
MAJID  
HUSAIN

subsequently, more than 30 days after the sale, he made an application setting out these facts and asking the sale to be set aside, it was held that the application to deposit the decretal amount and the penalty of 5 per cent. on the purchase money must be deemed to be an application not only for the deposit of the money but also to have the sale set aside; the requirements of order XXI, rule 89 were thereby complied with, and, no further application for setting aside the sale being necessary, it was immaterial that a separate such application was made beyond time.

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

Messrs. *Mukhtiar Ahmad* and *Gopalji Mehrotra*, for the opposite parties.

BENNET and VERMA, JJ.:—This is a civil revision by Mahboob Khan, a judgment-debtor, against an order in appeal of the Civil Judge of Jaunpur. The facts are that the Municipal Board of Jaunpur had a decree against Mahboob Khan and put up some property of his for sale on the 15th of July, 1936. Within a month of that sale, on the 11th of August, 1936, Mahboob Khan came to the court with a form of tender for deposit of the sale price and 5 per cent. as required by order XXI, rule 89, for the purpose of having the sale set aside. The Munsif signed the tender and Mahboob Khan took it to the treasury and deposited the money. Some days later, on the 21st of August, 1936, after a period of thirty days had expired, he made an application in writing setting out these facts. The matter eventually came before the Munsif before the sale was confirmed, and the Munsif went into the question whether an oral application was made to him for setting aside the sale in addition to the tender and held that it had been made. He therefore accepted the application of the judgment-debtor and set aside the sale. It will be noted that the sale had not been confirmed. The auction purchaser appealed to the Civil Judge and the Civil Judge held: "The oral evidence on the record does not fully convince me that an oral application such as that alleged by the judgment-debtor was ever made.

1938

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 MAHBOOB  
 KHAN  
 v.  
 MAJID  
 HUSAIN

The court had therefore no right to set aside the sale under order XXI, rule 89 of the Civil Procedure Code."

A learned Judge of this Court has differed from this view and has referred this case to a Bench. Various rulings have been produced. One of these is *Ramraj Singh v. Rabi Prasad* (1). In this ruling SIR P. C. BANERJI, J., held: "In the first place the application to deposit the money and the penalty of 5 per cent. on the purchase money must be deemed to be an application not only for the deposit of the purchase money but also to have the sale set aside." Under order XXI, rule 89 two things are required. Firstly that the judgment-debtor should apply to have the sale set aside, and secondly that he should deposit in court the sum of money required by that rule. According to learned counsel for the opposite party there should be three things, namely an application to have the sale set aside, also a tender and also a deposit. We do not think that the rule requires more than two things and the interpretation by SIR P. C. BANERJI, J., is one with which we agree. No doubt a more strict view has been taken in certain rulings that there should be an oral application and this has been laid down by CHAMBER, J., in *Sarvi Begum v. Haider Shah* (2), and in *Murugappa Asari v. Shanmuga Mudaliar* (3) and *Pachiavae v. Vallimuthu Velan* (4). We consider, however, that the view in *Ramraj Singh v. Rabi Prasad* (1) is one which we should follow and accordingly we follow it. The form of tender does not use the actual words that the sale should be set aside but it is clearly the intention of a person presenting this form to a court for signature that the deposit is being made for that purpose. For these reasons we allow this civil revision and we set aside the order of the lower appellate court and we restore the order of the court of first instance with costs throughout.

(1) (1921) 63 Indian Cases, 140.

(3) A.J.R. 1925 Mad. 909.

(2) (1911) 9 A.L.J. 12.

(4) A.J.R. 1925 Mad. 639.