

1923.

SEA
SHACHARI
PEARI
v.
RAM
KISHORI
KUER.

MULLICK, J.

1911, as being liable to the decree-holder's charge: but as under the Hindu Law a widow is entitled to proceed against all the properties of her deceased husband, to recover her maintenance allowance, there can be no objection to the order which has been made in this case. The result is that the judgment of the learned Additional District Judge is affirmed and appeal No. 170 of 1922 is dismissed with costs.

BUCKNILL, J.—I agree.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mullick and Bucknill, J.J.

MUSSAMMAT BIBI ZAINUB

v.

PARAS NATH.*

1923.

June, 15.

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rules 89 and 92(2), section 115—Execution sale, application to set aside, deposit—limitation—auction-purchaser, whether is a necessary party—Revision.

An application under Order XXI, rule 89, to set aside a sale on deposit of the decretal amount and compensation is within time if the deposit is made within 30 days from the date of the sale even though notice of the application is not served on all the parties affected by the sale until after the expiry of that period.

Ganesh Bab Naik v. Vithal Veman Mahalya(1), applied.

Mussammatt Sumitra Kuer v. Damri Lal(2) and *Ajiuddin Ahmed v. Khoda Bux Khondkar*(3), not followed.

Query.—Whether an application to make the auction-purchaser a party to a proceeding under Order XXI, rule 89, is required.

* Civil Revision No. 86 of 1923, from an order of Damodar Prasad, Esq., Officiating Additional District Judge, Patna, dated the 31st January, 1923, reversing an order of Babu Krishna Sahai, Subordinate Judge, Patna, dated the 10th May, 1922.

(1) (1913) I. L. R. 37 Bom. 387 (2) (1921) 2 Pat. L. T. 336.

(3) (1919) 50 Ind. Cas. 5.

If, without any such application, notice is issued upon the auction-purchaser he becomes a party to the proceedings and the requirements of rule 92(2) are satisfied.

Where the auction-purchaser's name and address were stated in the application and it was prayed that the sale should be set aside after payment of compensation to him, *held*, that this was an application to make the auction-purchaser a party.

Where a court of competent jurisdiction has held that an application was made within time that decision, even though wrong, is not subject to the revisional jurisdiction of the High Court.

Fazal Rab v. Manzur Ahmad(1), referred to.

Appeal by the judgment-debtors.

This application was made against an order passed by the officiating Additional District Judge of Patna on the 31st January, 1923, reversing the order of the Subordinate Judge of Patna, dated the 10th May, 1922. It appeared that on the 18th April the Subordinate Judge of Patna sold certain immovable properties belonging to the two petitioners and their co-judgment-debtors in execution of a money decree. On the 5th May the petitioners applied for permission to deposit the money under Order XXI, rule 89, and to have the sale set aside. On the same date the decree-holder made an application stating that he had received the full amount of his decretal claim from the judgment debtors and asking that the payment should be certified. On the 6th May the petitioners deposited in Court the compensation due to the auction-purchaser. On the same date the auction-purchaser paid into Court the balance of the auction-purchase money. Thereupon the Subordinate Judge adjourned the case till the 10th May in order that the petitioners might produce a treasury *chalan* showing that the necessary sums had been paid into the treasury. On the 10th May the case was duly put up and the sale was set aside. Against this order the auction-purchaser appealed to the Additional District Judge who held that as the

1923.

MUSSAM-
MAT BIBI
ZAINUB
v.
FARAS
NATH.

(1) (1918) I. L. R. 40 All. 425.

1923.

MUSSAM-
MAT BIBI
ZAINUB
v.
PARAS
NATH.

auction-purchaser had not been made a party to the proceedings within one month of the date of the sale the deposit could not be accepted. He accordingly set aside the order of the Subordinate Judge and directed that the sale should be confirmed. The present application was made against the Additional District Judge's order.

Muhammad Hasan Jan, Syed Ali Khan and Ahmad Raza, for the petitioners.

Siveshwar Dayal, for the opposite party.

MULLICK, J. (after stating the facts, as set out above, proceeded as follows) :—

It is urged by the petitioners that the learned Additional District Judge declined to exercise jurisdiction in refusing to accept the deposit. Now Order XXI, rule 92, nowhere speaks of the auction-purchaser being made a party; it provides that no sale can be confirmed or set aside unless notice of the application has been given to all persons affected thereby; and, in my opinion, the rule means that the Court is incompetent to make any order at all till such notice has been given. The duty of moving the Court to issue notice lies of course upon the applicant and all that the Court has to do is to give him a reasonable opportunity for doing so. On default the Court may dismiss the application, and there is no obligation upon the Court to issue a notice of its own motion and without the assistance of the applicant. The law requires that the application to deposit should be made within thirty days of the sale, but it does not impose any period of limitation for the issue of notice; and so it has been held in *Ganesh Bab Naik v. Vithal Vaman Mahabya* (1). It is not clear whether the learned Additional District Judge was of opinion that the period of limitation for the issue of notice was thirty days or whether he was of opinion that there must be an express prayer to make the auction-purchaser

(1) (1913) I. L. R. 37 Bom. 387.

1923.

MUSSAM-
MAT BIBI
ZAINUB
v.
PARAS
NATH.

MULLICK, J

a party to the proceedings within that period. In either event his view of the law is wrong. The learned Additional District Judge, however, relies on the decision of a single Judge of this Court in *Mussammatt Sumitra Kuer v. Damri Lal* (1) which follows a decision of the Calcutta High Court in *Ajiuddin Ahmad v. L. Khoda Bux Khondkar* (2). It seems to have been held in these cases that the applicant must make the auction-purchaser a party to the proceedings within one month.

If the view of the learned Judges was that notice must be issued upon the auction-purchaser within one month, then I must respectfully differ. All that the law requires is that the deposit shall be made within one month of the sale.

With regard to the contention that the auction-purchaser must be made a party, the law does not in terms require him to do so, but assuming that it does I have not been able to obtain from the learned Vakil for the opposite party, any precise exposition of the applicant's duty in this matter. In the present case the applicants stated, in the body of their petition, the name and address of the auction-purchaser and asked that the sale should be set aside after payment of Rs. 175 as compensation to the auction-purchaser. I fail to see why this was not an application to make the auction-purchaser a party. The fact is that as soon as the notice is issued upon him the auction-purchaser becomes a party to the proceedings and it is therefore unnecessary to make a special prayer for adding him as a party. There is no prescribed form of application and, in my opinion, in the present case there was a sufficient application for the service of notice upon the auction-purchaser.

The Subordinate Judge, therefore, acted without jurisdiction in setting aside the sale without finding a date for hearing the auction-purchaser.

The learned Additional District Judge, therefore, had jurisdiction to set aside the learned Subordinate

(1) (1921) 2 Pat. L. T. 336.

(2) (1919) 50 Ind. Cas. 5.

1923.

MUSSAM-
MAT BIBI
ZAINUB
v.
PARAS
NATH.

MULLICK, J.

Judge's order and to remand the case for the issue of notice upon the auction-purchaser or to dispose of the matter finally himself. It appears that, as all the parties affected by the sale were before him, he chose the latter alternative and he held that the applicants were not entitled to get the sale set aside because they had failed to serve the auction-purchaser with a notice within one month of the sale.

Now, it is true that this was a wholly erroneous view of the law of limitation, but all the same it was a decision arrived at with jurisdiction and it cannot therefore be revised under section 115, Civil Procedure Code. The principle is now too well settled, but we have been invited by the learned Vakil, for the opposite party, to refer to *Fazal Rab v. Manzur Ahmad* (1) because the facts of that case are somewhat similar to the facts before us. There the sale was held by the Collector on behalf of the Civil Court and the deposit was made in the Court of the Collector because the Civil Court was closed. The Civil Court of first instance set aside the sale, but the appellate Court confirmed it and, upon an application for revision being made to the High Court, it was held that parties could not by a resort to the revisional jurisdiction secure the benefits of an appeal and that a Court of competent jurisdiction having held that the deposit had not been made within the specified time the decision could not be interfered with under section 115.

In my opinion the order of the Additional District Judge, though erroneous, was final and it cannot be revised in the exercise of our revisional jurisdiction.

It has, however, been urged that we should interfere in the exercise of our powers of superintendence, but those powers are not to be lightly exercised. The petitioners were asking what was really an indulgence and it was their duty to see that the statute was complied with. If they had put in the process-fee for the issue of the notice at the time

(1) (1918) I. L. R. 40 AM. 425.

of the deposit the Subordinate Judge would probably not have disposed of the case till notice had been served.

In my opinion the petitioners were guilty of negligence and we should not exercise our powers under section 107 of the Government of India Act in their favour.

The application will, therefore, be dismissed with costs.

BUCKNILL, J.—I agree.

Application dismissed.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

BASDEO PRASAD

v.

DWARIKA PANDEY.*

1923.

June, 15.

Mortgage suit—suit by persons claiming in succession to original mortgagors, against mortgagees and other defendants—plaintiff's title challenged by all the defendants—no appearance by mortgagees except to file written statement—suit dismissed—appeal by plaintiff—decree against mortgagees.

Where, in a suit for redemption of a mortgage, the plaintiffs are not the original mortgagors but persons claiming to be entitled to a share under a partition of the properties of the original mortgagors, the defendants are entitled to challenge the plaintiffs' title.

In a suit for redemption the plaintiffs claimed that they had succeeded to a portion of the properties of the original mortgagors. The mortgagee defendants filed a written statement contesting the plaintiffs' right but did not otherwise

* Second Appeal No. 919 of 1921, from a decision of Ananta Nath Mitra, Esq., Additional District Judge of Saran, dated the 20th January, 1921, reversing a decision of Babu Kamini Kumar Bawerji, Munsif of Chapra, dated the 31st March, 1920.