

CIVIL REVIEW.

Before Das and Macpherson, J.J.

SHAM SUNDAR SINGH

v.

MUNSHI MUSHAHIB LAL.*

1923.

March, 21.

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 90—Application to set aside sale—compromise on condition that amount paid by certain date—amount deposited, and court asked not to pay the amount to decree-holders—objection to payment to decree-holders subsequently withdrawn—sale set aside.

An application under Order XXI, rule 90, to set aside a sale was compromised on the terms that if the judgment-debtors paid to the decree-holders a certain sum by the 23rd September, 1921, the sale should be set aside but that if such sum was not paid by that date the application would stand dismissed. On the 19th September, 1921, the judgment-debtors deposited the money in court and invited the court to set aside the sale. They also petitioned the court not to pay the money to the decree-holders until the decision of a regular suit which they proposed to institute against the decree-holders, and which was in fact instituted on the 24th. On the 23rd the decree-holders filed a petition praying that the sale should not be set aside as the deposit made by the judgment-debtors was a conditional deposit. While the matter was being argued the pleader for the judgment-debtors informed the court that his clients had no objection to the money being withdrawn by the decree-holders. On the 9th November the court set aside the sale. *Held*, on second appeal from an appellate order reversing the order setting aside the sale, that the deposit by the judgment-debtors was a valid deposit. The order of the first court was accordingly restored.

Dulhin Mothura Koer v. Bansidhar Singh(1), followed.

*Civil Review No. 304 of 1922, from an order of G. J. Monahan, Esq., District Judge of Monghyr, dated the 6th July, 1922, setting aside the decision of Babu T. D. Mukharji, Subordinate Judge of Monghyr, dated the 9th November, 1921.

(1) (1911) 10 Ind. Cas. 880.

Application by the judgment-debtors.

The facts of the case material to this report are stated in the judgment of Das, J.

Abani Bhushan Mukherji, for the appellants.

Ram Prasad, D. C. Varma and Janak Kishore, for the respondents.

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DAS, J.—I am unable to agree with the view taken by the learned District Judge. On the 22nd December, 1920, a sale of a certain property took place in execution of a certain decree obtained by the opposite party as against the petitioners. On the 21st January, 1921, the petitioners applied for setting aside the sale under the provision of Order XXI, rule 90, Civil Procedure Code. On the 23rd January, 1921, the parties entered into a compromise, the terms of the compromise being that if the judgment-debtors paid the sum of Rs. 2,695 to the decree-holders, on or before the 23rd September, 1921, the sale would be set aside, but that if the sum of Rs. 2,695 was not paid to the decree-holders within the time allowed, the application for setting aside the sale would stand dismissed and the sale would be confirmed. That was the position on the 23rd January, 1921. On the 19th September, 1921, the petitioners deposited the sum of Rs. 2,695 in Court and invited the Court to set aside the sale. The petitioners also applied to the Court that the money should not be paid to the decree-holders until the decision of a regular suit, which the judgment-debtors were about to institute, against the decree-holders. It appears that such a suit was in fact instituted on the 24th September, 1921. On the 23rd September, 1921, the decree-holders filed a petition praying that the sale should not be set aside as the deposit made by the judgment-debtors was a conditional deposit which had in effect prevented them from withdrawing the money from Court. The learned Subordinate Judge came to the conclusion that the payment of the money to the decree-holders could not be withheld, and on the 9th November the learned Subordinate Judge set aside the sale. It appears that while the matter was

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being argued before the learned Subordinate Judge, the judgment-debtors, through their pleader, intimated to the Court that they had no objection to the money being withdrawn by the decree-holders. The question which the Courts below had to consider was whether the deposit made by the judgment-debtors on the 19th September, 1921, was an unconditional deposit or a conditional deposit. The learned Subordinate Judge came to the conclusion that the deposit was an unconditional one, whereas the learned District Judge in appeal has taken the contrary view.

I am not, as at present advised, prepared to assent to the proposition that the deposit was a conditional one. It is, in my opinion, one thing to make the deposit subject to a particular condition; it is another thing to make the deposit and to apply to the Court that the party entitled to withdraw the money from Court should not withdraw it until a particular decision is reached in a particular case. I will, however, assume that the deposit on the 19th September, 1921, was a conditional deposit. The question still remains whether there was anything which happened afterwards which prevented the Court from giving the appropriate relief to the judgment-debtors. The judgment-debtors, through their pleader, intimated to the Court that they would not object to the money being withdrawn by the decree-holders, and as a matter of fact they took up that position before the decree-holders made any application for withdrawal of the money from Court. The case, in my opinion, is governed by the decision of the Calcutta High Court in *Dulhin Mothura Koer v. Bansidhar Singh* (1). In that case the judgment-debtor made the deposit under Order XXI, rule 89, on the last day for making a deposit, and the petition by which he made the deposit prayed that the money was not to be paid out to the decree-holder auction-purchaser till the disposal of a suit which had been commenced by the petitioner in another Court; but it appeared that when objection was taken by the decree-holder that the deposit was

(1) (1911) 10 Ind. Cas. 830.

not an unconditional deposit the judgment-debtor withdrew the objection. Mookerji, J., in delivering the judgment of the Court, said as follows: "Now, it is perfectly true that a deposit under Rule 89 of Order XXI, in order that it may be a valid deposit, must be unconditional, because the deposit is to be made for payment to the purchaser and the decree-holder. When, therefore, a deposit is made with a condition that the sum may not be drawn out at once but may be retained in Court until a certain event has happened, it is not a good deposit within the meaning of the rule.....It appears, however, that the deposit was accepted by the Court without any question, and as soon as objection was taken by the decree-holder, the petitioner withdrew the condition, so that the money became available for payment to the decree-holder before he had made any attempt to withdraw the money from Court. Under such circumstances, we are not prepared to hold that the deposit was invalid and not sufficient for reversal of the sale. The position might have been different if, upon objection taken by the decree-holder, the petitioner had persisted in her effort to annex a condition to the deposit. The decree-holder was not prejudiced in any manner by the insertion of the prayer in the application of the petitioner that the money should be retained in Court, and he was substantially in the same position in the end as if such prayer had never been made. We must consequently hold that there was substantially a valid deposit within the time limited by law, sufficient for reversal of the sale."

In my opinion in the circumstances which have happened, we must regard the deposit made by the judgment-debtors on the 19th September, 1921, as a valid deposit. That being so, the order of the learned District Judge must be set aside and the order of the Court of first instance must be restored. There will be no order for costs.

MACPHERSON, J.—I agree.

Order set aside.

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