REVISIONAL CIVIL.

Before Macpherson and James, JJ.

1934.

February, 27.
April, 7.

LACHMI OJA

v.

MAHARAJ KUMAR RAM RAN BIJAY PRASAD SINGH.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 174—*deposit accepted as sufficient in the office of Munsif and sale set aside—deposit subsequently discovered to be short by something over twelve annas—order setting aside sale, whether without jurisdiction.*

In order to be a valid deposit so as to give jurisdiction to the court to set aside a sale under section 174 of the Bengal Tenancy Act, 1885, the money must be lodged in full within thirty days and not later.

Within thirty days of the sale, the judgment-debtor made a deposit, under section 174 of the Bengal Tenancy Act, of the amount due under the decree and of a sum which purported to represent the proportion of the purchase money for the benefit of the auction purchaser, and the deposits were accepted by the *serishtadar* in the office of the Munsif and in due course the Munsif made an order setting aside the sale. It was subsequently discovered that the amount deposited for the benefit of the auction-purchaser was short by something over twelve annas of the requisite amount.

Held, (*i*) that the deposit was not valid under section 174, and that, therefore, the order setting aside the sale was without jurisdiction;

(*ii*) that the judgment-debtor cannot escape the consequences of making an insufficient deposit by the fact that after the deposit was made the *serishtadar* and the Munsif themselves both made mistakes in treating it as if it were sufficient.

Sarjoo Prasad Missir v. *Nannoo Rai*(1), and *Chandi Charan Mandal* v. *Banke Behari Lal*(2), followed.

* Civil Revision no. 242 of 1934, from an order of Babu Bhagwan Prasad, Munsif of Buxar, dated the 31st March, 1933.

(1) (1916) 1 Pat. L. J. 459.

(2) (1899) I. L. R. 26 Cal. 449, F. B.

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Mir Dildar Ali v. *Thakurain Kusum Kumari*(1), *Gopinath Tewari* v. *Hiraman Bibi*(2); *Ugrah Lal* v. *Radha Prasad Singh*(3), *Abdool Latif Moonshi* v. *Jadub Chandra Mitter*(4) and *Rangini Sundari Dasi* v. *Hiralal Biswas*(5), not followed.

Makbool Ahmed Chowdhry v. *Bazle Sabhan Chowdhry*(6), distinguished.

Per MACPHERSON, J.—If the period of thirty days from the date of sale allowed by section 174 of the Bengal Tenancy Act and by Order XXI, rule 89 (Code of Civil Procedure, 1908), to the judgment-debtor for making the deposit in court can be extended at all, it is only when the judgment-debtor has established that he has made a mistake and that that mistake is directly due to an act *of the court* itself.

Application in revision by the auction-purchaser.

The case was in the first instance heard by Macpherson, J. who referred it to the Division Bench by the following Order of Reference:—

MACPHERSON, J.—In this application for revision the specific prayer is to set aside the order of the Munsif refusing to review his order setting aside a sale under section 174(2) of the Bengal Tenancy Act, on the ground that the court ought to have held that it had no jurisdiction to set aside the sale.

At the hearing Mr. Jayaswal asks that the application be treated as also one questioning the jurisdiction of the Munsif to set aside the sale of the holding.

The petitioner purchased on the 7th May, 1932, at rent sale held at the instance of the landlord opposite party, the raiyati tenancy of the other opposite parties and on the 25th May, 1932, one of the judgment-debtors deposited the decretal amount and costs amounting to Rs. 137-7-0 and by another chalan a sum of Rs. 10-8-0 as representing the five per cent. of the purchase money payable to the petitioner as auction-purchaser. In point of fact the deposit in favour of the petitioner should have been Rs. 11-4-9 which is five per cent. on Rs. 226. The Court nevertheless on the 8th June set aside the sale. No notice was given to the decree-holder or the auction-purchaser before it did so; it may be taken that the latter would have objected that the Court could not set aside the sale.

(1) (1922) 4 Pat. L. T. 642.
(2) (1933) 14 Pat. L. T. 478.
(3) (1891) I. L. R. 18 Cal. 255.
(4) (1897) I. L. R. 25 Cal. 216.
(5) (1929) 33 Cal. W. N. 1170.
(6) (1898) I. L. R. 25 Cal. 609.

The Munsif refused the application for review of the order on the ground that though the full amount required by section 174(1) had not been paid within thirty days as prescribed, he ought not, in the light of the decision in *Mir Dildar Ali* v. *Thakurain Kusum Kumari*(1) to interfere since the judgment-debtors had been misled as to the amount of the necessary deposit by the action of the Court itself which ought not to prejudice them.

Mr. K. P. Jayaswal for the petitioner contends that section 174(1) which merely affords a special indulgence on the condition precedent that the deposit must be made within thirty days, must be strictly construed, and, secondly, that the present case differs from all previous cases in which the High Court refused to interfere with an order setting aside a sale which was not strictly warranted by that provision or by Order XXI, rule 89, of the Code of Civil Procedure and in particular he urges that there was no fault on the part of the Court itself.

Mr. B. P. Singh for the opposite party first takes the objection that the application is against the review only and that there being a technical objection this Court ought not to interfere " to give effect to a mere technicality at the expense of manifest justice ". His difficulty, however, is that it can hardly be a technicality of procedure if the Court has failed to comply with the statutory provisions of section 174(1). I am of opinion that the application ought to be regarded as substantially against the order of 8th June, 1932 [*see* also *Sarjoo Prasad Missir* v. *Nannoo Rai*(2)].

Mr. B. P. Sinha then contends on the facts that the judgment-debtors were misled by calculations of the office, so that the case comes within the recent decision in *Gopinath Tiwari* v. *Dulhin Hiraman Bibi*(3).

Now the judgment-debtor Harnarain Ojha applied for a chalan on the 29th May, 1932, stating that he had brought the entire decretal dues including costs. He apparently did not ask for any assistance from the office of the court (as was the case in most of the previous decisions); but as Mr. B. P. Sinha states that the office did actually make calculations, the record has been sent for. Now there is no provision in the Rules whereby the judgment-debtor may apply direct to any member of the staff of the court for information. On the contrary, the court on its administrative side for obvious reasons views such applications with extreme disfavour. All applications for information must be made in a prescribed form to the judge in charge of the copying department or to his subordinate of that department designated by him for the purpose. This is a point which appears in most of the cases, except *Chundi Charan Mandal* v. *Bankey Behary Lal Mandal*(4) to have escaped notice. Clearly information supplied by a member of the staff of the court under such circumstances could not possibly be the act of the court itself.

Mr. B. P. Sinha then refers to the provisions of the General Rules and Circular Orders (Civil), Volume I, for receipt of money. Rules 9 to 11 have apparently undergone no substantial alteration since at least

(1) (1922) 4 Pat. L. T. 642.
(2) (1916) 1 Pat. L. J. 459.
(3) (1933) 14 Pat. L. T. 478.
(4) (1899) I. L. R. 26 Cal. 449, F. B.

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1910, the edition of which is the earliest available, nor apparently from the time of the Full Bench decision in *Chandi Charan Mandal* v. *Banke Behary Lal Mandal*(1).

9. Payments.....cannot be accepted either in Court or at the Treasury unless the money be tendered with a chalan in quadruplicate signed by the Chief Ministerial Officer of the Court under whose decree or order the money is tendered and also by the Accountant of the Court or group of Courts".

10. "Any person desirous of paying money into Court.....shall be furnished free of cost with four forms of chalan Form no. (A) 1 in each of which he must enter in English the particulars required from him....."

11. "The person desirous of paying in the money having filled up four forms of chalan, shall present them to the Chief Ministerial Officer of the Court. The latter shall then *ascertain that the amount tendered is correct* and is due from the person on whose account it is tendered to the *person to whom* it is stated to be payable *and after correcting the forms of chalan, if necessary*, shall sign it and pass the forms on to the Accountant of the Court or set of Courts, who having made the necessary entries in Part II shall give a serial number to them. The chalan shall then be laid before the Judge in charge, and he shall, if in order, sign them.....".

It may be mentioned that the form of chalan shows the 'amount to be tendered' and that the Judge-in-charge-of-accounts is distinct, from the "Court" or any particular Court.

In this connection it may perhaps be observed that the calculations sometimes found on the back of the applications and usually made by the execution muharrir, may be made by him at the instance of the judgment-debtor by private treaty or may be a preparation (of course on unofficial information) for a reference on the point from the serishtadar, who is the chief ministerial officer of the Court.

In the present instance it is obvious that the Chief Ministerial Officer of the Court did fail to ascertain that 'the amount tendered' in the second chalan was correct or to correct the form of chalan. The question, therefore, is whether his laches is the act of the court. As Jenkins, J. observed in the Full Bench case—

"It is essential to the respondent's success that it should be established that he has been prejudiced by the act of the Court and that the mistake that has been made is attributable to that act."

The possibilities are either that the intention of the rule is to prevent the person paying in money from paying in anything except the exact amount or that the court may have information from the ministerial officer which will prevent it from inadvertently passing orders such as the present which are not justified by the amount paid in. In the recent case of *Gopinath Tiwari* v. *Hiraman Bibi*(2), Agarwala, J. following the Calcutta case which will presently be mentioned, has held that the scrutinising and passing of chalans by the Chief Ministerial Officer as contemplated by rule 11 is an act of a prescribed officer in accordance with the prescribed rules of the court and cannot be described as a mere casual act of a ministerial officer. The expressions employed are to be found in the judgment of Jenkins, J. already cited, where it is also observed that "what constitutes an act of the Court depends on the circumstances of the case". Both in that case of this Court and in *Rangini Sundari Dasya* v. *Hiralal Biswas*(3) the petitioners had

(1) (1899) I. L. R. 26 Cal. 449, F. B.
(2) (1933) 14 Pat. L. T. 478.
(3) (1929) 33 Cal. W. N. 1170.

asked that the amount to be deposited should be intimated to them. The deposit was in accordance with the information supplied by the execution clerk of the court and the chalan incorrectly filled up accordingly was passed by the serishtadar before the expiry of the prescribed period. The distinctions between those two cases and the present are that they are under Order XXI, rule 89, of the Code of Civil Procedure and that apparently no application was in the present instance made to the Court for information. The distinction between these two cases and the earlier decisions (except one) whether governed by Order XXI, rule 89 (including section 310A, the previous provision), or by section 174, is that in the latter the relevancy of the Account Rules was not considered. It may even be contended that the time prescribed by those provisions cannot legally be extended at all, whether by attention or inattention to the Account Rules, or otherwise.

As to the distinction between section 174 of the Bengal Tenancy Act and Order XXI, rule 89, it is pointed out by Maclean, C. J. in *Chundi Charan Mandal* v. *Banke Behary Lal Mandal*(1) that the language of section 174 is different from that of section 310A of the Code of Civil Procedure, the words in the former being " the amount recoverable under the decree with costs " whilst in the latter the words are " the amount specified in the proclamation of sale.....' " The former words are not, qua the amount, nearly so precise as the latter, and rather suggest that some enquiry may be necessary to ascertain the actual amount ". This comment was made in respect of the earliest case which is *Ugrah Lal* v. *Radha Pershad Singh*(2) which, the learned Chief Justice stated, " proceeded upon the footing that section 174 provided no machinery for ascertaining the amount but that in practice the amount so calculated was to be taken as the amount payable under the section ". He proceeded " that may or may not be so....." and added " that in the case of *Ugrah Lall* v. *Radha Pershad Singh*(2) there would appear to have been an order of some sort made by the Munsif ". The next paragraph runs :—

" In the case of *Kabilaso Koer* v. *Raghu Nath Sukan Singh*(3) the Court would appear to think that before a sale can be set aside the provisions of section 174 must be strictly complied with. I am not prepared to say that a decision upon the construction of section 174 of the Bengal Tenancy Act can be regarded as a safe guide to enable us to ascertain the meaning of section 310A of the Civil Procedure Code. Great reliance, however, is placed upon the case of *Makbool Ahmed Chowdhry* v. *Bazle Sabhan Chowdhry*(4). In that case, apparently, it was held that although the judgment-debtor had not deposited the 5 per cent. on the purchase-money, as he had deposited the amount calculated by the Court as the amount to be deposited, the sale ought to be set aside. Speaking with the utmost respect for that decision, I am unfortunately unable to appreciate the principle upon which it is based. So far as the report shows, there is nothing to indicate that

(1) (1899) I. L. R. 26 Cal. 449, 453, F. B.
(2) (1891) I. L. R. 18 Cal. 255.
(3) (1891) I. L. R. 18 Cal. 481.
(4) (1898) I. L. R. 25 Cal. 609.

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the decree-holder or the auction-purchaser had anything to do with the ascertainment of the amount by the Munsif or what power the Munsif or any of his officers had to fix the amount; and if the amount were fixed behind the back of the decree-holder and auction-purchaser, the result would be that the amount fixed perhaps by some absolutely irresponsible person in the Munsif's Court is to be treated as the amount to be deposited instead of the amount stated with every distinctness by the Act of the Legislature. This seems to me to be legislating not construing what the Legislature has said ".

In the Full Bench case itself no attempt had been made by the judgment-debtor to pay in the five per cent. of the purchase money within the prescribed period. It was there unanimously held that the Court could not set aside the sale. Maclean, C. J. declined to lay it down as a hard and fast rule that the Court was powerless to set aside the sale if payment under section 310A was not made within the thirty days prescribed, or that the consequences of a mistake of the Court should fall on the judgment-debtor or to say what constitutes a mistake of the Court. At any rate, nothing would in his view avail the judgment-debtor except " to show, at the least, that it was the duty and within the province of the court to give the information (on which he had relied), and that it was incorrect. It is not suggested that any information was required in accordance with the rules which govern applications for information..... It is only in compliance with these rules that information can or ought to be given ".

The only reference to section 174 is by Macpherson, J. who declined to consider whether *Abdool Latif Moonshi* v. *Jadub Chandra Mitter*(1) to which he was a party, was rightly decided. In that case there had been short payment of nine pies. Ameer Ali, J. relied upon *Ugrah Lall* v. *Radha Pershad Singh*(2) where within the prescribed period an amount found to be slightly short of the exact sum had been paid and the balance after the prescribed period, and held that it would be grievous to hold that the judgment-debtor was not entitled to have the sale set aside. Macpherson, J. was cautious in so far as regards assenting to the reasons advanced by his colleague.

The first case of this Court was *Sarjoog Prasad Missir* v. *Nannoo Rai*(3) which is a case under section 174. It was again a case where no part of the five per cent. had been deposited: there had also been an application to an officer of the court for an indication of the amount which he had to deposit under section 174 in order to have the sale set aside. The Munsif nevertheless set aside the sale and declined to review his order. The deficit was subsequently deposited. Their Lordships held that the High Court had jurisdiction to set aside the order of the first court refusing to review the order to set aside the sale and further that it was not the duty of the court officer to inform the judgment-debtor of the amount to be deposited under section 174 and in supplying the information sought for by the judgment-debtor the officer was not acting as an officer of the Court. They approved

(1) (1897) I. L. R. 25 Cal. 216.
(2) (1891) I. L. R. 18 Cal. 255.
(3) (1916) 1 Pat. L. J. 450.

the Full Bench decision of the Calcutta High Court and disapproved *Ugrah Lal* v. *Radha Pershad Singh*(1) and *Abdul Latif Moonshi* v. *Jadub Chandra Mitter*(2), and expressed the view that there is no essential difference between the obligations imposed by section 174 of the Bengal Tenancy Act, 1885, and by rule 89 of Order XXI of the Code of Civil Procedure.

In *Mir Dildar Ali* v. *Thakurain Kusum Kumari*(3) the position was that the purchaser, as in the present instance, was a third party. The full amount required under the provisions of section 174 had not been paid in. It was held that the judgment-debtor had been lulled into security by neglect of duty of the court which entered in its order-sheet that the judgment-debtor had deposited the full decree money with costs and compensation and that therefore the sale should be set aside. It is to be observed that in that case there is no reference to the Account Rules and reliance was placed upon the fact that the execution clerk had made a mistake in reckoning up the costs and that the petitioner had nothing to go upon except the account given him by the execution clerk, the executing court itself not having stated what the amount of costs were. It is, therefore, distinguishable from the present case in that the present deficit is not due to any inaccurate information being supplied whether from an official or an unofficial source or to any question as regards the costs.

Further while section 174(*1*) contemplates an application to have the sale set aside, it does not appear to contemplate that the court shall make itself responsible for information as to what *the purchase money was*, still less, for the correctness of the arithmetical calculation of five per cent. thereof. The first question, therefore, is whether the Court is responsible by reason of the account rules for any failure of the chief Ministerial Officer to indicate to the payer in of the money that the amount he is paying in, is not the full amount necessary to effect his purpose. A further question is whether if so rule 11 is valid in that it either expressly or by implication adds to the provisions of section 174(*1*) of the Bengal Tenancy Act? Maclean, C. J. considered that section 174 was a special indulgence limited by a condition of paying in within the prescribed period. Can this prescribed period be extended in any way by the fact that the Chief Ministerial Officer of the Court has not invited the attention of the judgment-debtor to the fact that his arithmetic is not correct? Further, it seems necessary to consider whether the intention of rule 11 is merely to prevent the court itself from making a mistake judicially or also to prevent the party from making a mistake?

The present case does not come completely within the decision in *Gopinath Tiwari* v. *Dulhin Hiraman Bibi*(4) and it ought, in my opinion, to be determined by a Division Bench to which therefore it is hereby referred.

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(1) (1891) I. L. R. 18 Cal. 255.

(2) ((1897) I. L. R. 25 Cal. 216.

(3) (1922) 4 Pat. L. T. 642.

(4) (1933) 14 Pat. L. T. 478.

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On this Reference.

K. P. Jayaswal and *M. N. Pal*, for the petitioner.

B. P. Sinha, for the opposite party.

JAMES, J.—In this case a holding was brought to sale in execution of a rent decree on the 7th of May. On the 23rd of May the judgment-debtor made a deposit under section 174 of the Bengal Tenancy Act of the amount due under the decree, and of a sum which purported to represent the proportion of the purchase money which he was also required to deposit if the sale was to be set aside. The deposits were accepted in the office of the Munsif and in due course the Munsif made an order setting aside the sale. It was subsequently discovered that the amount deposited for the benefit of the auction-purchaser was short by something over twelve annas of the requisite amount and the decree-holder moved the Munsif to rescind his order annulling the sale. The Munsif, finding that the judgment-debtor had been lulled into security by the action of his predecessor in accepting the insufficient amount, declined to set aside the order and permitted the judgment-debtor to make good the deficit, relying upon the decision of this Court in *Mir Dildar Ali* v. *Thakurain Kusum Kumari*(1). The auction-purchaser has applied for revision of the order setting aside the sale, on the ground that this order was made in the illegal exercise of jurisdiction, since the executing court had no power to make the order unless the judgment-debtor had strictly complied with the provisions of section 174 of the Bengal Tenancy Act. The case originally came for hearing before a single Judge of this Court, who referred it to a Division Bench, being doubtful regarding the authority to be attached to certain decisions of single Judges of this Court which would favour the view taken by the Munsif.

(1) (1922) 4 Pat. L. T. 642.

The question came before the Calcutta High Court in 1891 in *Ugrah Lal* v. *Radha Pershad Singh*(1) in a case in which the amount had been calculated in the office after notice to the decree-holder, whereon Sir Comer Petheram observed that the amount so calculated and settled by the officer of the court, had been settled as the amount payable under section 174, and that when that amount had been paid into court, an order to set aside the sale must be made by the court as a matter of right. In 1897 the case of *Abdool Latif Munshi* v. *Jadub Chandra Mitter*(2) came before the Calcutta High Court. In that case the amount paid in was short by nine pies; but there was no specific prayer that the sale might be set aside. Subsequently after the period of limitation when the auction-purchaser applied for confirmation of sale, the judgment-debtor prayed that the sale might be set aside; but it was found that the amount deposited was short by nine pies. The late Mr. Ameer Ali decided that the sale ought to have been set aside, pointing out that as a matter of practice the calculation of the amount due was made in the Munsif's office and that after the deposit was made, it was the duty of the ministerial officer dealing with the chalan to examine it and check its correctness; and he considered that it would be grievous in the circumstances to hold that the judgment-debtor was not entitled to have the sale set aside when a deficiency of three farthings was discovered in the amount deposited. The ground on which the executing court in that case had refused to set aside the sale was that no separate application had been made for that purpose. Macpherson, J., concurring in the judgment of Ameer Ali, J. with some reservations, remarked that the deposit of the amount should be regarded as a sufficient application and that the decision of the lower courts could not be supported on

(1) (1891) I. L. R. 18 Cal. 255.

(2) (1897) I. L. R. 25 Cal. 216.

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the ground on which it rested. It is to be observed that in that case the amount of the deficit was very trivial, a fact on which Ameer Ali, J. commented, though it was not on the triviality of the deficit that the decision was based. In 1898 another case of a similar nature came before the Calcutta High Court in *Makbool Ahmed Chowdhry* v. *Bazle Sabhan Chowdhry*(1). Mr. Justice Ghose there maintained the order setting aside the sale although the sum equal to five per cent. of the purchase money had not been deposited; but in that case the judgment-debtor had formally applied to the office of the Munsif for the purpose of ascertaining the exact sum which he had to pay and an account had been prepared for him which was signed by the Munsif. But it is to be observed that this amount was fixed by the Munsif in the presence, and with the assent of, the pleaders of both parties.

The question was considered by a Full Bench of the Calcutta High Court in *Chandi Charan Mandal* v. *Banke Behari Lal*(2), a case under section 310A of the Civil Procedure Code. In that case the deposit had been made in accordance with information given by some ministerial officer of the court; but the amount deposited was less than that required by law. It was held that the sale could not be set aside. Maclean, C. J., remarking that different considerations might arise if the court in the presence of the parties had by an order fixed the amount, held that it would not avail the judgment-debtor that he relied on information given by some officer of the court. He pointed out that it could only be the duty and within the province of a ministerial officer to give such information in a case in which the judgment-debtor had applied in accordance with the rules which govern applications for information. Macpherson, J. who concurred in this decision had been a party to the

(1) (1898) I. L. R. 25 Cal. 609.
(2) (1899) I. L. R. 26 Cal. 449, F. B.

decision in *Abdool Latif Munshi* v. *Jadub Chandra Mitter*(1). He remarked that it was not necessary to consider whether that case had been correctly decided because that was a case under section 174 of the Bengal Tenancy Act though it is difficult to see why the principles to be applied in testing the validity of a deposit made under Order XXI, rule 89, should not generally apply when a deposit is made under section 174 of the Bengal Tenancy Act.

The matter came before a Division Bench of this Court in *Sarjoo Prasad Missir* v. *Nannoo Rai*(2). In that case the judgment-debtor had ascertained from an officer of the court the amount due under the decree and had made the deposit, but he had omitted to deposit any sum to cover the five per cent. of the purchase money payable to the auction-purchaser. The Munsif set aside the sale; but it was held by the High Court that the order setting aside the sale was without jurisdiction and that it must be set aside. The learned Judges remarked that *Ugrah Lal* v. *Radha Prasad Singh*(3) and *Abdul Latif Munshi* v. *Jadub Chandra Mitter*(1) were no longer to be regarded as authorities on the question of deposits to be made under section 174 of the Bengal Tenancy Act. They declined to consider the argument that the judgment-debtor had been misled by a mistake on the part of an officer of the Munsif's court, on the ground that no duty was cast upon the officer of the Munsif's court to give any information to the defendant for any purpose for which he might require it under section 174.

In *Mir Dildar Ali* v. *Thakurain Kusum Kumari*(4) the judgment-debtor after obtaining erroneous

(1) (1897) I. L. R. 25 Cal. 216.

(2) (1916) 1 Pat. L. J. 459.

(3) (1891) I. L. R. 18 Cal. 255.

(4) (1922) 4 Pat. L. T. 642.

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information from a clerk made the deposit before limitation had expired whereupon the Munsif recorded the order:

"Judgment-debtor deposited full decree money with costs and compensation; put up on the date fixed for orders,"

which was a date subsequent to that on which limitation expired under section 174. On that date it was found that the deposit was insufficient; and on objection made by the decree-holder, the Munsif declined to set aside the sale. Adami, J., sitting singly, observed that the judgment-debtor could not protect himself by a mistake of the execution moharrir, but he was protected by the fact that he had obtained an order from the executing court recording the deposit of the full amount of the decree money and compensation. It was the duty of the executing court before entering an order in the ordersheet that the full decretal amount had been deposited to satisfy itself what were the costs to be paid by the judgment-debtor and the court had taken no trouble to find out what those costs should be before making the order. Owing to this neglect of duty, the petitioner was lulled into security and so prejudiced by the neglect of the court to let him know that the amount deposited was insufficient and so he should be permitted to make good the deficit when the fact that his deposit was not sufficient was brought to his notice.

In *Gopinath Tewari* v. *Hiraman Bibi*(1) the amount deposited by the judgment-debtor was short of the amount required; but the chalan had been passed by the serishtadar. Agarwala, J. held that this passing of the amount as correct by the serishtadar after scrutiny required by the rules did amount to a misleading of the judgment-debtor by an officer of the court and that the sale should be set aside, relying chiefly on the decision in *Rangini Sundari Dasi* v. *Hiralal Biswas*(2) which does give some

(1) (1933) 14 Pat. L. T. 478.
(2) (1929) 33 Cal. W. N. 1170.

authority for the view that the passing of the chalan by the serishtadar relieves the judgment-debtor of responsibility; though that decision was also partly based on the fact that the judgment-debtor before he made the deposit had been misled by wrong information given by an officer of the court on verbal application. I have myself, in a somewhat similar case to that of *Gopinath Tewari* v. *Hiraman Bibi*(1) accepted as authority the decision in *Rangini Sundari Dasi* v. *Hiralal Biswas*(2); but I think that the argument of Mr. Jayaswal must prevail, that that decision ought not to be treated as authoritative in this Court, in face of the decision of the Division Bench in *Sarjoo Prasad Missir* v. *Nannoo Rai*(3). It was there made clear that the law throws the obligation upon the defendant himself to ascertain for himself the amount he has to pay into court; and that no notice should be taken of information given by officers of the court otherwise than in accordance with the prescribed rules of the court. In the present case the only acts prescribed by the rules which are cited on behalf of the judgment-debtor are acts subsequent to the deposit; the passing of the chalan under the account rules and the order of the Munsif accepting the deposit. In *Sarjoo Prasad Missir* v. *Nannoo Rai*(3) the deposit had been accepted in the accounts department and the Munsif had made an order setting aside the sale, although the amount deposited was deficient. In this case as in that case the passing of the chalan in the office was done before the expiry of the period of thirty days; and the order of the Munsif setting aside the sale was made shortly after the expiry of that period. In *Sarjoo Prasad Missir's*(3) case the judgment-debtor, in making his deposit, forgot that he had to deposit five per cent. of the purchase money; in the present instance he calculated incorrectly the

(1) (1933) 14 Pat. L. T. 478.

(2) (1929) 33 Cal. W. N. 1170.

(3) (1916) 1 Pat. L. J. 459.

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amount which had to be deposited on that account. I doubt whether distinction should be made on that ground: the basis of the decision in *Sarjoo Prasad Missir's*(1) case was that the judgment-debtor had not deposited the amount required by law, and I consider that we ought to be governed by the decision in that case, in which the facts were essentially similar. As the learned Judges remarked in *Sarjoo Prasad Missir's*(1) case, the money to be a valid deposit and to give the court jurisdiction to set aside the sale must be lodged in full within thirty days and not later. It cannot be said that the reason why the judgment-debtor made a deficient deposit is to be found in the fact that after the deposit was made, the serishtadar and the Munsif did not detect the error. It is misleading to say that the judgment-debtor is lulled into security by the fact that the serishtadar may have made a mistake, or that he is to be held to have made an adequate deposit because if the mistake had been detected in time, it might have been corrected in time. This is very different from the case in which the amount to be deposited has been fixed by an order of the Munsif made in the presence of the parties and with their assent; and the judgment-debtor cannot in my opinion be held to escape the consequences of making an insufficient deposit by the fact that after the deposit was made, the serishtadar and the Munsif themselves both made mistakes in treating it as if it were sufficient.

I would, therefore, allow this application and set aside the order of the Munsif dated the 8th of July, 1932, setting aside the sale. The auction-purchaser is entitled to his costs: hearing fee two gold mohurs.

MACPHERSON, J.—I agree. It is the view to which I inclined in making (at some length) the reference to a Division Bench and the argument has resulted in confirmation of the view. If the period of thirty days from the date of sale allowed by section

(1) (1916) 1 Pat. L. J. 459.

174 of the Bengal Tenancy Act and by Order XXI, rule 89, to the judgment-debtor for making the deposit in Court can be extended at all, it is only when the judgment-debtor has established that he has made a mistake and that that mistake is directly due to an act *of the Court* itself.

Rule made absolute.

REVISIONAL CIVIL.

Before Courtney Terrell, C. J. and Varma, J.

PEARAY PASI

v.

GAURI LALL.*

1934.

March, 22, 23, *April*, 4.

Negotiable Instruments Act, 1881 (*Act XXVI of* 1881), *sections* 8, 9, 46 *and* 78—*suit based on promissory note, whether necessarily governed by the provisions of the Act—person other than holder of the note, whether competent to maintain a suit based on the note on the allegation that he is the beneficial owner and the holder is his benamidar—assignment of note, how effected.*

Negotiable Instruments can be enforced by an assignee only when the assignment has been effected in accordance with the provisions of the Negotiable Instruments Act, 1881, and transfer of the rights of a party under a note to order to someone else, unless effected by operation of law, must be effected by indorsement and delivery and not otherwise.

Benode Kishore v. *Asutosh Mukhopadhya*(1), referred to.

A suit based on a promissory note is necessarily governed by the provisions of the Negotiable Instruments Act, under which only the holder of such note is competent to sue thereon.

A person who is not the holder of the note cannot, therefore, maintain a suit based on the note, on the allegation

* Civil Revision no. 493 of 1933, from an order of Maulavi Khalilur Rahman, Small Cause Court Judge of Patna, dated the 13th June, 1933.

(1) (1912) 16 Cal. W. N. 666.