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and the Court will have no option but to dismiss the application under section 3 of the Limitation Act." In this case the learned Advocate for the appellant has been unable to shew either that an objection on the ground of limitation was taken and disallowed in any earlier execution proceedings, or that any of the earlier execution proceedings from 1925 onwards reached a stage at which the judgment-debtor could have taken that objection. That being so, the objection under section 47 was properly taken on the 19th January, 1928, and the decision of the Courts below must be affirmed. The appeal is dismissed with costs.

COURTNEY TERRELL, C. J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Fazl Ali and Chatterji, JJ.

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April, 30.

MAHARAJADHIRAJ SIR RAMESHWAR SINGH
BAHADUR

v.

MANGAL PRASAD SAHU.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 89—attached properties sold in separate lots—application for setting aside sale of some of the properties—deposit of sale proceeds of some lots only—whether sufficient compliance with law—appeal—auction-purchaser, whether a necessary party.

Where in execution of a decree the properties attached were sold in separate lots and the judgment-debtor applied for setting aside the sale of the properties covered by some only of the lots by depositing in court the sale proceeds of those lots with compensation of 5 per cent. on that sum.

Held, that there was not a sufficient compliance with the provision of Order XXI, rule 89, Code of Civil Procedure, 1908, and that the sale could not be set aside.

* Appeal from Original Order no. 76 of 1928, from an order of Babu Suresh Chandra Sen, Subordinate Judge of Darbhanga, dated the 10th February, 1928.

Kripa Nath Pal v. Ram Lakshmi Dasya (1) and *Karuna Menon v. Krishna Menon* (2), followed.

Muttathil Krishna Menon v. The Collector of Malabar (3) and *Raghunandan Pandey v. Garju Mandal* (4), distinguished.

Held, further, that an appeal arising out of an application under Order XXI, rule 89, cannot proceed in the absence of the auction-purchaser.

Appeal by the judgment-debtor.

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

Murari Prasad, for the appellant.

L. K. Jha (with him *P. Jha* and *A. K. Mitra*), for the respondents.

CHATTERJI, J.—The decree-holder proceeded to execute his decree against five properties out of which two properties, namely, lots nos. 3 and 4, had been purchased by the appellant, the Maharaja of Darbhauga. He prayed that these two properties might be sold after the sale of the other three properties in case there was any deficiency in the price. This prayer was allowed by the Court with the result that lots 1, 2 and 5 were put up to sale on the 3rd January, 1928. Lots 2 and 5 were purchased by the decree-holder for Rs. 5,500 and lot no. 1 was purchased by a third party, Suba Lal Das, for a sum of Rs. 1,300. These amounts did not satisfy the decree and the other two lots which had been purchased by the appellant were put up to sale on the next day and purchased by one Raghunandan Dass on the 4th January, 1929. This purchaser deposited the entire purchase-money that very day. Within thirty days of the sale the appellant made an application under Order XXI, rule 89, of the Civil Procedure Code for setting aside the sale of lots 3 and 4 by a deposit of Rs. 1,500 being the sale proceeds of the lots 3 and 4 and compensation of five per cent. on the aforesaid

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(1) (1896-97) 1 Cal. W. N. 703.

(3) (1914) 22 Ind. Cas. 53.

(2) (1916) I. L. R. 39 Mad. 429.

(4) (1925) I. L. R. 4 Pat. 718.

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sum. This application was opposed in the lower Court with the result that it declined to set aside the sale.

In appeal it is urged that the appellant has substantially complied with the provisions of Order XXI, rule 89, by the deposit of the auction-money so far as lots 3 and 4 are concerned. There is a preliminary objection raised on behalf of the other side that the appeal cannot proceed because the auction-purchasers have not been made parties to this appeal.

It is conceded that the auction-purchasers have not been made parties. Suba Lal Dass was an auction-purchaser of property no. 1 and Raghunandan Dass was the auction-purchaser of lots 3 and 4 the sale in respect of which is sought to be set aside. Even if it be conceded that Suba Lal Dass is not a necessary party it cannot be gainsaid that Raghunandan is vitally interested in the result of this proceeding. Certainly his presence is necessary and so much so, that his absence may be considered as fatal to the decision of the appeal. A prayer is made to us on behalf of the appellant that the auction-purchaser might be made a party now. But we do not think that we should be justified, after a valuable right has accrued to a purchaser, to implead him at this late stage. The appellant did not choose to make these auction-purchasers parties with his eyes wide open and knowing full well that a third party had purchased at least some of the lots; and I do not think that we shall be justified, when no cause is shown for not having impleaded these persons in the beginning, in allowing the prayer at this late stage and joining these persons as parties to this appeal. On this ground alone the appeal must fail.

In the next place I do not think that the appeal can succeed also on the merits. Order XXI, rule 89, provides that where immoveable property has been sold in execution of a decree any person interested may apply to have the sale set aside on his depositing in

Court for payment to the purchaser a sum equal to five per cent. of the purchase-money, and for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder. Even if it be said that so far as the purchase-money for lots 2 and 5 is concerned the decree-holder has received a part of the decretal amount by a set off, it cannot be maintained that he has received the purchase-money for property no. 1 which has been purchased by a third party, namely, Suba Lal Dass. It is clear therefore that the amount deposited is not what is required to be deposited under Order XXI, rule 89.

Reference was made to the case of *Muttathil Krishna Menon v. Collector of Malabar* (1) by the learned Advocate for the appellant. But this case is perfectly distinguishable. There some of the judgment-debtors had deposited certain sums of money after the sale while another judgment-debtor deposited the balance of the decretal amount mentioned in the sale proclamation. It was held that as all the deposits taken together represented the amount for which the sale proclamation was issued, the deposits should be considered as valid. This is not the case here, where the appellant has deposited only a part of the amount mentioned in the sale proclamation. Reference was also made by the learned Advocate for the appellant to the case of *Raghunandan Pandey v. Garju Mandal* (2). In this case the judgment-debtor deposited five per cent. of the purchase-money for payment of compensation to the auction-purchaser, while the decree-holder and the judgment-debtor put in a petition stating that the amount recoverable under the decree had been paid to the decree-holder. It was still held that there was not a sufficient compliance with section 174 of the Bengal Tenancy Act under the provisions of which

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(1) (1914) 22 Ind. Cas. 53.

(2) (1925) I. L. R. 4 Paf. 718.

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the deposit was made and the sale was not set aside. Thus this case rather goes against the appellant. On the other hand, the case of *Kripa Nath Pal v. Ram Lakshmi Dasya* (1) is a clear authority against the appellant. Here at a sale in the execution of a decree the properties attached were sold separately in nine lots and the judgment-debtor prayed to have the sale of one of the properties set aside by tendering the balance due under the decree after deducting the amount bid by the decree-holder for some of the properties and the amount deposited by the other purchasers. That was also a sale in execution of a mortgage decree but it was held that there was no valid deposit within the terms of section 310A corresponding to Order XXI, rule 89, of the Code. This view has been followed in the case of *Karuna Menon v. Krishna Menon* (2) and also in the case of *Totaram Chunilalshet v. Chhotu Motiramshet* (3). Having regard to the clear provisions made in Order XXI, rule 89, and these authorities we must hold that the deposit is insufficient and the sale has not been set aside rightly.

The appeal is dismissed with costs.

FAZL ALI, J.—I agree.

Appeal dismissed.

REVISIONAL CIVIL.

Before Fazl Ali and Chatterji, JJ.

KUMAR ABHAYANAND SINGH

v.

MAHARAJADHIRAJ SIR RAMESHWAR SINGH
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1929.

May, 1, 2, 6.

Code of Civil Procedure, 1908 (Act V of 1908), Order XXIII, rule 3—compromise—whether Court can postpone passing of the decree in a proper case.

* Civil Revision no. 179 of 1929, against an order of Babu S. C. Sen, Subordinate Judge of Darbhanga, dated the 12th April, 1929.

(1) (1896-97) 1 Cal. W. N. 708. (2) 1916) I. L. R. 39 Mad. 429.

(3) (1923) 73 Ind. Cas. 454.