

1928

N. V. N.
NATCHIAPPA
CHETTYAR
v.
KO THA ZAN
AND ONE.

DAS AND
DOYLE, JJ.

Where, therefore, at the time of purchase circumstances are such that it is for the benefit of the purchaser that the mortgages involved in the purchase should not be extinguished, it must be held that they enure for the benefit of the purchaser.

The appeal stands dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Cunliffe and Mr. Justice Baguley.

MOHAMED CASSIM

v.

A. J. DAVID.*

1928

April 30.

Civil Procedure Code (Act V of 1908), O. 21, rr. 89, 92—Limitation Act (IX of 1908), Sch. I, Art. 166—Requisite deposit less by a very small amount, effect of—Delay of one day in making deposit, effect of—Strictness of the provisions of the Code.

Held, that where an application is made under the provisions of O. 21, r. 89, of the Civil Procedure Code to set aside sale on deposit, a very small shortage of the amount required to be deposited may be disregarded and will not vitiate the deposit, but even a day's delay in making the application or the deposit beyond the period of 30 days from the date of sale cannot be disregarded. The provisions of O. 21, rr. 89 and 92 are strict.

K. C. Bose for the appellant.

Leach for the respondent.

CUNLIFFE and BAGULEY, JJ.—This is an appeal under Order 43, rule 1 (*j*) against a refusal of the District Court of Insein to set aside a sale in Civil Execution No. 20 of 1926 of that Court. The questions to be considered arise out of the construction in the circumstances of Order 21, rule 89 and Order 21, rule 92. Order 21, rule 89, lays down part of the conditions under which a deposit must be made by

* Civil Miscellaneous Appeal No. 197 of 1927 from the order of the District Court of Insein in Civil Execution No. 20 of 1926.

any one who wishes to have a decree of sale by the Court set aside. He must deposit a fixed sum which is based on 5 per cent. of the sale proceeds *plus* the amount specified in the proclamation of sale.

It is not disputed that the amount deposited by the present appellant was Rs. 4 and some odd annas short, but we do not think that this shortage was substantial enough to vitiate the deposit on that ground. There is another requirement, however, with which the payment ought to have complied and that is as to the time in which the deposit should have been made. The time within which such payment must be made into Court is within 30 days of the date of the Court sale. Here again, there is no dispute in relation to the facts.

The appellant was one day late, and it remains to be considered whether the view that the Court should take of this short amount of time beyond the period specified ought also to be disregarded in favour of the appellant.

We have come to the conclusion definitely that it ought not to be disregarded. The provisions of Order 21, rule 92, and also the provisions of Order 21, rule 89, are strict and on the actual facts of this case we think that there was no real excuse for the deposit being made out of time.

An attempt has been made to throw the blame on the Bailiff of the Court, but we are not at all satisfied that that officer was responsible for the delay. Even when he was offered the money a day late there is no doubt that there was some kind of a dispute between the Bailiff and the person paying the money because the appellant was not paying the money himself. He had to borrow it and this dispute was as to the amount exactly required. Not only that, the whole history of this case, which is one of an unceasing attempt to delay and defeat the process of the Court, leads us to think that no discretion, if any such

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discretion is exercisable, should be used in favour of the appellant. We think it was argued in the Court below, but it has not been argued here, that some provision of the Limitation Act applies. We are quite certain that it does not apply in the circumstances of this case. Accordingly, the appeal will be dismissed with costs three gold mohurs in favour of the respondent.

APPELLATE CIVIL.

Before Mr. Justice Cunliffe and Mr. Justice Baguley.

1928
 April 30.

A. K. A. C. T. V. CHETTYAR FIRM

v.

THE COMMISSIONER OF INCOME-TAX.*

Income-tax Act (XI of 1922), s. 66 (3)—Application for mandamus on points of law different from those urged before Commissioner to state a case, effect of.

Held, that where an assessee seeks for a *mandamus* from the High Court against the Commissioner of Income-tax requiring him to state a case on points of law different from those he had urged before the Commissioner to state a case, his application cannot be entertained.

Venkatram for the applicant.

A. Eggar (Government Advocate) for the Crown.

CUNLIFFE and BAGULEY, JJ.—This is an application on the part of the A. K. A. C. T. V. Chettyar firm of Wakema. It is made under section 66, sub-section (3), of the Indian Income-tax Act. The application seeks for a *mandamus* against the Commissioner of Income-tax requiring him to state a case on two points of law. The points of law are alleged to arise out of an assessment of the firm to income-tax, but, whatever merits they may have, it is our opinion that

* Civil Miscellaneous Application No. 22 of 1928.