APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Chandavarkar.

GANESH BAB NAIK (ORIGINAL DEFENDANT), APPELLANT, *v.* VITHAL VAMAN MAHALYA AND ANOTHER (ORIGINAL PLAINTIFF AND AUCTION PURCHASER), RESPONDENTS.* 1912. *November* 22.

Civil Procedure Code (Act V of 1908), Order XXI, Rule 89—Civil Procedure Code (Act XIV of 1882), section 310A—"Decree-holder"—Execution of decree—Auction sale—Application by judgment-debtor to set aside sale—Deposit within thirty days—Auction purchaser not a necessary party to the application—Notice to all parties—Rateable distribution claimed by other decree-holders—Satisfaction of the decree under which the property was sold.

The deposit under Order XXI, Rule 89 of the Civil Procedure Code (Act V of 1908) must be made within thirty days from the date of sale. It is not necessary that the notice required to be given under Rule 92 of the said order should be given within thirty days of the date of sale. Once notice has been given under Rule 89 to all persons affected thereby, the Court has full authority to set aside the sale.

A decree-holder having applied for execution of his decree, the proceedings in execution were transferred to the Collector. He issued a proclamation and proceeded with the sale, but before the auction sale took place, he received from the Court intimation of applications made by other decree-holders against the same judgment-debtor for rateable distribution. The Collector inserted references to the applications in his proclamation of sale and the property was subsequently sold. Then within thirty days the judgment-debtor applied to have the sale set aside under Order XXI, Rule 89 of the Civil Procedure Code (Act V of 1908) on 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. Although the deposit was sufficient to satisfy the judgment-debt of the creditor, he objected to the judgment-debtor's application on the ground that the deposit was insufficient because the amount deposited should have been sufficient to satisfy not only his decree but also the claims of those decree-holders whose applications for rateable distribution had been brought to the notice of the Collector before the sale.

Held setting aside the sale, that the term "decree-holder" in Order XXI, Rule 89 of the Civil Procedure Code (Act V of 1908) meant that person alone for satisfaction of whose decree the sale had been ordered and did not include other persons who would have a right to claim rateable distribution out of the sale proceeds under section 73 of the Civil Procedure Code (Act V of 1908).

* Second Appeal No. 58 of 1912.

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SECOND appeal against the decision of E. H. Waterfield, Acting District Judge of Kanara, confirming the order passed by V. V. Bapat, Subordinate Judge of Honavar, in an execution proceeding.

The plaintiff obtained a money decree against the defendant in respect of three bonds. The decree was dated the 30th September 1907. In execution of the decree the plaintiff levied attachment on certain property belonging to the defendant and the property was ordered to be sold. The execution proceedings were then transferred to the Collector who issued a proclamation. Certain other decree-holders against the same defendant then applied to the Court for rateable distribution under section 73 of the Civil Procedure Code (Act V of 1908). The Court forwarded the applications to the Collector who inserted references to them in the proclamation of sale and the property was sold at auction. Within thirty days from the date of sale the defendant applied to have the Court sale set aside under Order XXI, Rule 89 of the Civil Procedure Code, and deposited in Court for payment to the auction purchaser a sum equal to five per cent. of the purchase money and for payment to the plaintiff the amount specified in the proclamation of sale as the amount of his decree. The amount so deposited was not sufficient to cover the sums of the other decrees to which reference was made in the proclamation of sale. The plaintiff, therefore, objected to the sale being set aside, and the Subordinate Judge passed the following order :—

The amount deposited by the applicant judgment-debtor is less than what is required under Order XXI, Rule 89. The application is therefore rejected.

On appeal by the defendant, the District Judge confirmed the order. With respect to a preliminary objection raised by the plaintiff, the Judge observed :—

A preliminary objection was taken by the respondent that the auction purchaser was not made a party to the appeal or the original application,

though notice was issued to him by the lower Court. This defect appears to be one which can be remedied by this Court under Rule 20 of Order XLI and I have made order accordingly.

The defendant preferred a second appeal.

N. A. Shirvalkar for the appellant (defendant) :—The deposit we paid in Court was sufficient. We were not bound to deposit money sufficient to satisfy the claims of the decree-holders who applied for rateable distribution : *Hari Sundari Dasya* v. *Shashi Bala Dasya*[1], Order XXI, Rule 89, clause (*b*). The said clause requires that a deposit should be made for payment to the decree-holder of the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. Here the sale was ordered to satisfy the plaintiff's decree and not the decrees of the applicants under section 73 of the Civil Procedure Code. The recital of the said applications in the proclamation of sale was immaterial.

P. M. Vinekar for respondent 1 (plaintiff) :—The proclamation of the Collector refers to all the decrees. The language of the proclamation shows that the property was sold for the satisfaction of all the decretal amounts. In *Pita* v. *Chunilal*[2] it was held that section 310A of the Code of 1882 required that a deposit should be made of the amount specified in the proclamation of sale. The defendant has not deposited the whole amount mentioned in the proclamation, therefore, the auction sale cannot be set aside.

G. P. Murdeshwar for respondent 2 (auction purchaser) :—The defendants' application to set aside the sale must fail because we were not made a party to it. See *Ali Gauhar Khan* v. *Bansidhar*[3] and *Karamat Khan* v. *Mir Ali Ahmed*[4]. Those were cases under section 311 of the Code of 1882.

(1) (1896) 1 Cal. W. N. 195.
(2) (1906) 31 Bom. 207
(3) (1893) 15 All. 407.
(4) (1891) All. W. N. 121.

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[Scott, C. J. :—Does Order XXI, Rule 92 require that you should be impleaded within thirty days of the sale?]

It does not, and neither did section 311 of the Code of 1882. Still the Allahabad High Court has held that the purchaser is a necessary party to an application under that section. The Court issued notice to us of its own accord three months after the sale. That could not make good the default of the defendant in not making us a party to the application within the period of limitation, that is, thirty days. The District Court could make us a party to the appeal only if we had been a party to the application. As we had not been made a party to the application, the order of the District Judge under Order XLI, Rule 20 cannot stand.

SCOTT, C. J. :—The first point on this appeal is a preliminary point taken by the auction purchaser that he was a necessary party to the application of the judgment-debtor under Order XXI, Rule 89, and that the application is bad as he was not made a party to it within thirty days. The contention is based upon the decision of the Allahabad High Court in *Ali Gauhar Khan* v. *Bansidhar*[0]. The point, however, is now provided for by the Civil Procedure Code of 1908, Order XXI, Rule 92, which says that where in the case of an application under Rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale, provided that no order shall be made unless notice of the application has been given to all persons affected thereby. That cannot mean that notice must be given within thirty days of the date of sale, and the learned District Judge has, we think, exercised a right discretion directing that the auction purchaser should be made a party

[0] (1893) 15 All. 407.

to the proceedings in the appeal before him under Order XLI, Rule 20. Once notice has been given of the application under Rule 89 to all persons, the Court has full authority to set aside the sale. Those conditions now exist and we, therefore, have to consider whether the sale should be set aside.

An application was made by the judgment-creditor in the suit of Vithal Vaman against Ganesh Babnaik for attachment and sale of certain specified immovable property. The order for sale was dated the 4th of September 1909, the attachment having been six months previous. Subsequently the judgment-debtor applied that the proceedings should be sent to the Collector for execution of the decree. That can be done under section 68 of the Civil Procedure Code which provides for the transfer to the Collector of the execution of decrees in cases in which a Court has ordered any immovable property to be sold or the execution of any particular kind of decrees or the execution of decrees ordering the sale of any particular kind of interest in immovable property. The proceedings in this case related to the first class of cases specified in section 68 as a particular immovable property had been ordered to be sold. The Collector proceeded with the sale but before the auction took place he received from the Court intimation of applications made by other decree-holders against the same judgment-debtor for rateable distribution under section 73. The decrees were not sent to him for execution but the darkhasts or applications for rateable distribution were sent to him for information. On receipt of those darkhasts he inserted references thereto in his proclamation of sale and the property was subsequently sold. Then within thirty days the judgment-debtor applied to have the sale set aside under Rule 89 on depositing in Court for payment to the purchaser a sum

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equal to five per cent. of the purchase money and for payment to the decree-holder Vithal Vaman, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, namely Rs. 240-11-11. Although the result of this deposit will be to satisfy the judgment-debt of the creditor, he comes forward and objects to the application on the ground that the deposit is insufficient, because, he says, it is necessary that an amount should be deposited sufficient to satisfy not only his decree, but also the claims of those decree-holders whose applications for rateable distribution have been brought to the notice of the Collector before the sale.

It has been held in Calcutta in *Hari Sundari Dasya* v. *Shashi Bala Dasya*[1] and in *Roshun Lall* v. *Ram Lall Mullick*[2] that 'the decree-holder' in section 310A, clause (*b*), means, that person alone for satisfaction of whose decree the sale has been ordered, and does not include other persons who would have a right to claim rateable distribution out of the sale proceeds under section 295 or the present section 73.

The legislature in enacting the new Code has adhered to the words of section 310A which had been interpreted in this manner by the Calcutta Court. And not only is there that indication of the legislative approval of the view of the Calcutta Court, but in Rule 90 of the same Order we find that the legislature has thought it necessary when it intended to refer to persons entitled to share in rateable distribution of assets, to do so specifically and not to include them in the term 'decree-holder' according to the decisions in *Bejoy Singh Dudhuria* v. *Hukum Chand*[3] and *Ajudhia Prasad* v. *Nand Lal Singh*[4]. This is a strong indication that the term decree-holder in Rule 89 ought not

(1) (1896) 1 Cal. W. N. 195.
(2) (1903) 30 Cal. 262.
(3) (1902) 29 Cal. 548.
(4) (1893) 15 All. 318.

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to be construed in the extended sense in which the judgment-creditor in this case for some reason, which is obscure, has argued it should be construed. It is moreover to be observed that Rule 89, clause (*b*) provides for a deposit for payment to the decree-holder of the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. The only amount which answers to that description is the amount of the decree of Vithal Vaman for Rs. 240-11-11. The persons who claim rateable distribution are not before the Court, but the objection which they might have put forward has been argued on behalf of the judgment-creditor.

We set aside the order of the Acting District Judge and pass an order setting aside the sale as provided by Order XXI, Rule 89.

The judgment-creditor must pay the costs throughout. But the order as to costs against the second respondent only applies to the costs of the appellate Court. Costs against the first respondent costs throughout.

Order set aside.

G. B. R.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Chandavarkar.

MAHOMED MEHDI FAYA THARIA TOPAN, APPELLANT AND PLAINTIFF, *v.* SAKINABAI, RESPONDENT AND DEFENDANT.*

1912. *September 2.*

Husband and wife—Restitution of conjugal rights demanded and refused—Inaction for more than two years—Suit for restitution barred under Limitation Act (XV of 1877), Article 35—Limitation Act (IX of 1908)—General Clauses Act (X of 1897), section 6.

On 11th July 1906 the plaintiff sent his wife (who had left him) a notice demanding restitution of conjugal rights. The demand was refused on 19th

* Appeal No. 3 of 1912. Suit No. 486 of 1911.