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same reasons as the other suit was dismissed. It seems perfectly clear to me that it was rightly dismissed, as the defendant reporting the conduct of the plaintiff to the District Judge was acting in discharge of his judicial duty. That appeal, therefore, will also be dismissed with costs.

SHAH, J.:—I agree. In both these cases the acts attributed to the defendant were done by him in the discharge of his judicial duty, and the defendant was acting judicially. I do not feel any doubt whatever on that point. That is a complete answer to the suits filed by the plaintiff under Act XVIII of 1850.

Appeals dismissed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

NARAYAN VASUDEVACHARYA KATTI, HEIR AND NEPHEW OF DECEASED BINDACHARYA ANNACHARYA KATTI (ORIGINAL DEFENDANT), APPELLANT *v.* AMGAUDA MALAGAUDA PATIL (ORIGINAL PLAINTIFF), RESPONDENT*.

November 29.

Civil Procedure Code (Act V of 1908), Order XXI, Rules 89 and 92 (2)—Claimant of property sold in possession—Claimant paying into Court the decretal amount to set aside sale—Whether payment voluntarily or involuntarily made—Suit to recover amount paid.

In execution of a decree obtained by the defendant against a third party, the property was sold and purchased by the defendant. The plaintiff who claimed

* Second Appeal No. 742 of 1919.

to be the owner in possession of the property protested against the sale and ultimately got it set aside under Order XXI, Rule 89, Civil Procedure Code, 1908, by paying into Court the decretal amount and five per cent. of the purchase money. The amount being given to the defendant decree-holder and auction-purchaser, the plaintiff sued to get it refunded as having been involuntarily paid.

Held, dismissing the suit, that under the terms of Order XXI, Rule 89, the amount must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally and therefore no suit could lie for its recovery.

PER MACLEOD, C. J.:—"It seems to me that when it is expressly provided that the money [*sc.* paid into Court under Order XXI, Rule 89] should be paid in for a particular purpose, such money could not be treated as assets held by a Court."

Sorabji Coovarji v. *Kala Raghunath*[1]; approved of.

PER SHAH J.:—"When an application to set aside the sale is made under Order XXI, Rule 89, and the amount required by the rule is deposited, it is obligatory upon the Court to set aside the sale, as provided by Rule 92, sub-rule (2). The result of setting aside the sale is generally speaking in favour of the judgment-debtor. This result can be ensured by any person interested in the property by satisfying the claims of the decree-holder and auction-purchaser according to the provisions of the Rule. I do not see how a person can be allowed to go back upon his own act and to claim the amount back from the decree-holder after he has secured the benefit of having the sale set aside."

Dooli Chand v. *Ram Kishen Singh*[2] and *Seth Kanhaya Lal* v. *National Bank of India, Limited*[3], considered.

Ram Tuhul Singh v. *Biseswar Lall Sahoo*[4], observations relied on.

SECOND appeal against the decision of F. Boyd, District Judge of Belgaum, reversing the decree passed by R. G. Shirali, Subordinate Judge at Athni.

Suit to recover money.

In Suit No. 347 of 1909 in the Court of the Subordinate Judge at Athni, the defendant obtained a mortgage decree against one Shivgouda Devgouda Patil, which directed the recovery of the mortgage amount by sale of the plaint land. In Darkhast No. 608 of 1914 filed

(1) (1911) 36 Bom. 156.
(2) (1881) L. R. 8 I. A. 93.
(3) (1913) L. R. 40 I. A. 56.
(4) (1875) L. R. 2 I. A. 131

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by the defendant to execute his decree the property was sold. The plaintiff then paid into Court under Order XXI, Rule 89, the decretal amount of Rs. 1,207 and Rs. 63 being 5 per cent. of the purchase money for payment to the auction-purchaser, before the sale was confirmed, and got the sale set aside. The defendant was himself the auction-purchaser and therefore as such auction-purchaser Rs. 63 were paid to him and as decree-holder Rs. 1,207 were also paid to him.

The plaintiff sued for a refund of the decretal amount of Rs. 1,207 from the defendant alleging that he was the owner of plaint property and had been in possession thereof for many years ; that it never belonged to Shivgouda and the latter could not, therefore, mortgage it to the defendant ; that the mortgage executed to the defendant was in fraud of the plaintiff's rights.

The Subordinate Judge dismissed the suit holding (1) that the payment made by the plaintiff was a voluntary one and (2) that the defendant could not be held liable to refund the amount to him. His reasons were :—

" As regards the first question, I think it should be answered in the affirmative. No doubt, there are dicta of the Privy Council in *Dulichand* v. *Ramkishen* (I. L. R. 7 Cal. 648 at page 653) which show that money paid in order to stay a court sale is not voluntary. But those observations were *obiter*, the actual decision being stated on the equities arising in the case (*vide* end of the first paragraph on that page). More observations have, however, to be taken, subject to the limitations set down by the Privy Council, that there must be an obligation, implied or express, to repay (*Ram Tuhul Singh* v. *Biseswar*, 2 I. A. 131) the defendant or there should have been authority, express or implied, from the defendant for the payment (*Abdul Wahid Khan* v. *Shalukha Bibi*, I. L. R. 21 Cal. 496, P. C.). Neither of these circumstances is alleged in the present case. In their absence the payment must be deemed to have been voluntary (*The Collector of Shahabad* v. *Ram Buddun Singh*, 10 W. R. 400, quoted in column 8328, Woodman's Digest, Vol. III, Edn. of 1912)".

" Next question is whether the present defendant can be held liable. He is the decree-holder to whom the amount paid in by the plaintiff has been paid.

eneral grounds it is not possible to hold him responsible. It cannot

be said that his act of receiving the amount has in any way prejudiced the plaintiff. No doubt the Privy Council held a decree-holder liable to refund in the above quoted case of *Dulichand*. But that decision, as I have already pointed out, was rested on the equities. In the present case there are no similar equities. On the other hand, the equities would seem to be rather in favour of the defendant. In the Darkhast the plaintiff's objections were noted by the Collector and made known to the intending purchasers. The purchaser had purchased with his eyes open. And if the purchaser had sued for a refund on the ground that the judgment-debtor had no saleable interest in the property, the decree-holder (the present defendant) could have successfully defended the suit on the ground that the purchaser had notice of the present plaintiff's claim at the time of the sale. But since the sale was not confirmed owing to the plaintiff's payment, the defendant has been prevented from gaining a position which was well nigh impregnable (as pointed out just now), if the sale had been confirmed and he had been paid the decretal amount out of the sale-proceeds. And this has been due to no fault of his, but owing to the plaintiff's own action in paying the amount. It cannot be said that the defendant's conduct was anything but what he was entitled to purchase under the decree obtained by him. The amount was thrust upon him, so to say. If so, he certainly cannot be one of the persons from whom the plaintiff can claim a refund."

On appeal, the District Judge reversed the decree and allowed the suit, holding that the payment made by the plaintiff was not voluntary and the suit could lie. He relied on *Dulichand* v. *Ramkishen Singh* (I. L. R. 7 Cal. 648, P. C.); *Jugdeo Narain Singh* v. *Raja Singh* (I. L. R. 15 Cal. 656); *Varajlal* v. *Kachia* (I. L. R. 22 Bom. 473).

The defendant appealed to the High Court.

A. G. Desai, for the appellant.

H. B. Gumaste, for the respondent.

MACLEOD, C. J.:—The plaintiff filed this suit to recover from the defendant the sum of Rs. 1,207 which he paid into Court in the following circumstances.

In Suit No. 347 of 1909 in the Court of the Subordinate Judge at Athni the defendant obtained a mortgage decree against one Shivgouda Devgouda Patil, which directed the recovery of the mortgage amount by sale

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of the present plaint land. In Darkhast No. 608 of 1914 filed by the present defendant to execute his decree the property was sold. The present plaintiff then paid into Court, under Order XXI, Rule 89, the decretal amount of Rs. 1,207 and Rs. 63 being five per cent. of the purchase money for payment to the auction-purchaser, before the sale was confirmed, and got the sale set aside.

The present defendant–then plaintiff–was the auction-purchaser. As such auction-purchaser the Rs. 63 were paid to him and as decree-holder the Rs. 1,207 were also paid to him.

The plaintiff alleged that the property sold belonged to him, that it had never belonged to Shivgouda, that Shivgouda had mortgaged the property to the defendant in fraud of the plaintiff's rights, and that as the plaintiff had been obliged to pay the money to get the sale set aside he was entitled to have the amount refunded.

Thus a question was raised which, so far as we have been able to discover, has never hitherto come before the Courts for decision.

The issues in the trial Court were :—

1. Whether the payment made by the plaintiff was a voluntary one ?

2. Whether the defendant could be held liable to refund the amount to the plaintiff ?

The learned trial Judge held that the payment was voluntary. It would only be an involuntary payment if there was an obligation implied or express to repay or authority express or implied from the defendant to pay, and neither of those circumstances was alleged in the case.

It appears that the plaintiff had objected to the sale taking place, and that the Collector had noted his objections and made them known to intending purchasers.

Accordingly the suit was dismissed with costs.

In first appeal it was held that the payment by the plaintiff was not voluntary.

If that were correct the question would obviously arise whether the plaintiff was a person entitled under Rule 89 to apply to the Court to set aside the sale.

But the learned appellate Judge for some reason which is not apparent did not consider himself bound to consider that question, or express any opinion thereon, and decreed the plaintiff's claim with costs throughout.

It is quite clear that that decision cannot stand. Assuming that the plaintiff had no interest in the property and yet in contravention of the provisions of Rule 89 was allowed to pay into Court the necessary sums of money for getting the sale set aside, he could not be considered to have acted in any other capacity than that of a volunteer.

Now a person whose property in his opinion has been wrongfully attached has various remedies at his disposal. He can make a claim that the property attached belongs to him and not to the judgment-debtor. Such a claim will be investigated under Rule 58, and under Rule 59 the claimant must adduce evidence to show that at the date of the attachment he had some interest in or was possessed of the property attached. If the claim is disallowed the claimant may file a suit to establish his claim. But the claimant may pay into Court under protest the amount of the decree-holder's claim in order to get the attachment removed at once from the property. There can be no doubt that such a payment would be involuntary and a suit would lie for its recovery, the question for decision being the same, whether the plaintiff could prove his title to the

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property which had been attached : *Kanhaya Lal* v. *National Bank of India*[1]; *Bhicoobai* v. *Hariba Raghuji*[2].

There is a third course open to the person in possession of immoveable property which is attached. He may content himself with giving notice that the property attached belongs to him, so that all intending purchasers will know that the successful bidder will have to fight him for possession. If the purchaser is resisted or obstructed he can apply to the Court under Rule 97, complaining of such resistance or obstruction, and the question who is entitled to the property will then be decided.

The present plaintiff, though he gave notice before the sale that he claimed the property as his own, did not wait to resist or obstruct the purchaser but paid the decretal amount into Court in order to get the sale set aside.

We have not got the proclamation of sale before us, but assuming that the Collector was a person of ordinary prudence he would have sold the right, title and interest, if any, of the judgment-debtor in the property, and not the property itself. If, then, the plaintiff, to suit his own convenience, got rid of the sale of the judgment-debtor's right, title and interest in the property by paying the decretal amount into Court, it is quite clear that he could not recover the amount as having been involuntarily paid. But assuming that the property itself was sold there may be a difficulty in distinguishing between a payment made under protest to get rid of an attachment and a payment made under protest to get a sale after attachment set aside. But we do not even know whether the payment was made under protest. Again it may have suited the plaintiff's

(1) (1913) 15 Bom. L. R. 472 P. C. (2) (1917) 42 Bom. 556.

convenience to get rid of the sale rather than resist the purchaser and involve himself in litigation. Money paid under protest would not, as a rule, be paid out to the decree-holder until the legality of the protest had been decided.

But there is another question, which is the most important, whether it was ever intended that a person applying to the Court under Rule 89 to set aside a sale could satisfy the conditions of the Rule by paying in money under protest.

The money deposited is earmarked (*a*) for payment to the purchaser of a sum equal to five per cent. of the purchase-money ; (*b*) for payment to the decree-holder of the amount specified in the proclamation of sale as that for recovery of which the sale was ordered less any amount received by the decree-holder since the proclamation of sale.

It has been held that there could be no rateable distribution under section 275 of the Code of 1882 of money deposited under section 310A as it was not money realised by sale or otherwise in execution of a decree but money to which the decree-holder was solely entitled: *Hari Sundari Dasya* v. *Shashi Bala Dasya*[1] ; *Roshun Lal* v. *Ram Lal Mullick*[2] ; *Roshun Lall* v. *Ram Lall Mullick*[3]. In *Sorabji Coovarji* v. *Kala Raghunath*[4] it was decided that in spite of the alteration in the wording of section 73 of the Code of 1908 money paid into Court under Order XXI, Rule 55, was not liable to rateable distribution and though the correctness of that decision has been doubted by Mr. Mulla, who is also of opinion that money paid into Court under Rule 89 would be liable to rateable distribution, it

(1) (1896) 1 Cal. W. N. 195.
(2) (1903) 7 Cal. W. N. 341.
(3) (1903) 30 Cal. 262.
(4) (1911) 36 Bom. 156

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seems to me that when it is expressly provided that the money should be paid in for a particular purpose such money could not be treated as assets held by a Court.

I should say that it was the intention of the Legislature in framing section 310A of the Code of 1882 to enable judgment-debtors, whose property had been sold at an undervalue, to recover it if they could pay the decretal amount and five per cent. on the purchase price into Court before the sale was confirmed. For the first time by Rule 89 a person, jointly interested in the property sold by virtue of a title acquired before the sale, was enabled, to get rid of the common ownership of the auction-purchaser, leaving it for future decision whether he could recover the amount by enforcing a lien or otherwise from the judgment-debtor. But I think it was also intended that once the property had been sold the price paid by the purchasers should be available for the decree-holder, leaving it to the purchaser to what he could out of his purchase, and that if the sale was set aside by payment into Court under Rule 89, the money should go to the decree-holder in execution of whose decree the property was sold. In other words, that once property had been sold, the sale could not be set aside by a payment into Court under protest. The auction-purchaser is entitled to the benefit of his purchase whatever it may amount to, and it is only under certain conditions that he can be deprived of that benefit, namely, that he gets five per cent. for the loss of his bargain, and the decree-holder gets the benefit of his execution sale. If the Legislature had intended that sales could be set aside if payment was made into Court conditionally, then it would have said so. It is a mere accident that in this case the decree-holder purchased the property himself. If the true owner allows the attachment to continue, and the property to be sold as

belonging to the judgment-debtor, he can treat the sale as a nullity and resist the auction-purchaser. There is no necessity for him to get rid of the sale of what in his opinion does not exist. The attachment of the property itself is a different matter, that may seriously inconvenience him, but if he is the true owner the sale of a non-existent interest in it does not affect him. If he pays in money to get that sale set aside it can only be treated as a voluntary payment.

There is a further consideration, that if a decree-holder could be deprived in this way of the money which in effect resulted from the sale in execution of property alleged to belong to his judgment-debtor, he might be deprived of any further opportunity of realizing the fruits of his decree. He is entitled to what the auction-purchaser has paid and it makes no difference to him whether or not the auction-purchaser gets anything tangible in return for his money. If he does not get what has been paid or agreed to be paid by the auction-purchaser he is entitled to get that which is paid to get rid of the auction-purchaser.

In my opinion the appeal should be allowed and the suit dismissed with costs throughout.

SHAH, J. :—I need not recapitulate the facts which have given rise to this second appeal. The question is whether the deposit made by the present plaintiff under Rule 89 of Order XXI of the Code of Civil Procedure for payment to the present defendant as the decree-holder in order to have the sale set aside can be recovered back from him. It is urged that the payment must be taken to have been made by the plaintiff under coercion, and that he is, therefore, entitled to recover the amount under section 72 of the Indian Contract Act. This contention cannot be allowed.

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Having regard to the terms and scope of Rule 89, it is clear that the amount must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally. The sale to be set aside would be the sale of the right, title and interest of the judgment-debtor in the property in question. There was no obligation upon the present plaintiff, who claimed to be the owner of the property to make any application under that Rule. But when an application to set aside the sale is made under that Rule and the amount required by the Rule is deposited, it is obligatory upon the Court to set aside the sale as provided by Rule 92, sub-rule (2). The result of setting aside the sale is generally speaking in favour of the judgment-debtor. This result can be ensured by any person interested in the property by satisfying the claims of the decree-holder and the auction-purchaser according to the provisions of the Rule. I do not see how a person can be allowed to go back upon his own act and to claim the amount back from the decree-holder after he has secured the benefit of having the sale set aside. The Legislature has in effect provided that on condition that the decree-holder is paid the amount mentioned in the proclamation, he shall not be allowed to insist upon the sale being upheld. It is necessarily implied that the party seeking to take advantage of the Rule shall not be allowed to deprive the decree-holder of the benefit which is secured to him under the Rule as a substitute for the sale-proceeds, which have been realised for the satisfaction of his decretal claim.

If such a claim for refund as is now made by the plaintiff were allowed, the decree-holder would be deprived of the benefit, without being necessarily placed in his former position with reference to the judgment-debtor under the decree. It is clear that the payment to the decree-holder of the amount deposited

under Rule 89 would mean satisfaction of the decree to that extent. He could not be justly deprived of this benefit unless he could be restored to his original position under the decree. This may not always be possible at the date of the claim for refund; and that appears to me to be a valid ground for holding that the claim for refund is not admissible. The deposit under the Rule is in its very nature unconditional and voluntary.

Mr. Gumaste for the plaintiff has relied upon the decision in *Dooli Chand* v. *Ram Kishen Singh*[1] and *Seth Kanhaya Lal* v. *National Bank of India, Limited*[2] in support of his contention that the payment made by his client is not voluntary. After a careful consideration of these decisions and of the observations of their Lordships of the Privy Council, I have come to the conclusion that a payment made under protest to get rid of an attachment or to prevent a sale in execution stands on a different footing and that the *ratio decidendi* of these cases cannot be applied to a payment made under Rule 89 in support of an application to set aside a sale of the right, title and interest of a third party held in execution of the decree. No decision directly bearing on the point, which we have to decide, has been cited to us; and in the absence of any clear authority I am unable to extend the doctrine of these decisions to the case of a payment made under a specific rule for a specific purpose. It seems to me that the observations in *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*[3] favour this view. The facts in that case were different; but as pointed out in that case "the question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay.

(1) (1881) L. R. 8 I. A. 93. (2) (1913) L. R. 40 I. A. 56.
(3) (1875) L. R. 2 I. A. 131 at p. 143.

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It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debt. Still less will the action lie when the money has been paid ..... against the will of the party for whose use it is supposed to have been paid."

On the whole I am of opinion that it would be unjust and contrary to the scheme and scope of Rule 89 to admit a claim for the refund of the payment made under that Rule after the person making the payment has had the benefit of the Rule. It is a matter for him to consider before making an application under Rule 89 whether under the circumstances it is to his benefit to have the sale set aside. But if he chooses to apply under that Rule, I do not see why the payment should not be treated as having been voluntarily made.

I concur in the order proposed by my Lord the Chief Justice.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

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GANPAT RAMA JOSHI, HAVIK, RAYAT, AND OTHERS (ORIGINAL DEFENDANTS 5 TO 7), APPELLANTS *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFF), RESPONDENT*.

Hindu Law—Widow—Failure of husband's heirs on death of widow—Escheat—Burden of proof—Crown to prove that property vested in the husband—Stridhan.

When the Secretary of State for India in Council seeks to recover possession of property as having escheated to the Crown on the death of a Hindu widow by reason of the failure of the deceased husband's heirs, it lies upon him to show that the property in suit had vested in the husband.

*First Appeal No. 104 of 1919.