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could have sold as executrix under section 90 by so stating expressly in the conveyance, I do not see any difficulty in holding that she sold in all the capacities she possessed when the deed (Exhibit B) does not expressly say in what particular capacity she has sold but merely recites all the capacities. I, therefore, hold that the sale to Ratanbai should be deemed to be a sale by Bai Diwali as the executrix of the will of Jasvir Bhudar.

Suit dismissed with costs.

Solicitors for the plaintiff: Messrs. *Mehta Dalpatram & Lalji.*

Solicitors for defendants: Messrs. *Merwanji Kola & Co.*

Suit dismissed.

G. G. N.

ORIGINAL CIVIL.

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

MANAJI KUVERJI (APPELLANT AND APPLICANT) *v.* ARAMITA (RESPONDENT AND OPPONENT)*.

1921. *June* 11.

Civil Procedure Code (Act V of 1908), Order XXI, Rule 89—Execution of decree—Decree absolute for sale of mortgaged property—Auction sale—Deposit in Court of the amount realized by sale but not the full decretal amount—Application to set aside the sale—Part-payment with an undertaking to pay full amount is not payment under Rule 89.

Under a decree absolute for sale the property of the applicant was directed to be sold and the nett proceeds to be applied towards the satisfaction of the decretal amount. The sale was held in due course; and within thirty days from the date of the sale the applicant brought into Court not the amount for

* O. C. J. Appeal No. 9 of 1921: Suit No. 733 of 1913.

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the recovery of which the sale was ordered but only the amount realized by the sale *plus* five per cent., with an affidavit stating that he was unable to ascertain from the particulars and conditions of sale the full amount of the decree and that he would pay the same into Court the moment it was calculated and ascertained. Notice being issued to the judgment-creditor and the auction purchaser to show cause why the sale should not be set aside :—

Held, that the applicant had not complied with the provisions of Order XXI, Rule 89, nor did the part payment of the amount due to the decree-holder with an undertaking to pay the balance amount to a deposit within the meaning of the Rule.

The provisions of Order XXI, Rule 89, being a concession allowed to judgment-debtor must be strictly complied with in order to enable the judgment-debtor to obtain the advantage of the concession.

APPEAL from the judgment of Pratt J. in an application to set aside a judicial sale of immoveable property.

In a suit on a mortgage a preliminary decree was passed on 10th January 1918, whereby the applicant, defendant No. 1 as mortgagor was ordered to pay into Court on or before 10th March 1918 the sum of Rs. 1,20,497 with interest and costs for payment to the plaintiff and other defendants according to the priority of their respective mortgages. Defendant No. 1 made default in payment of the decretal amount on the due date ; whereupon the plaintiff applied for and obtained a decree absolute for sale on 17th June 1918. By this decree two of the mortgaged properties were ordered to be sold by public auction by the Commissioner and the net proceeds of the sale to be applied towards the satisfaction of the mortgage decree. A proclamation of sale referring to the decree absolute was published on 27th May 1920, and particulars and conditions of sale were annexed thereto describing more particularly the properties to be sold.

The sale by public auction was held on 5th August 1920, the purchaser being defendant No. 8. On

4th September 1920, defendant No. 1 brought into Court Rs. 98,000 (the price for which the properties were sold) plus five per cent., with an affidavit para. 2 of which ran as follows :—

"I have today been able to find out a private purchaser of all my properties intended to be sold in the said particulars and conditions of sale and I am now able to make the deposit in Court contemplated by Order XXI, Rule 89 of the Code of Civil Procedure, and I bring into Court the sum of Rs. 98,000 being the amount at which the said properties were sold as aforesaid and Rs. 4,900 being five per cent. thereon required under the said rule. As no amount is specified in the said particulars and conditions of sale as that for the recovery of which the said sale was ordered, I am unable to ascertain the full amount of the decree and to pay the same into Court with this application. The moment it is calculated and ascertained, I will pay the same into Court."

On 8th October 1920, notice was issued to the judgment-creditors (mortgagees) and to the auction-purchaser (defendant No. 8) under Order XXI, Rule 92 to show cause why the sale should not be set aside.

Pratt J. discharged the notice with costs, observing in the course of his judgment :—

"Now it is clear that the applicant has not complied with the terms of Rule 89 in that he has paid into Court not the amount for the recovery of which the sale was ordered but only the amount realized by the sale. His excuse is that the proclamation of sale did not specify, as it should have done, the amount to be recovered. But the proclamation did specify the amount inferentially for it referred to the decree. The applicant was a party to the suit and must have known that the amount to be recovered was at least Rs. 1,20,497. This is not, therefore, a case which comes within the dictum of Jenkins J. in *Chundi Charan Mandal* v. *Banke Behary Lal Mandal*[1] that the applicant "has been prejudiced by the act of the Court and that the mistake that has been made is attributable to that act."

[1] (1899) 26 Cal. 449 at p. 459.

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"Mr. Desai for the applicant is driven to contend that the undertaking given to the Court on the 4th September to pay the balance operates as payment and that when payment is made it will relate back to the date of the undertaking. The expression "relate back" implies that the future payment will operate as a payment on the 4th September. But that cannot be so. The undertaking is merely a promise and a promise to pay is not equivalent to a payment. In the latter event the money is in Court and available for payment to the creditors. In the former event they would still be put to a further assertion of their rights.

"In a case recently decided in this Court, *Raoji* v. *Bansilal Narayan*[1], Rule 89 was described as a concession allowed to judgment-debtors on certain conditions. Unless those conditions are complied with the concession is not available. Further jurisdiction to set aside the sale is a jurisdiction conferred upon the Court in specific terms and unless those terms are complied with, the jurisdiction does not arise: *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan*[2]. I accordingly discharge the notice with costs."

Defendant No. 1 appealed.

Desai, for the appellant.

Coltman, for the respondent (defendant No. 8).

MACLEOD, C. J.:—On the 10th January 1918 the 1st defendant as mortgagor was ordered to pay into Court Rs. 1,20,497 and interest and costs when taxed for payment to the plaintiff and other defendants who were mortgagees. Default having been made in payment, a decree absolute for sale was made on the 17th June 1918, and two of the mortgaged properties belonging to the first defendant were directed to be sold and the

(1) (1919) 43 Bom. 735. (2) (1855) 6 Moo. I. A. 134 at p. 155.

net proceeds to be applied towards the satisfaction of the decretal amount. The sale was held on the 5th August 1920 and the auction purchaser was the eighth defendant De Souza.

On the 29th day after the sale, i. e., the 4th September 1920, the first defendant brought into Court Rs. 98,000 plus 5 per cent. with an affidavit stating "as no amount was specified in the particulars and conditions of the sale as that for the recovery of which the sale was ordered I am unable to ascertain the full amount of the decree and to pay the same into Court with this application. The moment it is calculated and ascertained I will pay the same into Court."

Notice was then issued to the judgment-creditors and the auction purchaser to show cause why the sale should not be set aside. The purchaser opposed the notice contending that the 1st defendant had not complied with the provisions of Order XXI, Rule 89. That was perfectly clear from the admitted facts of the case. But it was contended that a part payment of the amount due to the decree-holder, with an undertaking to pay the balance, amounted to a deposit within the meaning of Rule 89 of Order XXI, and that, therefore, the person giving the undertaking was entitled to an order setting aside the sale.

Now an undertaking to pay a certain amount is not payment, and, as has been laid down in previous decisions, the provisions of Rule 89 are a concession allowed to judgment-debtors, and they must be strictly complied with in order to enable the judgment-debtor to obtain the advantage of the concession. If part payment coupled with an undertaking to pay the balance were to be considered as payment in full, then the provisions of the rule would not be complied

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with. So the decision of the trial Judge was correct and the appeal must be dismissed with costs to the 8th defendant.

Solicitors for the appellant: Messrs. *Dikshit, Maneklal & Co.*

Solicitors for the respondent: Messrs. *Edgelow, Gulabchand, Wadia & Co.*

Appeal dismissed.

G. G. N.

ORIGINAL CIVIL.

SMALL CAUSE COURT REFERENCE.

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

1921. *June* 21.

SHANKAR BALKRISHNA TORNE (PLAINTIFF) *v.* SOUTH INDIAN RAILWAY AND OTHERS (DEFENDANTS)*.

Carriage of goods—Risk-note, form B—Goods diverted from agreed route by mistake of Railway—Whether tortious act—Claim to compensation—Notice of claim—Indian Railways Act (IX of 1890), section 77.

The plaintiff consigned certain goods to the S. I. Railway from Alleppy (in the Madras Presidency) to be carried to Wadi Bunder in Bombay, via Erkulam (S. I. Railway), Jallarpet (M. & S. M. Railway) and Raichur (G. I. P. Railway). The consignor executed a risk-note form B, whereby he undertook "to hold the Railway administration and all other Railway administrations working in connection therewith over whose Railways the said goods may be carried in transit from Alleppy to Wadi Bunder harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to, the said consignment from any cause whatever before, during and after transit over the said Railway or other Railway lines working in connection therewith, or any other agency employed by them respectively for the carriage of the whole or any part of the said consignment." At Jallarpet, a wrong label was attached, through mistake, to the wagon containing the goods, by the M. & S. M. Railway; and the goods instead of being sent along the line to Raichur were sent via Madras along the East Coast up to Waltair, the terminal station

* Small Cause Court Suit No. 1147/150075 of 1920.