

## ALLAHABAD HIGH COURT

Haji Inam Ullah

Vs

Mohammad Idris

(Mulla, J.)

08.03.1943

### ORDER

#### **Mulla, J.**

1. This is an application in revision by the judgment-debtor in an execution proceeding. It is directed against an order passed by the learned District Judge of Kumaon on 11th October 1941, in appeal from an order passed by the Civil Judge, Naini Tal, dated 30th July 1941. The facts of the case may briefly be stated as follows: In the year 1939 one Raghubir Saran obtained a decree against the applicant, Haji Inamullah and putting that decree into execution brought four houses to sale. The auction sale was held on 20th June 1941, and the property mentioned above was purchased by the respondent Mohammad Idris. Under Order 21, Rule 85 Civil P.C. it was incumbent upon the respondent, Mohammad Idris to deposit the full amount of purchase-money payable by him on 15th day from the sale of the property, that is, on or before 5th July 1941. It appears from the judgment of the learned District Judge that the purchase-money was in fact deposited by the respondent on 21st July 1941, that is, well beyond time. Order 21, Rule 86, Civil P.C. provides that in default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re-sold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

2. It is quite evident that Rule 86, which has been cited above lays a duty upon the Court to re-sell the property if the purchase-money has not been deposited within the period prescribed by the preceding Rule 85. The performance of this duty is quite irrespective of any application being made by any party to the proceeding. What happened in the present case was that the applicant judgment-debtor first made an application under Order 21, Rule 90, challenging the validity of the auction sale on various grounds. This application was followed by another dated 14th July 1941, in which the applicant judgment-debtor specifically pointed out to the Court that the imperative provisions of Rule 85 of Order 21, Civil P. C, had not been carried out by the auction purchaser. It appears, however, that in this application also, the applicant judgment-debtor mentioned some grounds for setting aside the sale under Order 21, Rule 90. On 21st July 1941, that is, the date on which the auction-purchaser deposited the full amount of purchase-money payable by him the applicant judgment-debtor also deposited the full amount due under the decree plus 5 per cent., along with an application under Order 21, Rule 89, Civil P. C. "When the

matter came up for the consideration before the learned Civil Judge of Naini Tal, it appears that the applicant judgment-debtor was asked to elect which of the two applications he intended to press. Under Order 21, Rule 89, Sub-rule (2) it is evident that the applicant judgment-debtor was not entitled to make or maintain any application until he had withdrawn his previous application under Order 21, Rule 90, Civil P. C. On 30th July 1941, the applicant judgment-debtor withdrew his application under Order 21, Rule 90, Civil P. C, and thereupon the Court proceeded to set aside the sale upon the application under Order 21, Rule 89, Civil P. C. From that order, the auction-purchaser went up in appeal to the learned District Judge of Kumaon. It was pressed before the learned District Judge on behalf of the auction purchaser that the withdrawal of the application under Order 21, Rule 90 having been made beyond a period of thirty days the application under Order 21, Rule 89, Civil P. C, which was not competent under the law before that date, must be deemed to be barred by time. This contention has been allowed to prevail by the learned District Judge who has consequently ordered that the sale made in favor of the respondent auction purchaser should be restored. The learned District Judge has not considered the legal effect of the important fact mentioned by him in his own judgment, namely, that the auction purchaser had deposited the full amount of the purchase-money payable by him on 21st July 1941, that is, far beyond the period of fifteen days given by the Court for that purpose, hence this application in revision.

3. The simple argument on behalf of the applicant is that it was incumbent upon the Court in the circumstances stated above to hold a re-sale of the property upon the failure of the respondent auction-purchaser to deposit the full amount of purchase-money payable by him within fifteen days from the date of the sale, that is, 20th June 1941. The sale in favor of the respondent auction-purchaser was automatically cancelled and the Court was bound to hold another sale under the provisions of Order 21, Rule 86, Civil P. C. It is further pointed out that the judgment-debtor having deposited the whole of the decretal amount plus 5 per cent., on 21st July 1941, it should be deemed that the payment was made towards the decree which was under execution, and therefore no re-sale should have been held. On these grounds it is alleged that the order passed by the Court below should be set aside and the order passed by the learned Civil Judge should be restored. Upon the facts stated above, I think the contention of learned Counsel for the applicant is sound and must prevail. It is evident that the attention of the learned District Judge was not invited to the imperative provisions of Order 21, Rule 86. What the learned District Judge has ordered to be done in the present case, namely, the restoration of the sale in favour of the respondent auction purchaser, is directly against the provisions of that rule. Under that rule, it is evident that the sale at which the respondent auction purchaser purchased the property in question was automatically cancelled and he could have no interest in the property which was the subject of the sale. It is also clear that in view of the admitted fact that the applicant judgment-debtor has deposited the full amount due under the decree which was under execution no re-sale should be held in this case. The result, therefore, is that I allow this application in revision and setting aside the order passed by the learned District Judge of Kumaon restore the order passed by the learned Civil Judge of Naini Tal, dated 30th July 1941. The applicant shall have his costs throughout from the respondent auction purchaser Mohammad