

(1931) 06 CAL CK 0033
In the Calcutta High Court

Nurjahan Khatun and Others

APPELLANT

Vs

Asia Khatun and Others

RESPONDENT

Date of Decision : 12-06-1931

Acts Referred:

Citation : AIR 1932 Cal 216 : 136 Ind. Cas. 478

Hon'ble Judges : Rankin, C.J;Pearson, J

Bench : Full Bench

Judgement

Pearson, J.—The question for determination in this appeal is whether in the circumstances a deposit in Court by a judgment-debtor, made under protest, would entitle him to have a sale in execution set aside under Order 21, Rule 89, Civil P.C.

2. The sale was held on 19th February 1930 and the matter was directed to come up for confirmation on 24th March. Meantime on 19th March two orders were passed, viz.:

(1) Judgment-debtors are permitted to deposit the decretal money with compensation as prayed for; and (2) judgment-debtors by a petition state that they have deposited the decretal amount with interest on protest on the ground stated therein. The decretal money will remain in Court until further orders.

3. On 24th March notice was directed to issue on the decree-holders to show cause why the sale should not be set aside. The matter came on for hearing on 26th May 1930 when the learned Judge directed the sale to be set aside and the execution case dismissed on full satisfaction. The ground on which this order proceeded was that the protest in making the deposit by the judgment-debtors was so far justified in that interest had been calculated on the entire decretal money up to the date of deposit; that that was wrong; that a sum of Rs. 47-3-6 on that account had been wrongly assessed and fell to be deducted from the deposit in Court.

4. The amount specified in the sale proclamation is what the judgment-debtor

has to deposit under Order 21, Rule 89 (1) (b), of the Code. That figure in this instance was the sum of Rs. 11,593-7-0 from which had to be deducted certain payments made by the judgment-debtors. In addition to that there was charged against the judgment-debtors in the account made up by the Court officer the sum of Rs. 10-1-6 for "subsequent costs" and Rs. 264-11-6 for "interest up to 19th March 1930," both of which sums were included in the total deposited by the judgment-debtor under protest, the latter sum apparently including the sum of Rs. 47-3-6 disallowed by the Judge in his order of 26th May. At any rate, having regard to the provisions of Rule 89 (1) (b), it may be taken that the judgment-debtor was not compellable to pay those two sums of Rs. 10-1-6 and Rs. 264-11-6 in order to obtain the benefit given him by the rule.

5. It has been argued in the present appeal that the learned Judge was nevertheless wrong in passing an order setting, aside the sale, because by making the payment under protest in the way they did, the result was that the judgment-debtors prevented the money from becoming available forthwith unconditionally to the decree-holder and such a conditional deposit is bad; see *Dulhim v. Bansidhar* 10 Ind.Cas. 880 Mt. *Shakoti v. Jotindra* 1 C.W.N. 132 and *Narayan Vasudevacharya Katti Vs. Amgauda Malagauda Patil*, . It seems to be clear that when a deposit is made under Rule 89 it must be made, in the ordinary way, for payment to the decree-holder voluntarily and unconditionally; see *Narayan Vasudevacharya Katti Vs. Amgauda Malagauda Patil*, and *Chairman, Purulia Municipality Vs. Bishun Sao*, . Mr. Sen however has argued that the present case differs from the cases cited in that the judgment-debtors here never denied but on the contrary admitted their liability under Rule 89, Order 21. In the present case the deciding factor, in my judgment, must be the terms on which the payment of the deposit was made. These are to be found in the petition of the judgment-debtors filed on 19th March. In that they state that:

when the petitioners wanted to deposit money with the permission of the Court the officer of the Court gave them an account according to which they have to deposit a large sum of money in excess. Besides this an excess amount is found to have been calculated as costs of execution and interest. Still the judgment-debtors deposit under protest the amount as calculated by the officer of the Court

and this is followed by a prayer that

the permission to the decree-holder to withdraw the said money may be withhold till the hearing of the objection on behalf of these judgment-debtors.

6. Had the objection been limited only to the execution costs and interest, the judgment-debtors would have been in better case; but it is not so limited. They object to having to deposit "a large sum of money in excess;" and "besides this" (meaning "in addition to this") there are the items of costs and interest. It is not therefore correct to assert that in that petition the judgment-debtors are admitting their liability. It would have been easy enough for them to frame the petition for deposit, without objection of the amount required by the rule and

protest against the other items; but this they have not done. The protest according to the petition extends to a "large sum of money in excess" over and above the costs and interest. In my judgment therefore this was not a good deposit under Rule 89 which entitled the judgment-debtor to have the sale set aside, and prima facie the order of the learned Judge cannot stand.

7. It appears however that on 25th March 1930, a few days after the deposit an attachment in execution was made of the deposit moneys to the extent of Rupees 3,410-10-0 by creditors holding a decree against the decree-holders in the present matter. A certificate for payment of that amount was granted to the attaching creditors on 12th. July 1930. In the circumstances this matter must go back to the lower Court for consideration of what effect, if any, these facts may have upon the present position and rights of the parties.

8. The appeal is allowed with costs three gold mohurs. The case is remanded to the lower Court for the final disposal of the matter upon determination of the question set out in the foregoing paragraph.

Rankin, C.J.

9. I agree.