

(1941) 02 CAL CK 0009
In the Calcutta High Court

Sm. Shamangini Roy Chowdhurani

APPELLANT

Vs

Sm. Mahalakshmi Rakshit

RESPONDENT

Date of Decision : 20-02-1941

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 4

Citation : AIR 1942 Cal 44

Hon'ble Judges : McNair, J

Bench : Division Bench

Judgement

McNair, J.

1.This is an application by the mortgagor for leave to deposit in Court the amount found due to the mortgagee under the Registrar's report that on such payment being made direction be given to the plaintiff to tax her bill of costs, and that on payment to the plaintiff of such amount as may be adjudged due to her in respect of costs, charges-expenses and subsequent interest, the plaintiff be directed to deliver up the original documents of title. The mortgage was by deposit of title deeds, and in effect the applicant is asking for leave to deposit in Court the amount found due under the Registrar's report and recover her security and is suggesting, as the costs have not yet been taxed and cannot be taxed within a reasonable time, that the mortgagee should retain the documents of title pending payment by the mortgagor of the amount of the taxed costs. The mortgagee is agreeable to this arrangement provided the mortgagor is also liable for the Accountant-General's commission, if any, and deposits that sum in Court, when ascertained. The preliminary decree was made on 3rd March 1939, and the final decree on 15th May 1940. The mortgagor applied on 12th September 1940 for relief under the Money-lenders Act. That application was dismissed and the property was sold on 14th September and the purchaser, Thakurmoni Dasi bought it for Rs. 17,400 and deposited 25 per cent. of the purchase money on the same day. On 27th September the certificate of the result of the sale was filed by the Registrar, but three days later the mortgagor applied for leave to set

aside the sale. That application was dismissed and the purchaser applied for confirmation of the sale. There were applications to the Court of appeal and interim injunctions which prevented either of these applications coming before the Court.

2. The purchaser opposes this application first on the ground that the mortgagor having applied under Order 21, Rule 89 and that application having been dismissed, cannot now apply for the same relief under Order 34, R. S. It is further argued that the sale is not under the provisions of the CPC but under the rules framed in Chap. 27 of the Original Side Rules and Orders for sale by the Registrar. Under these rules, it is said, there is no necessity for confirmation of a sale by the Registrar, therefore the provisions of Order 34, Rule 5 which inter alia provide that the application must be made before the confirmation of the sale are not applicable. Finally, it is argued that if Order 34, Rule 5 is applicable, then there must be strict compliance with the provisions of that rule and the mortgagor must deposit everything contemplated by Rules 4 and 5 of Order 34, including the costs. A similar argument had been put forward in application under Order 21, Rule 89, and it has been decided in relation to that order that costs need not be deposited when applications are made to set aside a sale on making required deposit in Court. It appears to me that the same principles apply to an application under Order 34, Rule 5 as under Order 21, Rule 89. Costs cannot be taxed, but, in my opinion, it is desirable that the order should be complied with as far as possible, and in most cases the mortgagee can furnish an estimate of his costs and that estimate can be accepted or modified by the Court and the Court may direct that a sufficient sum should be deposited when the application is made, or before the order is made on the application, provided the attorney for the mortgagee gives the usual undertaking to refund any balance that may ultimately be found due. In this particular instance that course is unnecessary because the mortgagor and mortgagee have agreed that the mortgagee should retain the title deeds which were deposited as security until the costs have been taxed and the amount of the taxed costs have been paid to him.

3. I cannot accept the argument based on the alleged absence of any provision in the Original Side Rules for the confirmation of a sale. The scheme of the rules has been explained in reported judgments and I do not propose to analyze that scheme again. But in Chap. 27, which deals with sales by the Registrar, the rules provide that after the Registrar has accepted the highest bid, he shall as soon as possible proceed to certify the result. The certificate of sale may be varied. If it is not varied it is confirmed by effluxion of time, or the purchaser may apply for an order confirming the certificate. Rule 45 then provides that where immovable property has been sold by the Registrar under Order 34, Rule 4 or any subsequent rule of that order and the certificate of the result of the sale has been confirmed, the purchaser may obtain a certificate of sale as evidence of title. Whether the sale has to be confirmed or not under these rules, in practice the purchaser applies, so far as I am aware, invariably, for confirmation of the sale, and there is before me the application by the purchaser in this case for

confirmation of the sale. In previous decisions where questions have arisen as to the necessity for strict compliance with the provisions of the Civil Procedure Code, when dealing with sales by the Registrar, the Court has held that the judgment debtor who seeks relief after a sale has been held should so far as possible observe the relevant provisions of the Code, and in my opinion, in this application the relevant provisions both of the Code and of the Original Side Rules have been observed by the present applicant. There will be an order in terms of para. 1, save that the figure of Rs. 13,363-3-0 shall be substituted for the figure Rs. 12,540-3-0; and in terms of paras. 2, 3, 4 and 5 of the summons. The purchaser will be entitled to withdraw the sum stated in para. 4. The applicant must also deposit in Court such amount, if any, as is due for the Accountant-General's commission. The mortgagee may add his costs to his claim. The applicant must pay the taxed costs of the purchasers. Certified for counsel.