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SOLANA RAMACHANDRA RAO & ORS.

v.

MADDI KUTUMBA RAO & ANR.

April 19, 1967

B [K. N. WANCHOO, C.J., V. BHARGAVA AND G. K. MITTER, JJ.]

Code of Civil Procedure (Act 5 of 1908), O.XXI, r. 89 (b)—Deposit of amounts to be paid to decree-holder—When can be dispensed with.

Properties belonging to a trust were sold in execution of a decree obtained by the second respondent against the trust and were purchased by the first respondent. Thereafter, a suit was filed under s. 92, C.P.C. for
C the removal of the trustees wherein it was prayed that the sale in favour of the first respondent may be set aside and adequate provision for discharging the decree of the second respondent be made in the scheme to be framed for managing the trust. The second respondent agreed to such a course and thereupon, the appellant, who was appointed a receiver in the suit under s. 92, applied to the Court under O.XXI, r. 89 C.P.C. for setting aside the sale. He deposited certain amounts for payment to the first respondent purchaser. He did not, however, deposit the
D amount specified in the proclamation of sale for payment to the second respondent decree-holder, as required under O.XXI, r. 89(b), but instead, prayed that the Court may dispense with such deposit. The Court allowed the application, but on appeal by the purchaser the High Court set aside the order.

In appeal, by the receiver, to this Court,

E HELD : If at the time when the application under O.XXI, r. 89 is made by the judgment-debtor, the decree has been satisfied or adjusted, the deposit of any money for payment to the decree-holder is not called for. But a mere promise on the part of the judgment-debtor to take steps to ensure payment of the decretal amount, even if acceded to by the decree-holder would not have the same effect. In the present case, the decree was kept alive and the decree-holder had merely agreed to postpone realising the decretal amount in case satisfactory provision for
F payment of his dues was made in the suit. There was no adjustment of the decree which could be recorded under O.XXI, r. 2; neither had the decree been satisfied. Therefore, the necessity for the judgment-debtor making a deposit under the provisions of O.XXI, r. 89(b) was not obviated. [706 B-C, E-H; 707 A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 805 of
G 1964.

Appeal from the judgment and order dated March 4, 1963 of the Andhra Pradesh High Court in Appeal against order No. 4 of 1960.

A. K. Sen, and *T. Satyanarayana*, for the appellants

H *Bishan Narain, A. Vedavalli* and *A. V. Rangam*, for respondent No. 1.

R. Thiagarajan, for respondent No. 2.

The Judgment of the Court was delivered by

Mitter, J. This is an appeal by a certificate granted by the High Court of Andhra Pradesh against a judgment and order of that court dated March 4, 1963. The appeal is by a receiver appointed in a suit under the provisions of s. 92 of the Code of Civil Procedure with the object of applying for setting aside a sale of certain properties belonging to a choultry.

The facts shortly are as follows :—The second respondent before this Court obtained a decree in O. S. No. 116 of 1949 of Sub-Court, Vijayawada against Tammana Tatayya and Narayana Murty Annapurna Satram and put some property to execution sale. The properties of the Satram were sold in court auction on July 1, 1957 and the first respondent, Maddi Kutumbarao became the purchaser for Rs. 24,600. O.S. No. 60 of 1957 was instituted in the same court for the removal of the two trustees on the ground of mismanagement. The decree-holder was made a party to this suit filed under s. 92, Civil Procedure Code and one of the reliefs prayed for in the suit was that the sale above-mentioned be set aside and provision be made for payment of the decree amount in O.S. No. 116 of 1949 under the scheme to be settled by the court. To quote from paragraph 11 of the plaint in that suit, the plaintiff asked that

> "all proceedings in execution of the decree obtained by the 3rd defendant against the Satram be stayed pending the framing of the scheme and that the sale in favour of the 4th defendant held on 1-7-1957 by the Sub-Court, Gudivada in E.P. No. 37 of 1956 in O.S. 116/49 Sub-Court, Vijayawada, be set aside and that adequate provision for the discharge of the same be made."

The plaint bears the date 22nd July 1957. The decree-holder, the third defendant, was a minor represented by his mother and guardian, Lakshmikantamma. It appears that on July 30, 1957 a memorandum was filed on his behalf in the court of the Subordinate Judge. It was stated therein that

> "As the plaintiff in O. S. No. 60 of 1957 have filed that suit for framing a scheme for the management of the choultry, etc. and have asked in that suit for a proper provision to be made for the amount due to the third respondent in this petition, under the decree in O.S. No. 116/1949, this third respondent agrees to the same.
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> Therefore, this 3rd respondent has no objection, for allowing the petition that has been filed for setting

A aside the sale held on 1-7-1957 in this suit without the necessity of depositing the sale warrant amount."

The receiver appointed in O.S. No. 60/1957 filed an application under O. XXI r. 89 in the court of the Subordinate Judge to set aside the court sale. He deposited Rs. 1,230 representing 5% of the purchase money for payment to the purchaser; Rs. B 410-15-0 as poundage and Rs. 123 for interest. No deposit was made for payment to the decree-holder and it was stated in paragraph 6 of the petition that:

> "The 3rd respondent represented by his mother is impleaded as third respondent in the Scheme Suit O.S. No. 60 of 1957, Sub-Court, Vijayawada, wherein C necessary provision for the discharge of the decree debt due to him from the choultry is prayed for and has to be made. At the request of the petitioner to keep up the fair name and prestige of the founders of the choultry, the 3rd respondent's mother as guardian and executor agreed to the said course and is willing D for an adequate provision for the discharge of the decree debt being made in the said suit and has agreed to postpone realising the decree debt in O.S. 116 of 1949, Sub-Court, Vijayawada, till then in case the existing trustees, respondents 1 and 2 do not choose to discharge the same in the meanwhile. Under the E circumstances, the petitioner submits that the Hon'ble Court may be pleased to dispense with the deposit of the amount specified in the proclamation of sale for payment to the decree-holder as required by cl. (b) of r. 89 of O. XXI C.P.C."

The prayer in the petition was that the sale of the properties in F favour of the fourth respondent be set aside and that respondents 1 and 2 do pay the expenses to be incurred by the petitioner The Subordinate Judge allowed the application observing:

> "Where there is an arrangement between the decree-holder and the judgment-debtor for the satisfaction of the decree and the decree-holder does not G want any deposit to be made into court, it is perfectly open to the judgment-debtor to come forward with a petition under O. XXI, r. 89 without depositing the amount required to be deposited under cl. (b)."

This was upset in appeal by the High Court. According to the High Court, O. XXI, r. 89 permits the decree-holder and the judgment-debtor to mutually cancel the decree debt and the H cancellation of the debt may be either by an adjustment on a constructive payment or by waiver by the decree-holder. The High Court however found itself unable to agree with the con-

clusion of the Subordinate Judge that on the facts of the case the decree-holder could be said to have received the amount shown in the proclamation of sale for the purpose of O. XXI, r. 89.

There can be no doubt that if at the time when an application under O. XXI, r. 89 is made by the judgment-debtor, the decree has been satisfied or adjusted, the deposit of any money for payment to the decree-holder is not called for. It was argued on behalf of the appellants that a mere promise on the part of the judgment-debtor to take steps to ensure payment of the decretal debt if acceded to by the decree-holder would have the same effect. Reliance was placed on a judgment of this Court in *The Union of India* v. *Kishorilal Gupta and Bros.*(1). There it was pointed out that

> "One of the modes by which a contract can be discharged is by the same process which created it, *i.e.* by mutual agreement; the parties to the original contract may enter into a new contract in substitution of the old one."

Reference was also made to the rule as stated by Cheshire and Fifoot in their Law of Contract, 3rd Edn. at p. 453: "if what the creditor has accepted in satisfaction is merely his debtor's promise to give consideration, and not the performance of that promise, the original cause of action is discharged from the date when the agreement is made." Relying on the above decision, it was contended on behalf of the appellants that even an executory agreement between the decree-holder and the judgment-debtor would have the same effect as the adjustment of a decree. It is necessary to bear in mind that a decree for payment of money is not a contract between the parties although it is possible for the parties to agree upon a course of payment or agree to have the decree satisfied otherwise than by payment of money. For the purpose of this appeal, it is not necessary to go into that question. Assuming that the proposition put forward on behalf of the appellants is correct, it must be shown that there was an agreement between the parties by which the decree-holder agreed to forego his rights under the decree. Paragraph 6 of the petition under O. XXI, r. 89 which has been quoted above shows that the decree-holder had merely agreed to postpone realising the decretal amount in case respondents 1 and 2 did not choose to discharge the same. That petition shows clearly that it was anticipated that the court would be in a position to make a provision for the discharge of the decretal debt. The decree was kept alive and not touched upon in any manner much less extinguished. The decree-holder was prepared to stay his hands in

(1) [1960] 1 S.C.R. 493, 502.

A case satisfactory provision for payment of his dues was made in the suit. There was no adjustment of the decree which could be recorded under the provisions of O. XXI, r. 2; neither had the decree been satisfied. The High Court was therefore right in its conclusion that the situation was not one which obviated the necessity for the judgment-debtor making a deposit under the B provisions of O. XXI, r. 89(b). On behalf of the appellants, reference was also made to the fact that the auction purchaser had been permitted by the court to withdraw the sum of Rs. 24,600 deposited in court. We were informed that such withdrawal had been permitted but the auction purchaser had once more made the necessary deposit under the orders of the court. This cannot C affect the position in law under O. XXI, r. 89.

In the result, the appeal fails and is dismissed with costs.

V.P.S. *Appeal dismissed*