

(1913) 01 MAD CK 0015
In the Madras High Court

Anantha Lakshmi Ammal

APPELLANT

Vs

Kunnanchankarath Sankaran Nair

RESPONDENT

Date of Decision : 03-01-1913

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89

Citation : (1913) 24 MLJ 205

Judgement

1. This case arises out of an application presented under Order XXI Rule 89 of the CPC to set aside an execution sale of certain Immovable property, by a person who purchased the property from the judgment-debtor after the auction sale. The auction purchaser contested the application on the ground that the applicant was not a person entitled to make the application and that she did not pay into Court, before the expiration of 30 day's from the date of sale, the deposit of 5 percent, on the purchase money, and to the decree-holder the amount due to him under the decree. The District Munsif set aside the sale; but on appeal the Subordinate Judge reversed his order, holding that a purchaser from the judgment-debtor subsequent to the auction sale is not one entitled to apply under the rule in question. He also made some observations calculated to throw doubt on the fact of the applicant's payment of 5 per cent, of the purchase money into Court and of the decree amount to the decree-holder within the period fixed by law, though he did not record any definite finding on the point. We are clearly of opinion that she did both. The whole amount due to the decree-holder under the decree was no doubt not paid in cash to the decree-holders. They waived a portion of the amount due to them and put in an application to the Court requesting that satisfaction might be entered of the whole amount due to them under the

decree. No doubt this application was not signed by all the decree-holders but only by the Vakil and by one of the decree-holders. It is also true

that no special vakalat authorising the vakil to put in the petition and to waive the balance amount due under the decree was produced at the time

of the application. But there can, in our opinion, be no doubt from the subsequent conduct of the other decree-holders that they had all agreed,

previously to the application, to its being put in by the vakil. It was held by this Court in *Veda la Lakshminarasimha Charyulu v. Pacha*

Lakshmiamma (1912) M.W.N. 756 that the payment to the decree-holder need not be in cash and that it is enough if the decree-holder is satisfied

with regard to the whole of the amount due to him to justify an application under order XXI rule 89. The applicant had therefore, satisfied the

requirements of the rule within the period allowed to her under the law.

2. The remaining question for consideration is whether the petitioner was one entitled to make an application under the rule. According to the

language of the rule, ""when Immovable property is sold in execution of a decree, any person either owning such property or holding an interest

therein by virtue of a title acquired before such sale may apply to have the sale set aside."" It is argued on behalf of the respondent that the applicant

under the section must be one owning the property by virtue of a title acquired before the sale and that any one purchasing subsequent to the sale is

not entitled to the benefit of the rule. After full consideration, we are not prepared to adopt this construction. No doubt the expression ""by virtue of

a title acquired before such sale may, according to the phraseology employed, qualify both ""owning such property"" and ""holding an interest

therein."" But it may at least equally well be taken to qualify only the expression ""holding an interest therein."" It is not denied that a person

purchasing from the judgment-debtor after the attachment of the property and before its sale would be entitled to the benefit of the rule. Why

should one purchasing after the sale be in a worse position than one purchasing after the attachment but before the sale? An alienation of the

property attached in execution of a decree is not favoured by the law. The right of the alienee is subject to all rights enforceable under the

attachment. He would, no doubt, obtain a valid right to the judgment-debtor's title subject to such rights. But so would a purchaser after the

auction sale also. If the sale by the Court be confirmed, the auction-purchaser's title would, no doubt, date from the time of the sale. But he does not get a complete legal title until and unless the sale is confirmed. The title of a private purchaser after the auction sale could be defeated only by the latter being confirmed by the Court. The object of Rule 89, as of the corresponding provision in Section 310A of the old Code, was to give the judgment-debtor a further chance of avoiding the sale of his property; See *Birj Mohun Thakur v. Rai Umanath Chowdhry* ILR (1892) C. 8. The respondent's argument that no one claiming any right to the property by a transaction subsequent to the sale whether he be the absolute assignee of the judgment-debtor's rights or one having only a mortgage or other subsidiary right can claim the benefit of the rule, will largely frustrate the beneficial object of the legislature. A judgment-debtor might not have the means to pay up the amount of the decree and make a deposit of 5 per cent, of the auction amount without either parting with his title to the property or raising money on the security of it. He cannot according to the respondent do either. We do not think that this could have been the intention of the legislature. *Manickka Odayan v. Rajagopala Pillai* ILR (1907) M. 507 and *Kuppana Kavundan v. Kumara Kavundan* ILR (1900) M. 450 laid down that according to Section 310A of the repealed code a purchaser subsequent to the auction could apply for the benefit of the statute, although *Hazari Ram v. Badai Ram* (1897) 1 C.W.N. 279, adopted a contrary view. According to the old code "" any person whose Immovable property has been sold"" was competent to apply u/s 310 A. The opinion of this Court was that the language included a person who purchased from one whose Immovable property was sold as he would stand in the shoes of his vendor. If we take it that the ""owner"" in Rule 89 applies to one in whom the title is absolutely vested as distinguished from one who has only an interest in the property, it is difficult to see what necessity there can be to entitle any person who became the owner before the attachment of the property to make an application for setting aside the sale on the conditions mentioned in the section. It is almost impossible that any one whose title dated prior to the attachment could do so. It would be hardly reasonable to suppose that one who had only a disputable title was the person intended to be given the right to set aside the title of an auction-purchaser. It is also unlikely, in our opinion, that the legislature

intended to confer the benefit of the section only on persons who purchased between the attachment and the auction-sale of the property. As

already observed the object of the section justifies and requires the construction we put on it.

3. A contrary interpretation would lead to an unsupportable distinction between a purchaser after the attachment and a purchaser after the auction-

sale. We have no doubt that the reasonable construction of the section would be to make it include any person owning the property at the time the

application is put in whose ownership would be liable to be displaced by the auction sale if it be confirmed. Under the old code the expression

any person whose Immovable property is sold"" was generally construed as including any one having a title or any interest in the property which title

or interest was liable to be defeated by the auction sale and not a title or interest that would not be affected by it. Thus a donee claiming under a

gift before the attachment *Erode Manikkoth Krishnan Nair v. Puthiedeth Chembakkoseri Krishnan Nair* ILR (1902) M. 365, a second mortgagee

who was not a party to the mortgage-decree in pursuance of which the auction-sale was held and whose title was regarded as not capable of being

affected by it *Mallikarjunadu Setti v. Lingamutri Pantulu* ILR (1902) M. 332, a purchaser before the attachment *Arjan Mollah v. Jadunath Roy*

Chowdry (1897) 1 C.W.N. 243., and *Ramachandra v. Rakhmabai* ILR (1898) B. 451 and a co-sharer (of the property) with the judgment-

debtor whose interests were sold *Abdul Rahaman v. Matiyar Rahaman* ILR (1902) C. 425 were held not entitled to apply for setting aside the

sale. There was, however, a conflict, of opinion on the question whether a simple mortgagee was entitled to set aside the sale even though his right

might be defeated by it. See *Paresh Nath Singha v. Nabo Gopal Chuttopadhyia* ILR (1901) C. 1. This Court in *Srinivasa Ayyangar v. Ayyathorai*

Pillai ILR (1898) M. 416 was of opinion that a puisne mortgagee who was a party to the decree for sale in favour of a prior mortgagee was

entitled to the benefit of the section. The predominance of judicial authority may be taken to have been that any person in whom the ownership or

any interest in the property was vested at the time of making the application and whose title was liable to be defeated by the confirmation of the

auction-sale could take advantage of Section 310 A. But there was a conflict of opinion amongst the Judges, chiefly on the point whether a person

who was not the owner but only had an interest in the property sold, was entitled to do so. It is not clear, as observed by Messrs. Woodroffe and Ameer Ali in their commentaries on the Civil Procedure Code, what the effect of the amendment is. If the object was to make it clear that a person who has only an interest in the property sold and is not the owner of it should have the benefit of it in cases where his interest would be affected by the sale, the language employed cannot be regarded as otherwise than unhappy. If the affirmative proposition that one having an interest ""by virtue of a title acquired before the sale"" might apply to have it set aside is taken to imply the negative proposition that a person obtaining an interest in it after the sale should not have the benefit of the section and should not be taken to be regarded as the owner pro tanto of the property, this seems to be hardly consistent with the object of the legislature, namely, to relieve the hardship entailed on an owner by the sale of his property in Court-auction. For, he might often be unable to avail himself of the benefit of the section except by raising money on the security of the property itself. If an interest was created before the attachment of the property, the owner of the interest would not ordinarily require the benefit of the section as his title would not be affected by the sale. It is, to say the least, extremely difficult to suppose that the object of the draftsman was to favour the small and undeserving class of persons deriving an interest in the property after the attachment and before the sale. In any event, there is no reason why, in the face of what we regard to be the mischief of the statute, we should construe the expression ""person owning such property"" as also qualified by the phrase ""by virtue of a title acquired before such sale."" The language does not require us to do so and we decline to adopt the construction suggested for the respondent.

4. In *Dulhin Mathura Koer v. Bangsidhari Singh* (1911) 15 C.L.J. 83 Mooherjee, J. delivering the judgment of the Court animadverted on the obscurity of the amendment made in the present Code and held that, although the language of the rule might be comprehensive enough to include a person having an interest in the property sold which would not be affected by the auction-sale, a reasonable construction should be put upon it so as to exclude such a person from the purview of the provision. See also *Muhammad Ahmadullah Khan v. Ahamad Said Khan* (1911) 8 A.L.J.

Rep. 356. *Ishra Das v. Asaf Ali Khan* ILR (1911) A. 186 has been strongly pressed on us for the respondent. There the application was made by

a judgment-debtor who had disposed of the property by sale to another person after the auction sale was held. *Tudball and Chamier, JJ.* held that

the application was incompetent because the applicant was not the owner of the property at the time that the application was made. Both the

learned Judges were apparently also of opinion, though that question did not arise for decision in the case, that the ownership of a petitioner under

the section must have been acquired under a title prior to the sale. *Mooherjee J. in Dulhin Mathura Koer v. Bangsidhari Singh* (1911) 15 C.L.J. 83

was also apparently of the same opinion. The learned Judge took it that the legislature intended to settle the conflict between *Appaya Shetti v.*

Kunhati Beari ILR (1906) M. 214 and *Hazari Bam v. Badai Ram* (1897) 1 C.W.N. 279. The latter case was not reported in the authorised

reports, and the language of rule 89 is certainly consistent with the view that the expression ""by virtue of a title acquired before the sale"" does not

qualify the first clause viz., ""any person owning such property."" For the reasons already stated, we think that the reasonable construction is to hold

that it does not. The Subordinate Judge's view that the applicant was not entitled to apply under Rule 89 of Order XXI must therefore be rejected.

5. The case is one in which a second appeal does not lie, a single appeal only being provided in such cases even where the question is between the

parties to the suit or their representatives. It is argued that we cannot interfere with the order of the Subordinate Judge in revision u/s 115 C.P.C.

This contention is clearly unsupportable. The Subordinate Judge by placing a wrong construction on the rule in question held that the first Court

had no jurisdiction to set aside the sale on an application by the petitioner in the case. In doing so he clearly acted in excess of his jurisdiction. See

Manisha Eradi v. Siyali Koya ILR (1887) M. 220 and *Vuppuluri Atchayya v. Sitaramachandra Rao* (1912) 24 M.L.J. 112. An error of this kind

has been treated as coming within the purview of Section 115, C.P.C. in several of the cases relating to Section 310A of the old code. We do not

consider it necessary to refer to the cases cited on both sides with reference to the scope of Section 115 C.P.C.

6. We dismiss the second appeal but allowing the revision petition reverse the order of the Lower Appellate Court and restore that of the District

Munsif with costs here and in the Lower Appellate Court.