
(1927) 08 MAD CK 0060
In the Madras High Court

Bodapati Adenna

APPELLANT

Vs

Bodapati Chinna Ramayya (dead) and Others

RESPONDENT

Date of Decision : 11-08-1927

Acts Referred:

Citation : (1928) ILR (Mad) 770 : (1928) 27 LW 307 : (1928) 54 MLJ 445

Judgement

1. The question for our decision in this C. M. S. A. (with which has been filed a C. R. P.) is whether a lessee, subject to whose lease Immovable property has been sold in court auction, can apply under Order 21, Rule 89 of the Civil Procedure Code, to have the sale set aside. The District Munsif dismissed the application but it was allowed by the Subordinate Judge on appeal.

2. Rule 89 of Order 21 runs as follows:

Where Immovable property has been 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

upon complying with certain conditions. The argument addressed to us is twofold:

(a) that a lease obtained before a sale is not an "interest" held in the property "by virtue of a title acquired before such sale; and

(b) that the property sold excluded the lessee's right and therefore that the lessee cannot be said to have an interest in that property.

3. According to Section 105 of the Transfer of Property Act, a lessee is a transferee of a right to enjoy the property leased, and there is enough authority [see Secretary of State for India v. Karuna Kantha Chowdhry ILR (1907) C 82, and Mohipal Singh v. Lalji Singh (1912) 17 CWN 166] for the position that a lease amounts to a transfer of interest in the property, and, if there was a transfer of interest, there was, as the rule also requires, "title acquired-" In Potti Nayakar v. Suppammal, Venkatasubba Rao, J., went so far as to express the view that even a trespasser has an interest which would allow him to come under this

rule, a view which was dissented from by the other learned Judge who composed the Bench, Oldfield, J. It is unnecessary for us to offer an opinion upon this point, and we mention the case rather because the view is expressed in it that a lessee may apply, an opinion also to be found in the judgment of Ameer Ali, J., in the Calcutta Full Bench case, Paresh Nath Singha v. Nabogopal Chattopladhya ILR (1901) C 1. We can see no good reason why, if a mortgagee has an interest which enables him to apply, a lessee should not equally have an interest. (b) The argument under this second head virtually amounts to this, that the rule does not bear what appears to be its plain meaning and that in the term "interest" is comprised only the right, title and interest of the judgment-debtor which is sold and not any other interest subject to which the sale takes place. The corresponding provision in the Code of 1882, Section 310 (a) has the words "Any person whose Immovable property has been sold," and it can hardly be questioned that the language in the present rule is of a wider scope. Nevertheless it was held by the Full Bench in Paresh Nath Singha v. Nabogopal Chattopadhyaya ILR (1901) C 1 that under the old wording a mortgagee was a person who could apply, although, no doubt, that decision proceeded on the footing that the auction purchaser would be in a position to annul the mortgage. Although it is not expressly so stated, the judgments of the learned Judges who composed the majority in that case do give some ground for the inference that the application could be made because the mortgagee's was a right which might be affected by the sale. But that decision is not upon the language of the rule as it now stands, and we cannot avoid the conclusion that Mookerjee, J., when in Dulhin Mathura Koer v. Bangsidhari Singh (1911) 15 CLJ 83 he construed the rule as relating only to a person whose interest would be "affected", in the strictly legal sense of that word, by the sale, read into it something which it does not contain and which might have been clearly expressed if it had been intended so to restrict it. Whatever may have been the reason for amending the phraseology, we think that, as the rule stands, the word "property" must mean the tangible property sold, whether or not persons other than the judgment-debtor have any interest in it, and that it does not mean merely the right, title and interest of the judgment-debtor alone. This is clearly the meaning which must be given to the word "property" in Rules 62 and 91 of Order 21, and it is the meaning which Krishnan, J., attached to it in Kandaswami Asari v. Swaminatha Stapathi (1919) 10 LW 556. Any more restricted meaning would apparently limit resort to the rule to the judgment-debtor or to one of several joint judgment-debtors and would make it inapplicable in the very unusual case of a mortgagee decree-holder applying to have the sale under his own decree set aside. Its application to the case of a sale free of a prior mortgage could hardly arise, as, under Rule 12 of Order 34, the consent of the prior mortgagee is necessary to that course. We think accordingly that there are no sufficient grounds to limit the application of the rule in the manner suggested but rather that its purpose is to include among those who can apply such persons as mortgagees and lessees of the property, who may be concerned to avoid a transfer of the judgment-debtor's title although their own interest may not be "affected", using that word in its

strictly legal sense. Accordingly we confirm the order of the Subordinate Judge and dismiss the C. M. S. A. and the C. R. P., the latter with costs.