

(1986) 12 MAD CK 0044
In the Madras High Court

Nirmala Industries

APPELLANT

Vs

Srinivasa Perumal Financing Corporation and Others

RESPONDENT

Date of Decision : 09-12-1986

Acts Referred:

Citation : (1987) 100 LW 225 : (1987) 2 MLJ 3

Hon'ble Judges : Sengottuvelan, J

Bench : Division Bench

Judgement

1. Three important questions of law as enunciated below, arise for consideration in this civil miscellaneous appeal. They are:

(i) Whether an agreement for sale of the equity of redemption by a mortgagor during the pendency of a suit by the mortgagee for enforcement of the mortgage, will be hit by the doctrine of lis pendens?

(ii) Whether the holder of an agreement of sale can file an application under Order 21, Rule 89, C.P.C. for setting aside the sale on deposit on the basis he is a person claiming interest in the property sold, and

(iii) Whether the period of limitation for filing an application under Order 21, Rule 89, C.P.C. is governed by Article 127 of the Limitation Act, or by Order 21, Rule 92(2), C.P.C.?

2. The facts giving rise to these questions of law are briefly as under : Respondents 3 to 9 were the owners of an item of property over which a mortgage was created in favour of the first respondent. On 23rd January, 1978 the first respondent filed a suit, O.S. No. 85 of 1978 on the file of the Sub Court, Coimbatore, for enforcement of the mortgage. About four months later, the appellant entered into an agreement of sale with respondents 3 to 9 for purchase of the hypotheca for a sum of Rs. 6 lakhs. The appellant paid Rs. 1 lakh as advance and the sale agreement provided that on completion of the sale, the appellant would discharge the debts listed out in the agreement from out of the balance of sale price. Alleging that the third respondent had committed default in

completing the sale, the appellant filed C.S. No. 1538 of 1980 on the file of the Sub Court, Coimbatore, for specific performance of the sale agreement. To the said suit, the appellant had impleaded the creditors (including the first respondent) also as defendants. The appellant had offered in the plaint to deposit the amounts due to the creditors for payment to them. The first respondent entered appearance in the suit and took time twice, viz., on 4.3.1981 and 16.4.1981, for filing written statement and the suit was posted to 29.6.1981 for the filing of the written statement by him. However, without filing a written statement, the first respondent filed an execution petition, viz., E.P. No. 199 of 1981, in his suit, and brought the hypotheca for sale. The auction sale was held on 26.8.1981 and the second respondent herein was the successful bidder and he purchased the property for a sum of Rs. 7,52,000. The execution petition stood posted to 31.10.1981, for confirmation of the sale. It was at that stage, the appellant came forward with his application, E.A. No. 2058 of 1981, under Order 21, Rule 89, C.P.C for the sale being set aside on deposit. The appellant claimed in his petition that inasmuch as he had paid an advance of Rs. 1 lakh, and made further payments of Rs. 67,700 to the judgment-debtor, he held a statutory charge over the property, for the amounts paid by him, that furthermore, his suit for specific performance was pending and in such circumstances, he is a person claiming an interest in the property sold and as such entitled to file an application under Order 21, Rule 89, C.P.C The appellant deposited the amount noted below in compliance with the requirements of Clauses (a) and (b) of Rs. 89:

Amounts deposited

1. (a) Amount due as per execution petition ... Rs. 91,664.50

(b) Subsequent interest on Rs. 32,900 at 18 p.cp.a. from 23.3.81 to date of sale 22.10.81 Rs. 3,454.50 (c) costs in execution petition Rs. 586.85 (d) subsequent costs Rs. 36.85 ----- Rs.95,742.70 37,600.00 ----- 1,33,342.70 or 1,33,343.00

----- 2. For payment to auction purchaser 5 per cent on the sale price of Rs. 7,52,000 i.e., Rs. 37,6000.

Note: No poundage need be paid in an application under Order 21, Rule 89, as per Civil Rules of Practice and under the decisions of the High Court.

...Total amount deposited. Rs. 1,33,343

rounding up

The appellant alleged in his application that the court auction sale had been collusively brought about by the decree-holder auction-purchaser and judgment-debtor and he was reserving his right to claim damages from them for their collusive action. The appellant therefore prayed that the amounts deposited, by him in court be accepted and the sale be set aside under Order 21, Rule 89.

3. Respondents 1, 2 and 4 filed counters and opposed the appellant's application. The first respondent has stated that since he had already filed the suit, O.S. 85 of 1978, he was not concerned with the agreement of sale subsequently entered into and that it was false to say that, he, the judgment-debtor and the court auction-purchaser had colluded in order to bring about the court auction sale. He has further stated that since the appellant had not paid the poundage, the deposit made by him in court is not in accordance with law. The second respondent, in his counter, has taken the stand that the appellant is not a person having an interest in the property so as to file an application under Order 21, Rule 89, that secondly, the agreement of sale entered into subsequently to the filing of the suit, O.S. No. 85 of 1978, will be hit by the doctrine of *lis pendens*, and, thirdly, the appellant's application is barred by limitation since the deposit had not been made within 30 days' time. The second respondent also refuted the appellant's contention that he had colluded with the decree-holder and judgment-debtor and purchased the property in court auction to the detriment, of the appellant. His further criticism is that the correct amounts have not been deposited, because the appellant had failed to deposit the poundage. The fourth respondent has stated in his counter (which has been adopted by respondents 3 and 5 to 9) that there had been no collusion between him, the decree-holder and the court auction-purchaser, that the appellant has no *locus standi* to file the application and that, in any event, the application is barred by limitation.

4. The learned Subordinate Judge has sustained the objections raised by the respondents and held that the sale agreement is hit by the doctrine of *lis pendens*, that the appellant is not entitled to file an application to set aside the sale as he does not have an interest in the property and further more, the application is also barred by limitation inasmuch as the deposit had not been made within 30 days' time from the date of sale. Consequently, he dismissed the application. It is against that order, the appellant has preferred this appeal.

5. Mr. M.R. Narayanaswami, learned Counsel for the appellant, advanced arguments to contend that the finding of the learned Subordinate Judge on each of the three questions is not in accordance with law. Mr. K.N. Balasubramaniam appearing for the first respondent and Mr. M. Srinivasan appearing for the second respondent, asserted on the contrary that the findings are fully in accordance with law and do not therefore call for any interference. We shall take up the three questions for consideration in *seriatim*.

6. But before doing so we will dispose of a minor contention, which has been hesitantly raised by the respondents in their counter affidavits. The objection taken by them is that since the appellant has not remitted poundage along with the amounts specified in the sale proclamation and the 5 per cent solatium for the court auction-purchaser, the deposit is not valid in law and on that minor ground alone, the appellant's claim gets defeated. The respondents have not substantiated their criticism with reference to any provision of law, which

stipulates that an applicant filing an application under Order 21, Rule 89, should deposit poundage also, besides the amount specified in Clause (a) and (b) of the Rule. On the other hand, the appellant has stated in his application that no poundage need be paid while making an application under Order 21, Rule 89, as per the Civil Rules of Practice and as per the decisions of Court.

7. The appellant's contention in this behalf is correct, because Rule 203 of the Civil Rules of Practice states that if a sale is set aside under Order 21, Rule 89, the court may make an order for payment by the judgment-debtor of the poundage and other costs and interest, if any, not covered by the sale proclamation. In view of this provision, it follows that there is no question of any poundage being necessarily remitted even at the time an application under Order 21, Rule 89 is made. We can also pertinently refer to Form 72, which indicates how an application under Order 21, Rule 89, has to be made. In that form, there is reference only to the applicant remitting 5 per cent of purchase money paid by the auction-purchaser and the sum of money specified in the proclamation of sale and there is no reference to the applicant remitting any amount towards poundage. In such circumstances, the weak contention of the respondents that since the appellant had not paid the poundage, his application has to fail, is not a tenable one.

8. Now taking up for discussion the main questions, the first question which requires consideration is whether, the agreement of sale dated 27.5.1978 entered into by the appellant is affected by the doctrine of *lis pendens*. Undoubtedly, the first respondent had filed his suit O.S. No. 85 of 1978 for enforcement of the mortgage on 23.1.1978 itself. There is therefore no denying the fact that the agreement of sale had come into existence *pendente lite*. But, what must be looked into is, whether the sale of equity of redemption by the mortgagor *pendente lite* precludes the purchaser from claiming any right whatever. Shorn of details, which are not necessary for this case, Section 52 of the Transfer of Property Act, reads as follows:

During the pendency in any court having authority...of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding, so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose. (Proviso omitted).

From the section extracted above, it may be seen that a transfer *pendente lite* is not per se void or illegal but only it will not affect the rights of a party to the suit under any decree or order, which may be made in the pending suit or proceeding. Therefore, all that can be urged by the contesting respondents is that the sale agreement cannot have the effect of defeating the decree that would be passed in the suit filed by the mortgagee. The admitted position in this case is that the appellant never disputed the rights of this first respondent is

mortgagee and his entitlement to firing the property to sale is enforcement of the mortgage. On the other hand, he had himself offered to redeem the mortgage in the agreement of sale entered into with the mortgagor. By the time the appellant came to make his application under Order 21, Rule 89, C.P.C (hereinafter referred to as the case) the sale had taken place, but confirmation of sale had not taken place. If is only if the confirmation had taken place, the respondents can plead that the agreement of sale entered into pendente lite cannot affect the rights of the court auction-purchaser. As observed by Cranworth, L.C. the law is that "Pendente lite neither party to the litigation can alienate the property in dispute so as to affect the opponent." The observation of the Privy Council in *Faiyaz Hussain Khan v. Munshi Prag Narain* (1907) 17 M.L.J. 263 ILR 29 All. 339 : (1906-07) 34 I.A. 102, can also be usefully referred to. In that case there were two purchasers of the same property, the first purchaser having purchased the property at an execution sale under a decree obtained by the first mortgagee and second purchaser having purchased the property at another sale held under a decree obtained by the second mortgagee. When the purchaser under the first sale filed an action of ejectment, it was held that the second purchase was affected by the rule of *lis pendens* and therefore the second purchaser cannot offer any valid defence. While disposing of the appeal, the Board made this observation, which is of relevance to us:

Before the sale to Prag Narain (first purchaser) was confirmed, Faiyaz Hussain (second purchaser) had every opportunity to redeeming the property. He never offered to do so. On the sale being confirmed, the equity of redemption was extinguished.

This observation clearly shows that even if a transfer has been effected pendente lite, the transferee or his successor-in-interest acquires right, title and interest, except as against the claimant or his transferee in the suit, and in the case of a mortgage, the second transferee is entitled to redeem the first mortgage. In *Jageshwar v. Moti* AIR 1922 Nag. 89 a conflict arose between a prior mortgagee and a puisne mortgagee. There was a suit for foreclosure by the prior mortgagee without impleading the puisne mortgagee. Pendente lite that suit, the puisne mortgagee filed a foreclosure suit without impleading the prior mortgagee and that suit was decreed and possession was given to him. Thereafter, the mortgagee's suit was decreed and he filed a suit for possession against the puisne mortgagee. The Full Bench held that the puisne mortgagee's rights are affected by Section 25 of the Transfer of Property Act (hereinafter referred to as the Act) and therefore, the prior mortgagee is entitled to get a decree for possession, but however such a decree would be subject to the puisne mortgagee's right to redeem. To the same effect" is the ruling in *Amulya Krishna Bandopadhyaya Vs. Raruli Pioneer Co-operative Bank Ltd. and Others*, .

9. We may also refer to *Arunachalam Chettiar Vs. Valambal Ammal*, , wherein it was held that where two suits, one after another, were filed, both of them can attract the rule of *lis pendens* and that the second *lis pendens* can be refused

recognition only if it destroys altogether the benefit of the first *lis pendens*. Applying this ratio we have to point out that while the agreement of sale entered into by the appellant during the pendency of O.S. No. 85 of 1978 would attract the rule of *lis pendens* the court auction sale in favour of the second respondent would also affect the rule of *lis pendens* since the sale had taken place during the pendency of O.S. No. 1538 of 1980 filed by the appellant for specific performance of the contract of sale. In such circumstances, we cannot sustain the contention that on account of the doctrine of *lis pendens* the appellant cannot claim any right whatever and on that ground alone, the appeal deserves to, fail. Accordingly, we find under question No, 2 that though the contract of sale had been entered into by the appellant *pendente lite*, yet, he is not, precluded in law either on account of the rule of *lis pendens* or on account of the provision of Section 52 of the Transfer of Property Act, from filing a suit for specific performances or, in filing an application under Order 21, Rule 89 of the Code to safeguard his interest under the agreement of sale.

10. The second question relates to the *locus standi* of the appellant to file an application under Order 22, Rule 89 of the Code. Under Rule 89, any person claiming an. interest in the property sold at the time of the sale, or at the time of making the application, or acting for or in the Interest of such person, may apply to have the sale set aside on his depositing in court the amounts mentioned in Clauses (a) and (b) thereof. The crucial words for consideration are, "any person claiming an Interest in the property sold". Mr. Narayanaswami argued that since the appellant had paid an advance of Rs. 5 lakh and a further sum of Rs. 67,000 to the third respondents in terms of the agreement of sale, he is undoubtedly a person claiming an interest in the property sold. The counsel stated that the words "Interest in the property sold" are not *in pari materia* with the word "interest" occurring in Section 54 of the Transfer of Property Act. Section 54 of the Act lays down that a contract of sale of immovable property is a contract that a sale of such a property shall take place on terms settled between the parties, but however, the contract does not by itself create any interest or a charge on such property. According to the counsel, the word "interest" occurring in Order 21, has a wider connotation than the word "interest" used in Section 54 of the Transfer of Property Act.

11. The further contention was that u/s 55(6)(b) of the Act, the buyer is entitled to a charge on the property as against the seller and persons claiming under him for the amount of any purchase money paid in anticipation of the delivery and therefore, in his capacity as holder of a statutory charge, the appellant has an interest in the property, entitling him to file an application under Order 21, Rule 89, of the Code.

12. Mr. Balasubramaniam and Mr. Srinivasan refuted the arguments of Mr. Marayanaswami and argued that the words "interest in immovable property" should receive a uniform and consistent construction from courts, irrespective of the words occurring in different statutes and such being the case, the words

found in Order 21, Rule 89, must be given the same meaning to be given to the words found in Section 54 of the Act. The counsel further stated that "interest in immovable property" and charge on immovable property¹ are not synonymous or coterminous and, on the other hand, the words "interest in fm movable property" connotes more than the words "charge on the immovable property". In support of this argument, they referred to the definition of the word "charge" in Section 100 of the Transfer of Property Act. Section 100 lays down that where an immovable property of one person is by act of party or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property. The section then states that all the provisions hereinbefore contained which apply to a simple mortgage, shall, so far as may, apply to the said charge. The learned Counsel submitted that the words "and the transaction does not amount to a mortgage" clearly spell out the difference between a charge and a mortgage and therefore, a charge can never be equated with a mortgage, so as to entitle a charge holder to contend that he has interest in the property akin to that of a mortgagee.

13. Both sides placed for our consideration a number of authorities and we may usefully refer to them before expressing our view on the debate. Mr. Narayanaswami cited the following authorities to justify the appellant's locus stand to file the petition under Order 21, Rule 89, C.P.C In *Nelakanti Sundara Sivarao and Another Vs. Sammangi Gangamma and Another*, , *Venkatasubba Rao, J.* held that the interest referred to in Order 21, Rule 59, (C.P.C is not necessarily an Interest in land in the sense that expression is used in Section 54 of the Act, that the CPC and, the Transfer of Property Act are not in pari materia and there is no reason to hold that it it was within the contemplation of the Legislature that the interest referred to in Order 21, Rule 59, should exclude all rights, which are not interest in land. Applying that ratio the learned Judge held in that case that a person, who had entered into a contract of sale two days before the judgment-debtor's property was attached before judgment, can obtain valid title under the sale effected in pursuance of the agreement of sale and that the subsequent attachment would not affect his rights especially when he had deposited the balance of sale price in court. In *Diravyam Pillai and Another Vs. Veeranan Ambalam and Others*, , certain decree-holders for money attached the interest of the sons in the joint family properties, as by then, the five brothers, who were the senior members of the family, had been adjudged insolvents. Before the insolvency petition was filed, three of the brothers had entered into a contract of sale and in enforcement of the agreement of sale, the court directed the Official Receiver to execute on behalf of the insolvents a sale deed in favour of the purchaser. The attaching decree-holders impugned the sale. But a Bench of this Court held that as the sale agreement was anterior to the attachment, it would prevail against the attachment and that the right of a judgment-debtor in the property is on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching

creditor cannot claim to ignore that obligation.

14. Wadsworth, J. following *Diravyam Pillai and Another Vs. Veeranan Ambalam and Others*, , held in *Athinarayana Konar and Another Vs. V. Subramania Aiyar*, , that though a contract to sell land does not create any interest in or charge on the property, it does give rise to an obligation which limits the right of its owner and an attachment of the right, title and interest of the owner is subject to any such limitation by which he was bound. In *Mundrika Singh and Others Vs. Nand Lal Singh and Others*, , it was held that the holder of an agreement of sale, must be deemed to have acquired an interest in the property and therefore he has the requisite locus standi to file an application under Order 21, Rule 98, C.P.C. for setting aside the sale of an attached property in court auction. In *Rabindra Nath Banerjee Vs. Harendra Kumar Chakravarty and Others*, , it was held that the word "title" in Order 21, Rule 89 C.P.C. includes not merely completed and perfected title, but a title in process of maturity and therefore, a person, who entered into an agreement of sale and paid the earnest money before proclamation of sale and the balance of money subsequent to the sale, was entitled to seek a setting aside of the sale under Order 21, Rule 89 C.P.C. This was on the basis that when a part payment of purchase money has been made in terms of a contract of sale. Section 55(6)(b) of the Transfer of Property Act would be attracted and by reason of the statutory charge it has to be treated that the ownership of the property had passed. In *Karri Mahalakshmi and Others Vs. Satyavolu Venkata Bhaskara Umamaheswara Varaprasada Murthi and Others*, , Krishna Rao, J. after an exhaustive reference to the case-law on the subject, followed the same view taken in *Mundrika Singh and Others Vs. Nand Lal Singh and Others*, , and *Rabindra Nath Banerjee Vs. Harendra Kumar Chakravarty and Others*, , and observed that Section 54 of the Transfer of Property Act and Order 21, Rule 89, C.P.C. operate on different fields and as such, the word "interest" occurring in the relevant sections does not have the same meaning. In the words of the learned Judge "it will thus be seen that the last clause of Section 54 of the Transfer of Property Act is intended only to point out that an interest in the nature of ownership passes to the purchaser, whereas the expression "interest in the property" used in Order 21, Rule 89 is intended to show that such interest need not be equivalent to ownership. The object of Order 21, Rule 89, is to save the property from being lost in the court sale and in the said context any person who is interested in protecting his property, whatever be the nature of his interest, will be entitled to apply under the said rule". *Jayalakshmi Ammal and Another Vs. Subbraya Reddiar (deceased) and Others*, , was a peculiar case, where two maintenance-holders, who had a charge on an item of property, brought the property for sale for realisation of the arrears of maintenance and subsequently, they themselves filed an application under Order 21, Rule 89, for setting aside the sale. Though it was contended that the charge-holders, who were also decree-holders, had no locus standi to file an application under Order 21, Rule 99, the court overruled the objections and pointed out that the wording of the rule has been intentionally made expansive so as to confer a

right of filing applications under the section to all persons holding an interest in the property, although they may be mortgagee-decree-holders or charge-holders. *C.M.V. Krishnamachari Vs. M.D. Dhanalakshmi Ammal and Others*, is a decision not directly relevant to the controversy on hand, but has been cited to show that in matters like this, a liberal interpretation must be given and not a narrow or technical interpretation. Dealing with the scope of Order I, Rule 10(1), C.P.C., Ramamurthi, J. has held in that case that in order to enable an applicant to be impleaded as a party to the suit, it is not necessary that he must have got a direct interest in the subject-matter in dispute, which would be affected by litigation and it would be enough if the interest is in the nature of legal interest including equitable interest, which the law would recognise and uphold.

16. By way of contra authorities, learned Counsel for the contesting respondents cited the following decisions. In *Nasiruddin Haider Vs. Hakim Muhammad Tahir and Others*, it was held that even a person, who has obtained a decree for specific performance would not be entitled to file an application under Order 21, Rule 89, because the mere decree, without execution thereof, would not confer title on him over the property. Another decision cited is *Ayyasami Pillai v. Subbaraya Pillai* (1983) 96 L.W. 261, rendered by one of us. That was a case where a party, who had entered into an agreement for purchase of the suit property, after the filing of the suit, wanted to come on record in the proceedings when the matter was pending in second appeal before this Court. The request for impleading was rejected on various grounds, one of them being that by reason of the agreement of sale, the party cannot be deemed to have acquired an interest in the property.

16-A. In order to set out the difference between a mortgage and a charge, *Gobindachandra Pal v. Dwarkanath Pal*. ILR (1908)Cal. 837, was cited. It was observed in that case, that a mortgage is a transfer of interest in specific immovable property, while a charge only secures payment of money out of that property. Lastly, *Mahabir Dass and Others Vs. Motibhai Narsibhai Patel*, was cited to show that even if a first charge is created on properties, which were attached before judgment and a deed of security was executed in respect thereof, it will not amount to a mortgage, so as to attract the provisions of Order 34, Rule 1, C.P.C.

17. From the various decisions referred to above, it may be seen that the trend of judicial opinion is not to treat the word "Interest" occurring in Section 54 of the Transfer of Property Act, and Order 21, Rule 89 of the Code, on the same footing. Apart from the reasons given in the various decisions cited by Mr. Narayanaswami for giving a wider meaning to the word "interest" occurring in Order 21, Rule 89, we wish to add our own reasons in support of the view taken in those cases.

18. In the first place Section 54 of the Act defines what a sale of property is. It is first stated that "sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised". The next two clauses have

considerable significance for the matter under consideration. They read as follows:

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible things, can be made only by a registered instrument.

In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Then, lower down, there is the definition of a contract of sale. It is, thereafter there is an explanation to the effect that "a contract of sale does not, of itself, create any interest in, or charge, on such property". Since in the earlier part it is laid down that if immovable property of the value of Rs. 100 or more can be transferred by way of sale only by a registered instrument and immovable property of a value of less than Rs. 100 can be transferred by sale either, by registered instrument or by delivery of property, care has been taken to mention that a contract of sale, will not by itself, create any interest or charge on the property agreed to be sold. In order to bring about the difference between a sale and a contract of sale, the Explanation has been expressly provided. But that would not mean that the same meaning should be given to the "interest" occurring in Order 21, Rule 89, C.P.C. Mr. Balasubramaniam's argument that the phrase "interest in immovable property" is a technical term and has therefore to carry the same meaning under all statutes, is too sweeping a proposition for us to accept. In the first place, the Transfer of Property Act and the Code are two different types of enactments. While the former deals with substantive law, the latter deals with procedural law. There is certainly warrant in law that the words occurring in a statute should as far as possible be given the same meaning wherever the word occurs. But, there is no such warrant for such a view being taken with reference to the words occurring in two different statutes and when it is not provided in either of the two statutes that the words should have the same meaning as the one given in the other statute. For example, we may point out that Section 2 of the Criminal Procedure Code contains the definitions of several terms. But lastly under Clause (5), it is stated that the words and expressions, which have not been defined will be governed by the definitions contained in the Indian Penal Code. In contrast, this is not a case where the legislature has intended that the word "interest in the property" occurring in Order 21, Rule 89, C.P.C., should carry the meaning as would be applicable to those words found in Section 54 of the Transfer of Property Act. Secondly, Order 21, Rule 89 of the Code, is a beneficial provision, intended to help, a judgment-debtor or persons interested in averting the sale by depositing the - prescribed amount; In court. The Legislature has provided Order 21, Rule 89 of the Code to safeguard the interests of affected persons without any loss or injustice resulting to the decree-holder or the auction-purchaser. The person, who wants to set aside a sale has to deposit the entire amount due to the decree-holder as mentioned in the

proclamation of sale and also 5 per cent of purchase money as solatium to the court auction-purchaser. The beneficial nature of the provision may also be seen from the fact that an application can be made not only by a person claiming an interest in the property sold at the time of sale, but also by one claiming interest in the property at the time of making the application, i.e., one, who has acquired an interest, subsequent to the date of sale and also by any one acting for or in the interest of the persons above mentioned. Moreover, Section 54 talks of the creation of interest in immovable property, whereas Order 21, Rule 89 refers to a person claiming an interest in property. Undoubtedly, there is considerable difference between the creation of interest under law in immovable property and the claiming of an interest by a person in immovable property. The creation of an interest in property would involve legal considerations, while the claiming of interest in immovable property would only call for scrutiny of the bona fides of the claim. It has also to be pointed out that the holder of an agreement of sale has a right under the Specific Relief Act, to seek enforcement of the contract of sale and furthermore, his contract will prevail over the claims of all others except against bona fide transferees for value without notice. Therefore, as pointed out as early as in *Sundara Sivarao v. Gangamma* 68 M.L.J. 66 : ILR (1935) Mad. 84 : 40 L.W. 34, there is no justification for interpreting the words occurring in Order 21, Rule 89 of the Code with reference to the words found in Section 54 of the Act. The learned Subordinate Judge has, therefore, committed an error in holding that the appellant did not have locus standi to file an application under Order 21, Rule 89, C.P.C. In fact, the Subordinate Judge has held in one place that the appellant had the requisite status to file the application; but in other portions he has held that he did not have any right to file the application. On account of the preponderance of decisions in favour of the appellant's contentions, and on our own construction of Order 21, Rule 89 of the Code, we have no hesitation in answering the second question also in favour of the appellant.

19. We then come to the most important question posed for consideration, viz., whether the application under Order 21, Rule 89 is within time or out of time. It may be recalled that the sale of the hypothecs took place on 26.8.1981, and the 3rd respondent auction-purchaser deposited a sum of Rs. 1,88,000 on that day. The appellant deposited a sum of Rs. 1,33,340 and filed his application E.A. No. 2058 of 1981, on 22.10.1981, viz., on the 57th day of sale. Since the deposit had been made beyond the period of 30 days mentioned in Order 21, Rule 92, of the Code, the Subordinate Judge held that the application is barred by limitation and dismissed the application on that ground too.

20. Mr. Narayanaswami, counsel for the appellant stated that after the amendment of Article 127 of the Limitation Act, by Act 104 of 1976, the period of limitation for filing applications for setting aside a sale in execution of a decree has been enlarged from 30 to 60 days and inasmuch as the appellant had deposited the money and made the application on the 57th day of the sale, the deposit and the application were well within time and therefore the Subordinate Judge has grossly erred in holding that the application is barred by limitation. On

the other hand, Mr. Balasubramaniam and Mr. Srinivasan argued that though Article 127 provides a period of 60 days limitation, an application under Order 21, Rule 89 is governed by Order 21, Rule 92, and Rule 92 clearly states that only in those cases where the deposit had been made within 30 days, the sale can be set aside. Therefore, according to the learned Counsel, though Article 127 of the Limitation Act has been amended, the time for deposit has not been changed and continues to be only 30 days and since that requirement has not been complied with, in this case, the appellant's application deserves outright dismissal and the Subordinate Judge has acted correctly in dismissing the application.

21. The counsel for the respondents cited a number of authorities to contend that the deposit of the amounts contemplated in Rule 89 is not only a condition precedent, but such deposits must also necessarily be made within a period of 30 days. Some other authorities were also cited to indicate the importance attached to the requirement under Rule 89 regarding the payment of the correct amount of deposit. A third category of authorities has been cited to raise an argument that even if Article 127 of the Limitation Act has applicability, yet, the provision in Rule 92 is of the nature of a special statute and as such, the special provision will prevail over the general provision. A fourth category of decisions was cited to contend that Rule 92 does not conflict with Article 127, but only lays down a special condition and without fulfilment of that condition, a mere reliance on the law of limitation, will be of no avail. Lastly, the counsel placed reliance on an unreported judgment of a Division Bench of this Court in *R. Shanmugham v. Noor Ahmed* and Ors. A.A.O. No. 336 of 1979, dated 4.9.1979.

22. Refuting the arguments of the respondents' counsel, Mr. Narayanaswami stated that the question of limitation has to be decided with reference to Article 127, and not Rule 92 of the Code, and there cannot be two periods of limitation, one under the Limitation Act and the other the Civil Procedure Code, Mr. Narayanaswamy referred to the Judgment of Ramanujam, J., in *Thangammal and Others Vs. K. Dhanalakshmi and Another*, and stated that the correct ratio has been laid down therein and that ratio would govern the facts of the case.

23. The conflict regarding the period of limitation has arisen because of the different periods being mentioned in Article 127 of the Limitation Act and Order 21, Rule 92, CP.C Before Article 127 was amended, there was no conflict between the Article and Order 21, Rule 29, as well as Rule 92, spoke of only a 30 days time-limit for filing an application under Order 21, Rule 89, and making deposit of the amount contemplated under the rule. But after the amendment, Article 127 refers to a period of 60 days, while Rule 92 continues to refer to the old time limit of 30 days. At the outset, it would be interesting to note why Article 127 came to be amended. The Law Commission noticed that a period of 30 days fixed under the Code for depositing the amounts mentioned in Rule 89, was inadequate and the Judgment-debtors experienced considerable difficulty in raising amounts to make the deposits and save the properties from being irretrievably sold in court auction. Consequently, the Law Commission made its

recommendation for enlarging the period of limitation from 30 days to 60 days in the following terms:

An application to set aside a sale on deposit under Order 21, Rule 89 has to be made within 30 days of the sale. It has been stated that this period proves to be too short in practice, and often causes hardship inasmuch as the judgment-debtor cannot arrange for moneys within that time. Banks take a far longer period than one month in sanctioning advances, and it has been suggested that the period should therefore be increased. We find some force in this suggestion, and are inclined to accept it. No doubt, the law should take into account the position of the purchaser also, but since 5 per cent of the purchase money has to be paid to him under the Rule, no serious prejudice is likely to be caused to him by an increase in the writing period.... Accordingly, we recommend that in the Limitation Act 1963, in the schedule in the second column against Entry 127 for the words "thirty days" the words "sixty days" should be; substituted.

However, a corresponding change was not made under Order 21, Rule 92 of the Code, and therefore, the Rule contemplates only a period of 30 days for making the deposit. The question now is, whether an applicant under Order 21, Rule 89 of the Code is to have a period of 60 days for making the deposit and filing an application or 60 days for filing an application and 30 days for making the deposit. We are clearly of the view that it is Article 127 which should govern the situation and not Order 21, Rule 92, of the Code. We have come to this view on account of the following reasons : The Limitation Act is a specific enactment intended to set out the law for the limitation of suits and other proceedings. On the other hand, the CPC is an enactment relating to the procedure of the Courts of civil judicature. Secondly, though Section 29(2), of the Limitation Act, provides for overriding effect for any specific provision relating to the limitation in "any special or local law, we cannot consider the period of 30 days mentioned in Rule 92, as a special provision regarding limitation, because the main rule, viz., Rule 89, does not prescribe any such period of limitation. As such, the period of 30 days mentioned in Rule 92 must only be taken as a reflection of the period mentioned in the Limitation Act prior to the amendment. Thirdly, there is no provision in the Code of Civil Procedure, laying down that any provision relating to limitation contained in the Code will have overriding effect over the provisions of the Limitation Act. Fourthly, Article 127 is a common provision for filing applications under Order 21, Rule 89 in Rule 91, C.P.C for setting aside court sales. The Article cannot therefore be dissected into two in order to make the period of limitation for an application under Order 21, Rule 89, as 30 days for filing an application under Rules 90 and 91 as 60 days. Fifthly, if Article 127 and Order 21, Rule 89, are not read harmoniously, then it will lead to the anomalous position that under the Limitation Act, a competent person will have a period of 60 days to file an application under Order 21, Rule 89 of the Code, but under the procedural Code, v he will have only 30 days. Such an anomaly will not only lead to uncertainty, but also result in considerable hardship to the judgment-debtors. Sixthly, the very purpose for which Article 127 was amended will get defeated if

Order 21, Rule 92 is allowed to, prevail over Article 127. Seventhly, Rule 89 does not speak anything about the time limit within which the deposit has to be made. It is only in Rule 92 we find a reference to the deposit being made within 30 days. Since there is no reference it, Rule 89 to any period, it goes without saying that the period of 30 days referred to in Rule 92 is with reference to the period of 30 days provided under the Limitation Act. Such being the position, when the period under the Limitation Act has been enlarged to 60 days, there should be a corresponding change in Rule 92 also. However, unfortunately, when amending Article 127 under Act 104 of 1976, the Legislature has failed to carry out the corresponding amendment in Rule 92. The failure however should not be clutched at to advance an untenable proposition that two periods of limitation are provided, one under the Limitation Act and another under the Code for making an application under Order 21, Rule 89, and depositing the amounts indicated in Clause (a) and (b).

24. Though Ramanujam, J. has stated in his judgment that Article 127 would, in the particular circumstances, operate as special law, and Order 21, Rule 92 would operate as general law, we do not think the two Acts can be construed in that manner. On the other hand, it would be more appropriate if the respective enactments are held to have sway in their respective field atone. Viewed in that manner. We think that where any provision of the Code is in conflict with the Limitation Act, regarding the period of limitation, then the latter should prevail and not the Procedure Code. We will now refer to the authorities cited by counsel on either side. As already stated, Mr. Narayanaswami placed reliance on *Thangammal and Others Vs. K. Dhanalakshmi and Another*, . Therein Ramanujam, J. has held that in view of the enlarged period of limitation given under Article 127, an applicant will have 60 days time to file an application under Order 21, Rule 89 of the Code to set aside a sale on deposit, and the said right cannot be taken away under Rule 92(2) by insisting on the payment of the amount within 30 days. We are in full agreement of the view taken by the learned judge in this matter.

25. As we have already referred to, the respondents' counsel have cited a number of authorities, all rendered with reference to the old Limitation Act, to support various propositions advanced by them. In *V.S. Subramania Asari Vs. Ramaswami Pillai*, , it was held that notwithstanding the period of 30 days provided under Article 16 of the Limitation Act a mortgagor judgment-debtor was entitled to file an application for setting aside the sale under Order 34, Rule 5, C.P.C. since the latter provision would constitute a special provision against the general provision in Article 166 and would therefore have overriding effect. In *The Union of India (UOI) Vs. Ram Kanwar and Others*, , it was held that though the Limitation Act provided only a period of 20 days for filing a Letters Patent appeal, the High Court rules provided for a limitation period of 30 days, and as such, the High Court Rule would constitute a special law within the meaning of Section 29(2) of the Limitation Act. In *Kaushalya Rani Vs. Gopal Singh*, , a private complainant filed an appeal against acquittal beyond the period of

limitation provided for in Section 417(4), CrI.P.C. It was held that Section 417(4) was a special provision and as such, the general law of limitation governing appeals will not apply. In *Rajendra Nath Kar Vs. Gangadas and Others*, , it was held that if any special period of limitation is prescribed by the Act (West Bengal Premises Tenancy Act, 1956) that period will govern the proceedings under the Act in preference to the period, if any, prescribed by the Limitation Act. These authorities have been cited to show that any special provision regarding the period of limitation will prevail over the general period of limitation prescribed in the Limitation Act.

26. In order to show that the requirements under Order 89 and 93 of the Code, regarding deposit must be strictly complied with, the following authorities were cited. A shortage of Rs. 1.4.0 in the deposit made under Order 21, Rule 89, cannot be made good after the expiry of 30 days and the Court has no jurisdiction to excuse the delay-*vide* *Kalidasa Chetty Vs. Dodda Siddha Chetty Another*, . An order setting aside a Court sale in execution of a mortgage decree cannot be obtained under Order 21, Rule 89, by merely depositing five per cent of the purchase money for payment to the auction purchaser and persuading the decree holder to abandon execution proceedings-*Vide* *Tribhuvandas Purshottamdas Thakur Vs. Ratilal Motilal Patel*, .

27. The following authorities were cited to contend that there should be concurrent application and deposit and both should be made within a period of 30 days. A sale in execution cannot be set aside under Order 21, Rule 89 without an application (oral or written) within 30 days *vide* *Popporu Venkatanarasimma v. Jayanthi Lakshminarasimhan* AIR 1917 Mad. 662 : 3 L.W. 173, *Venkatasubbarao v. Narayanarao* AIR 1922 Mad. 83 : 66 I.C. 44, and *Pachaiyee Vs. Vallimuthu Velan*, . In *Umedsingh v. Shankarlal* AIR 1948 Nag. 623, it was held that where the period of limitation prescribed for an application under Order 21, Rule 89 of the Code expired on a day, when the court is away on casual leave, it is imperative on the applicant to file his application and make the necessary deposit on the very next day on which the court is opened and he is not entitled to add the days on which the court is closed to the statutory period. This authority has also been cited to show that the period of 30 days referred to under Order 21, Rule 92, is a special period of limitation and it is in accordance with that period the application and the deposit should be made. Though the ratio contained in these decisions may have value, we do not think they have much of relevance to the matter in issue before us. As already stated, all these decisions have been rendered with reference to the old Limitation Act. At that time, there was no conflict between the relevant provisions of the Limitation Act and the Code regarding the period within which an application coupled with deposit should be made under Order 21, Rule 89. It is on account of that factor, we state that the decisions do not throw any light on the subject-matter of debate.

28. There is however one decision, which has been rendered after the Limitation

Act had been amended. That is the judgment of a Division Bench consisting of Ismail, J. (as he then was) and Balasubrahmanyam, J. in R. Shanmugham v. Noor Ahmed and Ors. A.A.O. No. 336 of 1979, dt. 4.9.1979. In that case, a lessee filed an application under Order 21, Rule 89. However, he deposited the amount contemplated by the rule beyond the period of 30 days, but within the period of 60 days. The executing Court dismissed his petition on the ground of limitation. The Division Bench sustained the order of the Court below. But with great respect to the learned Judges, we find that this judgment does not contain any detailed discussion on the conflicting provisions contained in the Limitation Act and the procedural Code. All that the Bench has stated is as follows:

No doubt, Order 21, Rule 89(1), C.P.C. does not refer to any time-limit for making the deposit as contemplated by Rule 89(1)(a) and (b). However, Order 21, Rule 22, refers to Order 21, Rule 89, and also states that the amount should be deposited within 30 days from the date of the sale. In this case, admittedly, the deposit had not been made within 30 days from the date of the sale as required by Order 21, Rule 92, read with Order 21, Rule 89, C.P.C. and consequently, the learned Subordinate Judge was justified in dismissing the application filed by the appellant herein. Hence the appeal falls and is dismissed.

In the absence of any discussion, we are not able to understand the reasons which impelled the learned Judges to hold that Rule 92 will prevail over Article 127 and restrict the period of limitation to 30 days for an application under Order 21, Rule 89. On the other hand, we have given various reasons for holding that it is Article 127 of the Limitation Act, which should prevail and not Rule 92 of the Code. But inasmuch as the earlier judgment is also a bench Judgment, we think it proper that this question should be referred to a Full Bench for determination so that there can be an authoritative pronouncement on the subject which may arise for consideration in a number of cases in future years.

29. In the result, while rendering four findings on questions 1 and 2 in favour of the appellant, and the third question also in a like manner, we feel constrained to refer the third question for consideration by a Full Bench, since the earlier ruling or Division Bench on this question is in conflict with our view, and in our opinion, requires reconsideration. We therefore direct the papers to be placed before the Honourable the Chief Justice for a Full Bench being constituted for determination of the following question and for resolving the conflict of the view taken by Ismail, J. (as he then was) and Balasubrahmanyam, J. in A.A.O. 336 of 1979 and the view taken by us in this appeal. Cost will abide and follow the result of the Full Bench decision:

Whether the period of limitation for filing an application under Order 21, Rule 89, C.P.C. is governed by Article 127 of the Limitation Act or by Order 21, Rule 92(2), C.P. Code?

This appeal having been set down this day for hearing before Sengottuvelan and David Annoussamy, JJ. pursuant to the orders of the Hon'ble the Chief Justice

the Court delivered the following judgment.

Sengottuvelan, J.

One of the several points that arises for decision in the above civil miscellaneous appeal, is the period of limitation within which an application under Order 21, Rule 92, C.P.C., is to be filed in an execution petition. According to Order 21, Rule 92, C.P.C., an application to set aside the sale under Order 21, Rule 89 and the consequent deposit will have to be made within 30 days from the date of sale, whereas according to Article 127 of the Limitation Act, as amended recently, such an application is to be filed within 60 days from the date of sale. These two different provisions laying down the limitation for the same relief gave rise to different views in the decisions of this Court. In the unreported decision of this Court in Shanmugham v. Noor Ahmed and Ors. A.A.O. No. 336 of 1979, a Division Bench held that Order 21, Rule 92(2) lays down a special condition and without the fulfilment of the conditions, viz., filing an application to set aside the sale and making the deposit within 30 days, one cannot rely upon Article 127 of the Limitation Act, which lays down the period of limitation for filing an application to set aside the sale as 60 days from the date of sale. As against this decision, Ramanujam, J. in the case reported in Thangammal and Others Vs. K. Dhanalakshmi and Another, , held that Article 127 was consequent to the recommendation of the Law Commission which felt that the period of limitation for setting aside the sale is not sufficient and as such, only the provision contained in Article 127 will prevail and an application can be filed and deposit can be made within 60 days from the date of sale. In view of the conflict in the decisions of this Court, Natarajan, J. and Venkataswami, J. placed the matter before the Chief Justice who ordered the same to be placed before a Full Bench of this Court.

30. Subsequent to the said order, the same question was considered by the Supreme Court in the case reported in, Basavantappa Vs. Gangadhar Narayan Dharwadkar and Another, . Where the Supreme Court has held that the provisions contained in Article 127 of the Limitation Act will prevail. In view of the above decision, learned Chief Justice has again directed the matter to be placed before this Bench. The Supreme Court in the above decision has categorically held that the period of amendment of Article 127, and the provisions contained in the Limitation Act will prevail over the provisions contained in Order 21, Rule 92(2). In view of the above judgment, the view expressed by the earlier Division Bench that the application to set aside the sale filed on the 57th day of the date of sale is in time, will have to be affirmed.

31. Of the three points, points 1 and 2 had been held in favour of the appellant already. In view of the decision of the Supreme Court, the third point is also held in favour of the appellant. Consequently, the amount deposited by the appellant in the executing court is accepted and the sale held on 26.8.1984 is ordered to be set aside. This appeal is allowed. No order as to costs.

32. Advocate for the respondents prays leave to appeal to Supreme Court. Since the decision on all the three points rests on the provisions contained In the CPC and the" Limitation Act, and the reported decision) cited above, there is no question of legal importance that requires to be decided by the Supreme Court. Under the circumstances, leave prayed for is refused.