

(1921) 02 MAD CK 0009
In the Madras High Court

Sundaram alias Mytheenbibi

APPELLANT

Vs

Mamsa Mavuthar, Sheikkasim Mavuthar

RESPONDENT

Date of Decision : 22-02-1921

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 64

Citation : AIR 1921 Mad 157 : (1921) ILR (Mad) 554 : (1921) 13 LW 498 :
(1921) 40 MLJ 497

Hon'ble Judges : John Wallis, C.J.;Oldfield, J;Kumaraswami Sastri, J

Bench : Full Bench

Judgement

John Wallis, C.J.—The interpretation of the words ""whose Immovable property has been sold"", which were found in Section 311 of the

Code of 1882 as to setting aside sales for irregularity and were used in Section 310-A, enacted subsequently, as to setting aside a Court sale on

payment of the decree amount and five per cent on the purchase money, gave rise to much difference of opinion, and were not reproduced in the

corresponding Rules 90 and 89 of Order 21 of the Code of 1908. As regards Section 310-A there was a conflict of opinion as to the nature of the

interest which was sufficient to justify an application under the section and also as to whether a transferee by way of private sale from the judgment

debtor after attachment but before the court sale, and a similar transferee after the court sale, were persons authorized to apply under the section.

In Paresh Nath Singha v. Nabogopal Ghattopadhaya ILR (1901) Cal 1 it was decided by a Full Bench in Calcutta, Rampini, J. dissenting, that a

mortgagee was a person whose Immovable property had been sold. In Ramchandra v. Rakhmabai I.L.R(1898) . Bom. 450 it was, that a

purchaser prior to the Court sale was not entitled to apply, whereas in Srinivasa

Ayyangar v. Ayyalhorai Pillai ILR (1897) Mad 416 it was held

that he could. Again in Kallar Singh v. Toril Mahton and Anr. (1897) 1 Cal. W.N. 24 it was. that a purchaser by private sale after the Court was

not entitled to apply, whereas a contrary view was taken in Appayya Chetti v. Kunhati Beari ILR (1906) Mad. 214. These difficulties it was held

endeavoured to meet in the new Code by substituting for ""any person whose Immovable property has been sold"" in Section 310-A the words ""any

person either owning such property or holding an interest therein by virtue of a title acquired before such sale.

2. On the language of this rule it was held by Benson and Sundara Aiyar, JJ. in Anantha Lakshmi Ammal Vs. Kunnanchankarath Sankaran Nair,

which was followed on this point in Subba Rayudu v. Lakshmi Narasamma ILR (1913) Mad. 775 that a purchaser subsequent to the court sale is

not precluded from applying, the words ""by virtue of a title acquired before such sale"" being read as applicable only to the words ""holding an

interest."" This is no doubt a possible construction of the rule, but it has not been accepted in any other Court and is opposed to Ishar Das v. Isaf

Ali Khan ILR (1906) Mad. 214. On the face of the rule words in question seem equally applicable to both classes of persons mentioned, and no

reason has been suggested why a subsequent transferee by way of sale should be allowed to apply while a subsequent transferee of a lesser

interest should not. On the other hand the previous conflict of decisions suggests that the intention of the amendment was to affirm Srinlvasa

Ayyangar v. Ayyathorai Pillal 8 M.L.J. 54 and Kallar Singh v. Toril Mahlon and Anr. (1897) 1 Cal. W.N. 84 and to overrule Bhayi Bhlmji v.

Administrator General of Bombay ILR (1906) Mad. 214 and Appaya Chetti v. Kunhati Beari. ILR (1906) Mad. 214 .

3. Having regard to the natural meaning of the words and the history of the rule I think we should accept the view that a purchaser subsequent to

the court sale is precluded from applying under the rule, and I would accordingly overrule Anantha Lakshmi Ammal Vs. Kunnanchankarath

Sankaran Nair, .and answer this part of the first question accordingly. The same result follows on the view taken in Pandurang Lakshman v.

Govind Dada I.L.R.(1916) 40 Bom. 557 and in Mussummat Dhanvanti Koer v. Sheo Sankar Lal (1919) 4 Pat. L.J. 340 . that the person owning

the property is all along the judgment-debtor, as in this view the purchaser subsequent to the court sale can only come in by virtue of an interest

acquired after the sale. I feel however quite unable to accept this construction. Having regard to the previous decisions, I cannot help thinking that

if the legislature had meant ""judgment-debtor"" they would have said so.

4.The next question involved in the reference is whether the judgment-debtor retains his right to apply after selling the property privately

subsequently to the Court sale, and in dealing with this question we must not lose sight of the similar question arising under the rule as to the

position of a judgment-debtor who has effected a private sale subsequently to the attachment and before the Court sale, and who was held by

Jenkins, C.J. in *Maganlal v. Doshi Mulji* ILR (1901) Bom. 631 to have been none the less entitled to apply u/s 310. A as a person ""whose

Immovable property has been sold"". This decision would be inapplicable under the new Code if the rulings in *Ishar Das v. Isaf Ali Khan* ILR

(1911) All 186 and *Subba Rayudu v. Lakshmi Narasamma* ILR (1913) Mad. 775 that a judgment debtor who effects a private sale subsequently

to the Court sale is not entitled to apply, are correct, as the same reasoning will apply to a private sale after attachment but before the court sale. It

seems to me exceedingly unlikely that the Legislature intended to alter the law as laid down in *Maganlal v. Doshi Mulji* ILR (1916) Bom. 557 so as

to prevent a judgment-debtor who had effected a private sale either before or after the Court sale from applying, and I agree with the learned

Judges in *Pandurang Lakshman v. Govinda Dada* I.L.R.(1916) 40 Bom. 557 and *Mussummat Dhanvanti Koer v. Sheo Shankar Lal* (1919) 4 Pat.

L.J. 340 that we should not put such a construction on the rule if it can possibly be avoided. Section 310 A was introduced in the interests of the

judgment-debtor to protect him from losing his property by a Court sale at an undervalue as too often happens. Now, so far as the judgment-

debtor's property is concerned, his interest in setting aside the Court sale is just as great when he has effected a private sale after attachment as

when he has not. On setting aside the court sale, if he has not effected a private sale, he gets back the property itself; if he has effected a private

sale after attachment, he gets the price into which he has converted the property. If he fails to set aside the court sale, the private sale goes off and

he gets neither the property nor the price. The right to set aside the sale given him by the Code puts him much in the position of a mortgagor and he

loses his equity of redemption unless the sale is set aside. He therefore retains a clear interest in setting aside the sale.

5. The construction of the rule however presents considerable difficulties. It has been suggested that, as all sales after attachment are void u/s 64 as

against all claims enforceable under the attachment, private sales after attachment should be disregarded and the judgment-debtor treated until

confirmation as the person owning the property. The private sales however are good as between the parties to them and the legislature would not

have used the words "" owning such property"" if they had merely"" meant the judgment-debtor. Moreover they appear to have amended the rule

with the express object of establishing the right to apply of the purchaser after attachment but before the Court sale which had been denied in

Bhayi Bhimji v. Administrator General of Bombay I.L.R.(1898) 23 Bom. 430. If, then, we hold a purchaser before the court sale to be "" a person

owning such property"" there appears to be no sufficient reason for saying that a purchaser subsequent to the Court sale is not also a person owning

such property, even though he may not be entitled to apply under the rule and, as there cannot be two persons owning the same property at the

same time, it would be impossible on this view to say that the judgment-debtor continues to be the "" person owning such property "" within the

meaning of the rule when he has effected a private sale whether such a sale was before or after the court sale.

6. On the whole I have come to the conclusion the course which appears to present fewest difficulties is to hold that the judgment-debtor whose

private sale after attachment is necessarily subject to the setting aside of the Court sale retains even after the private sale a sufficient interest in the

property within the meaning of the rule to entitle him to apply, and I would so hold, agreeing in the result with Pandurang Lakshman v. Govinda

Dada I.L.R.(1916) 40 Bom. : 559 and Mussummat Dhanwanti Koer v. Sheo Sankar Lal (1919) 4 Pat. L.J. 340 and differing from Ishar Das v.

Isaf Ali Khan ILR (1911) All. 186 and overruling Subba Rayudu v. Lakshmi Narasamma ILR (1913) Mad. 775 As regards the other question I

agree with my learned brothers.

Oldfield, J.

7. I concur in the answer proposed by my lord to the first question referred. But I prefer with all due deference to justify that conclusion on the

grounds that the judgment-debtor, even after the court sale and after a subsequent sale to a private purchaser, is still owner of the property, and

that such purchaser in the case before us, although he may hold an interest in it, is not within the rule, because his title was not acquired before the

court sale.

8. That construction of the legal position was adopted by Batchelor, J. in *Pandurang Laxtnan v. Govind Dada* I.L.R(1916) . 40 Bom. 557 , and it

is, it seems to me, the only one strictly reconcilable with the prohibition in Section 64 CPC of any private transfer pending the attachment. For,

although under that section such a transfer is void, not as between the parties to it, but only against claims enforceable under the attachment, the

transferee cannot be regarded as actually the owner of the attached property at the time when the payment has to be made or until the attachment

and court sale have been set aside. No doubt, on this view the necessity for the reference in Rule 89 to "" any person owning the property "" instead

of to ""the judgment-debtor"" remains without an explanation. The same difficulty was expressed in *Paresh Nath v. Nabogopal Chattopadhaya*

(1901) ILR 29 Cal. 1. (F.P.) in connection with the expression "" person whose Immovable property has been sold"" in Section 310 A of the former

Code. It is true that there was no question there of a transfer as made by the judgment-debtor after either the attachment or the Court sale; and it

is, I agree with my Lord, probable that the words in Rule 89 " by virtue of a title acquired before such sale," which, I further agree, qualify both

property "" and "" interest,"" were introduced with reference to the cases, to which he refers. But the decision was authoritative, being given by four

learned Judges, Rampini, J. dissenting; and the judgments turned on the distinction, drawn in language, which anticipated that used in Rule 89,

between the owner of property and the owner of an interest in it. With that distinction, introduced newly by the rule, we are at present concerned;

and it is a fair conclusion that it was introduced to embody explicitly in the law the result of *Paresh Nath v. Nabogopal Chattopadhaya* (1901) ILR

29 Cal. 1. (F. P.) It is then significant that the use of the expression "" any

I.L.R(1916) . 40 Bom. 557-person whose Immovable property has been sold"" instead of "" the judgment-debtor "" was explained (vide the judgment of Maclean, C.J.) as authorizing the mortgagee, who alone was then in question, to pay the decree amount, and not with reference to any suggestion that after a transfer the transferee was the person owning the property or whose property had been sold, as distinguished from the judgment-debtor, who had merely an interest therein. This decision no doubt supplies no affirmative explanation for the reference to the ""owner of the property."" which is applicable to the facts before us; and the phrase may have been used without consideration of the position of a transferee of full rights and may have been simply imported from *Paresh Nath v.*

Nabogopal Chattopadhyaya ILR (1901) C. 1. (F. B). But that case in some degree sub-ports the result, which general principle, I think, involves

that the reference in Rule 89 to persons holding an interest in the property does not cover the judgment-debtor after a transfer of ownership and I

would therefore reach our conclusion on that basis. This, may add, involves no expression of opinion as to whether the transferee is such a person,

since none is necessary on the present reference, the transfer in question in it having been after the court sale.

9. The second question referred is whether the case is one for the exercise of our revisional powers. The answer to it must in my opinion be in the

affirmative in accordance with the judgment of the Judicial Committee in *Balakrishna Udayar v. Vasudeva Ayar* 3 M.L.J. 69 (P.C.) since the lower

court's action consisted in a refusal to deal with the judgment-debtor's petition a non-exercise of their jurisdiction, not in any inclusion of law or

fact, in which the question of jurisdiction was not involved.

Kumaraswami Sastri, J.

10. I agree in holding that a judgment-debtor who transfers his interest in property subsequent to the court sale is competent to avail himself of the

provisions of Order 21, Rule 89 of the Code of Civil Procedure.

11. The right was first given to him by Section 310 A introduced in the CPC of 1882 by Act V of 1894 and his alienation of the property

subsequent to the Court sale was held not to be a bar to his application under the section *Narain Mandal v. Surendra Mohan Tagere* ILR (1904)

Cal. 107 *Moganlal v. Doshi Mulji* I.L.R(1901) .25 Bom. 631. There was a conflict

of decisions on matters which did not touch the present

question and the section was re-drafted in its present form in the Act of 1908 in order to set at rest the conflict of decisions referred to by

Mookerjee, J. in *Dulhin Mathura Koer v. Bangsidhari Singh* 15 Cal. L.J. 88 Though it settled some points in controversy it raised others of a more

difficult nature and there has been a conflict of decisions as to the rights of the judgment-debtor and alienees from him subsequent to the court sale.

In *Ishar Das v. Asaf Ali Khan* ILR (1911) All. 180 it was held that neither the defendant nor the alienee after the court sale was entitled to apply to

the defendant because he had parted with all his interest in the property at the date of the application and the alienee because he came in within

the express prohibition of the section. The Bombay High Court in *Pandurang Lakshman v. Govind Dada* I.L.R(1917) 40 Bom. 557 and the

Patna High Court in *Mussumtnut Dhanwvanti Koer v. Sheo Sankar Lal* (1919) 4 Pat. L.J. 340 and *Lakshmi Narain Agarwala v. Kali Prosanno*

Battacharji 52 I. C. 344 held that the defendant was entitled, to apply notwithstanding the alienation by him but that the alienee was precluded by

the terms of the section. The view taken in Madras has been that the defendant is incompetent as he had no subsisting interest in the property at the

date of the application but that a purchaser from him was entitled. In *Anantha Lakshmi Ammal Vs. Kunnanchankarath Sankaran Nair, Benson and*

Sundara Aiyar, J. were of opinion that the words "by virtue of a title acquired subsequent to the sale" do not refer to the word "owner," but only

to the words "holding an interest therein" so that while a mortgagee or other person holding a lesser interest was precluded the vendee was

competent. In *Subbarayadu v. Lakshmi Narasamina* ILR (1913) Mad. 775 *Sadasiva Aiyar and Spencer, JJ.* followed the decision in *Anantha*

Lakshmi Ammal Vs. Kunnanchankarath Sankaran Nair, and while holding that the defendant had no right they were of opinion that the subsequent

purchaser had. *Sadasiva Aiyar, J.* was of opinion that it was an elementary principle of law that unless a statute clearly allowed it a man who has no

right in a property on the date of filing a suit or making an application in respect of that property cannot be allowed to file that suit or make that

application "and that as *Anantha Lakshmi Ammal Vs. Kunnanchankarath Sankaran Nair*, allowed the alienee to make the application, there was

no reason why the judgment debtor should also be allowed to make it "" in disregard of the plain rule of jurisprudence."" Spencer, J. expresses no opinion as to whether the purchaser could apply as he was not a party to the application. In Jagannadhan v. Ramabramam (1919) 54 I. C. 753 the same learned Judges held that it was not open to the judgment-debtor to apply. In C. R. P. No. 1216 of 1918, Abdur Rahim, J. without deciding the case was of opinion that the decisions in Anantha Lakshmi Ammal Vs. Kunnanchankarath Sankaran Nair, and Subbarayadu v. Lakshmi Narasimham ILR (1913) Mad. 775 holding that a subsequent alienee can apply went against the plain provisions of Rule 89, and that there was no reason to limit "the words "" by virtue of a title acquired before such sale"" to the words "" holding an interest therein."" The learned Judge was of opinion that the decision in Pandurang Laksman v. Govind Dada I.L.R(1917) . 40 Bom. 557 was correct. This case was posted before a Full Bench which without deciding the larger questions raised decided that as the applicant was a mortgagee from the defendant after the court sale he was clearly a person prevented by the rule from applying. Ayling and Odgers, JJ. in the order of reference are strongly disposed to agree with the view of Bachelor, J. in ILR 40 Bom. In Seturamaswami Nayanivaru v. Syed Mir Hussan Sahib ILR (1918) Mad. 503. Seshagiri Aiyar and Phillips, JJ. held that a judgment-debtor who had executed a sale-deed but not registered it was competent to apply. They did not decide the question whether the registration would make any difference.

12. I am unable to agree with the view taken by the Allahabad High Court in Ishar Das v. Asaf Khan ILR (1918) Mad. 503. that neither the judgment-debtor nor his alienee can take advantage of the provisions of Rule 89. The main object of the enacting of Section 310A was to enable the judgment-debtor to prevent his property from being sold below the market value and he can in most cases only do so by raising money elsewhere as it is not likely that a person able to discharge the decree amount would allow his property to be sold in execution simply for the luxury of his having to pay 5 per cent to the purchaser. When a Judgment-debtor sells property in order to avail himself of the provisions of the section the gain to him is clearly the difference between the consideration he receives and the price at which his property has been sold. There is no reason

to suppose that the legislature in enacting Rule 89, wanted to deprive him of this and to penalize his attempt to save himself from loss by raising

money when his property has been undersold. The only question is whether the judgment-debtor or his alienees or both can apply.

13. With all respect I am unable to see why the purchaser from the defendant should be able to apply while the mortgagee or lessee should be

precluded as the plain language of Rule 89, excludes both as being transferees after the execution sale. I agree with my Lord, Oldfield. J. and

Rahim, j. in thinking that the words ""by virtue of a title arising subsequent to the sale "" apply to the words ""owning such property "" as well as to the

words "" holding an interest therein "".

14. So far as the judgment-debtor is concerned it is clear that he had the right to apply at the date of the sale and I see nothing in Rule 89,

compelling me to hold that he loses that right because of the alienation. The rule of general jurisprudence as to the necessity of the applicant having

an interest in the property at the date of the application would not prevent a judgment-debtor who has parted with his interest from applying under

Rules 55 and 69 of Order 21, Rule 55, empowers the judgment-debtor to get the attachment raised by paying the decree amount and its removal

proclaimed and under Rule 69, he can stop the sale by paying the amount specified in the proclamation. There are no very strong grounds for

holding that Rule 89, bars him especially when the peculiar position of judgment-debtor as regards the ownership of his property created by

Sections 64 and 65 of the Code are considered. So far as the decree-holder is concerned the alienation is void and so far as the Court purchaser

is concerned, title after confirmation vests in him from the date of purchase and not from the date of confirmation and unless the sale is set aside it is

difficult to see what title the judgment-debtor can convey to his vendee. All he can do is to convey such interest as would vest in him should the

sale be set aside and as Rule 89, expressly prevents the alienee subsequent to the court sale from applying, the only person that can apply must be

the judgment-debtor. Where conveyance would pass title only if the vendor can make an application or do a specified act, (the purchaser being

prohibited by law from doing so) I think the judgment-debtor has a sufficient interest in the property to enable him to apply to have the sale set

aside as his alienation is contingent on it.

15. As regards the jurisdiction of this High Court, I am clearly of opinion that a Court which refuses to entertain an application on the ground that

the petitioner has no locus standi fails to exercise a jurisdiction vested in it by law. I need only refer to the decisions of the Privy Council in

Balakrishna Udayar v. Vasudeva Aiyar 33 M.L.J. 69 (P.C.) and to Anantha Lakshmi Ammal Vs. Kunnanchankarath Sankaran Nair, .

Mussummal Danvanti Koer v. Sheo Shankar Lal (1919) 4. Pat. L.J. 340 Birj Mohan Thakur Rai v. Umanach Chowdhry ILR (1892) Cal. 8.