

the jurisdiction of which the defendant has not in any way submitted himself, is an absolute nullity. The decree in question has been obtained in the absence of the defendant, who lives in British India and is a British subject and who is not alleged to have submitted to the jurisdiction of the foreign Court. The decree under execution is, therefore, a nullity in British India and cannot be executed.

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JIVAPPA  
TIMMAPPAJEERGI  
MURGEAPPA.*Order reversed.*

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### APPELLATE CIVIL.

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*Before Mr. Justice Batchelor and Mr. Justice Shah.*

PANDURANG LAXMAN UPHADE (ORIGINAL OPPONENT), APPLICANT v.  
GOVIND DADA UPHADE (ORIGINAL APPLICANT), OPPONENT.<sup>o</sup>

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April 5.

*Civil Procedure Code (Act V of 1908), Order XXI, Rule 89—Sale in execution of decree—Judgment-debtor privately selling the property so sold—Application by judgment-debtor to set aside Court-sale.*

A judgment-debtor whose property has been sold at a Court sale in execution of the decree against him, has a right to apply to have the sale set aside as a person owning the property sold in execution of the decree within the meaning of Rule 89 of Order XXI of the Civil Procedure Code of 1908, in spite of the fact that he has transferred his interest in the property after the Court sale.

THIS was an application against an order passed by F. K. Boyd, District Judge of Nasik, reversing the order passed by G. L. Dhekne, Subordinate Judge at Pimpalgaon.

Execution proceedings.

The property belonging to the judgment-debtor Govinda, was sold at a Court sale in execution of a decree passed against him, and was purchased by one Pandurang for Rs. 166. Subsequently, the property was

<sup>o</sup> Civil Extraordinary Application No. 337 of 1915.

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privately sold by Govinda to one Gangaram for Rs. 500. Govinda next applied to the Court to have the sale set aside under the provisions of Rule 89 of Order XXI.

The Subordinate Judge held that Govinda having had no right to the property sold was not entitled to apply under the Rule. On appeal, the District Judge was of opinion that he was entitled to so apply.

The opponent applied to the High Court under its extraordinary civil jurisdiction.

The application was first heard by Shah J., but after it was argued for some time, it was directed to be placed before a Division Court for disposal. Accordingly it was heard by Batchelor and Shah JJ.

*W. J. Nimblear*, for the applicant:—The judgment-debtor having voluntarily sold his property, after it was sold at a Court auction, has no right or interest left in him to apply under Order XXI, Rule 89, to set aside the Court-sale: see *Lakshmi Ammal v. Sankaran Nair*; <sup>(1)</sup> *Ishar. Das v. Asaf Ali Khan*; <sup>(2)</sup> and *Subbarajudu v. Lakshminarasamma*. <sup>(3)</sup>

The present Code has made an alteration in section 310 A of the earlier Civil Procedure Code of 1882; for now only a person owning the property or holding an interest prior to the auction sale can take advantage of Order XXI, Rule 89.

*K. N. Koyajee*, for the opponent:—The present Code makes no change except with regard to the position of a purchaser acquiring title before the auction sale, in respect of which there was a conflict of decisions: *Ramchandra v. Rakhmabai*; <sup>(4)</sup> *Abdul Rahaman v. Matiyar Rahaman* <sup>(5)</sup> and *Srinivasa Ayyangar v. Ayyathorai Pillai*. <sup>(6)</sup> The words “owning such property” in the

(1) (1913) 24 M. L. J. 205.

(2) (1911) 34 All. 186.

(3) (1913) 38 Mad. 775.

(4) (1898) 23 Bom. 450.

(5) (1902) 30 Cal. 425.

(6) (1897) 21 Mad. 416.

new Code have the same meaning as the words, "whose immoveable property has been sold" in the old Code. The applicant under Rule 89 need not own the property or hold an interest at the date of the application; what is required is that he should do so at the date of the auction sale. Further, the judgment-debtor could not legally transfer his interest owing to the prohibition imposed by section 64 of the Civil Procedure Code or section 52 of the Transfer of Property Act. Refers to *Maganlal v. Doshi Mulji*.<sup>(1)</sup>

*Nimbkar*, in reply, referred to *Mulchand Dagadu v. Govind Gopal*.<sup>(2)</sup>

BATCHELOR, J. :—The question raised in this application is one of some difficulty and arises under Order XXI, Rule 89 of the present Code. The circumstances under which it arises are these :—In execution of a decree the judgment-debtor's property was sold by auction and was purchased by the present applicant for a sum of Rs. 166. Thereafter, and before the auction sale was confirmed, the judgment-debtor for a sum of Rs. 500 privately sold the property to one Gangaram, a stranger. Then within 30 days of the auction sale the judgment-debtor applied under Order XXI, Rule 89, to set aside the sale. The trial Court dismissed his application, but the District Court has allowed it, and from the District Court's order this application is brought by the auction purchaser.

The question is, whether it is open to the judgment-debtor to make this application under Order XXI, Rule 89 after he has by private sale transferred or attempted to transfer the property to a third party, such private sale being made after the sale by auction. Under Order XXI, Rule 89 an application such as this can be made by any person either owning the property or holding an interest therein by virtue of a title acquired before

<sup>(1)</sup> (1901) 25 Bom. 631.

<sup>(2)</sup> (1906) 30 Bom. 575.

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the Court sale. It is not pretended that the judgment-debtor can come in as a person holding an interest acquired before the Court sale, but it is claimed that he can apply as being in the eye of the law the person owning this property. Now the words which I have quoted from Rule 89 differ from the words in which in the Code of 1882 the corresponding enactment was phrased. For there, under section 310A of the Act, a section which was introduced by the amending Act V of 1894, such an application as this could be made by "any person whose immoveable property has been sold under this Chapter." No doubt at first sight it would appear that the generality of the words of section 310A has been cut down and restricted by the phraseology of the present Rule 89. But it appears to me that the alteration of language effected by the present Rule is sufficiently explained by reference to the conflict which there previously was as to the position of a purchaser acquiring title before the auction sale. In *Srinivasa Ayyangar v. Ayyathorai Pillai*<sup>(1)</sup>, for instance, it was held that such a purchaser could apply, whereas the contrary view was adopted in *Ramchandra v. Rakhmbai*.<sup>(2)</sup> I think, therefore, that the change brought about by Rule 89 may be understood as embodying the desire of the Legislature to make it clear that a purchaser acquiring title before the auction sale was competent to apply under this provision of the law.

So far, therefore, there would appear to be no reason for doubting the correctness of the District Judge's view. But the applicant has relied upon the decisions in *Ishar Das v. Asaf Ali Khan*<sup>(3)</sup> and *Subbarayudu v. Lakshminarasamma*<sup>(4)</sup> which are undoubtedly in favour of that construction of Rule 89 for which he contends. I need not discuss the Madras decision

(1) (1897) 21 Mad. 416.

(2) (1898) 23 Bom. 450.

(3) (1911) 34 All. 186.

(4) (1913) 38 Mad. 775.

in detail because the stronger case in the applicant's favour is admittedly the Allahabad ruling. It is enough to say, with respect, that I am not able to adopt the view that it is open to the subsequent purchaser to apply under this Rule, for, as it seems to me, he is excluded by the terms of the Rule. The decision in the Allahabad High Court followed upon the argument that Rule 89 gave judgment-debtors a last chance of saving the property for themselves and that it was no part of the Legislature's intention that the property should be saved for persons to whom it might be privately sold after the auction sale had taken place. While fully conscious of the weight due to this argument both on its own merits and by reason of its acceptance by the learned Judges of the Allahabad Court, I cannot but think with very sincere respect that there is another aspect of the question which also must be regarded. For, as I understand these provisions of the law, their object is not merely or not specifically to preserve the immoveable property in the hands of the judgment-debtor, but to ensure, so far as may be possible, that immoveable properties shall not at Court sales be sold at inadequate prices. If that is an important consideration, then it follows that in such a case as this it is no answer to the judgment-debtor to say that even if his application be granted, the immoveable property will still be lost to him. The reply would be that the loss of the immoveable property is now inevitable, but that the Court will be realizing the intentions of the Legislature if it construes these provisions so as to ensure that the monetary loss accruing to the judgment-debtor be as little as possible. For myself I can see no serious difficulty in holding that for the purposes of the Rule the judgment-debtor in the position of the present applicant is still the owner of the property in the eye of the law, the auction sale being still unconfirmed.

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That position must, I think, be held either by him or by the subsequent vendee, and in my view it clearly does not belong to the subsequent vendee, because he has not acquired any title, nor can he acquire any title until the auction sale has been set aside. The case does not, I think, essentially differ from the case where there is nothing between the judgment-debtor and the third party except an agreement that the third party will purchase at a higher value if the judgment-debtor can succeed in getting the auction sale set aside, and in that case it appears to me clear that the judgment-debtor would be entitled to come in under Rule 89. I do not think that he is in any materially worse position because there has passed between him and the stranger a conveyance which confessedly is not and cannot be operative inasmuch as the auction sale is still subsisting.

On these grounds, I am of opinion that the view taken by the District Court is right, and I would discharge the rule with costs.

SHAH, J.:—After hearing the arguments again in this case, I am of opinion that the judgment-debtor has a right to apply to have the sale set aside as a person owning the property sold in execution of the decree within the meaning of Rule 89, Order XXI, in spite of the fact that he has transferred his interest in the property after the Court sale. The transfer by him after the auction sale is, in my opinion, inoperative so long as the sale subsists, and it could take effect only if the sale is set aside on an application under Rule 89.

Having regard to the object and scope of this Rule, it seems to me that the judgment-debtor must be deemed to own the property for the purposes of the Rule. There is no reason to suppose that the object of the Rule is to save the immoveable property only for the benefit of

the judgment-debtor. But it seems to me that it is *within the scope* of the Rule to enable the judgment-debtor, if possible, to prevent the sale of his property by the Court for an inadequate price. One of the ways in which the judgment-debtor could secure this result would be that he might procure a purchaser for a higher price and thereby enable himself to deposit the necessary amount as required by the Rule. He might either agree to sell or sell the property to a third person subject of course to the condition that the Court sale is set aside. This very case affords an apt illustration of the manner in which the judgment-debtor may be able to take advantage of this Rule. The property in question is sold to the auction purchaser for Rs. 166, whereas the judgment-debtor would be able to realise Rs. 500 for the same property by a private sale. Even though the judgment-debtor would not be able to retain the immovable property if the sale were set aside, it is clear that the setting aside of the sale would be highly beneficial to him under such circumstances. It cannot and ought not to make any difference in the result whether he merely agrees to sell or actually sells the property subject to the auction-sale being set aside.

I do not see any reason to hold that the Rule refers to the ownership or interest as existing at the date of the application. It seems to me that a person owning the property or holding an interest therein by virtue of a title acquired before the sale is within the Rule, provided he owns it or holds an interest therein at the date of the sale by the Court. The words "*at the date of the application,*" are not to be found in the Rule, and I do not see any good reason to read the Rule as if the words were inserted therein.

Apart from the decided cases there is no difficulty in accepting the view, which has found favour with the lower appellate Court in this case. The learned pleader

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for the applicant here has, however, relied upon *Ishar Dās v. Asaf Ali Khan*<sup>(1)</sup> and *Subbarayudu v. Lakshminarasamma*,<sup>(2)</sup> which undoubtedly support his contention that the judgment-debtor who has transferred his interest in the property to a third person after the Court sale has no right to make an application to have the sale set aside under Rule 89. I have carefully considered these decisions. I regret that I am unable to follow them. These two decisions do not seem to me to be quite consistent with each other; and both of them appear to me to be based either upon too restricted a view as to the object and scope of the Rule or upon an interpretation involving the reading of certain words in the Rule which do not occur therein.

I, therefore, agree that the rule should be discharged with costs.

*Rule discharged.*

R. R.

## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Heaton.*

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April 12.

ARJUN RAMJI MHANKAL (ORIGINAL DEFENDANT NO. 1), APPELLANT  
v. RAMABAI KOM RAOJI VITHOBA PADWAL AND OTHERS (ORIGINAL  
PLAINTIFF AND DEFENDANTS NOS. 2 TO 4), RESPONDENTS.<sup>o</sup>

*Indian Limitation Act (IX of 1908), sections 3 and 7. Schedule I, Article 142—  
Minor—Representative—Death of the minor after majority but pending  
disability—Right of personal representative to sue—Limitation.*

Where a minor acquired a cause of action to sue for possession of property and died within three years after attaining majority, his personal representative can, although twelve years have expired since the cause of action accrued, institute a suit on the same cause of action at any time within the three years' period which had already commenced in the life-time of deceased.

<sup>(1)</sup> (1911) 34 All. 186.

<sup>(2)</sup> (1913) 18 Mad. 775.

<sup>o</sup> Second Appeal No. 759 of 1914.