

## APPELLATE CIVIL.

*Before Sir Stanley Batchelor, Kt., Acting Chief Justice*

*and Mr. Justice Kemp.*

NARSINHBHAT BIN CHINTAMANBHAT (ORIGINAL DEFENDANT No. 3),  
APPELLANT v. BANDO KRISHNA KULKARNI (ORIGINAL PLAINTIFF),  
RESPONDENT.\*

1918.

January 16.

*Civil Procedure Code (Act V of 1908), section 47—Auction purchaser—  
Whether a representative of the judgment-debtor—Court-sale.*

An auction-purchaser at a Court-sale is not a representative of the judgment-debtor within the meaning of section 47 of the Civil Procedure Code, 1908.

FIRST appeal against the decision of S. R. Koppikar, First Class Subordinate Judge at Belgaum, in Darkhast No. 443 of 1909.

Execution proceedings.

The facts material for the purposes of this report are as follows :—

On November 17, 1897, the plaintiff obtained an award decree to which the plaintiff and the defendants Nos. 1 and 2 alone were parties. The material terms of the decree are :—

" 1. Defendants should pay Rs. 56,575 to the plaintiff. Of this, Rs. 575 should be paid by the defendants to the plaintiff just now. This payment leaves a balance of Rs. 56,000. Out of this, Rs. 6,000 should be paid at the end of January 1898. If that amount is not paid by that time, that amount of Rs. 6000 should carry interest at 4½ per cent. from 1st November 1897 till payment. The remaining Rs. 6,000 (out of the sum of Rs. 12,575 for costs and interests, included in Rs. 56,575) should be paid with interest thereon at 4½ per cent. The principal Rs. 44,000 to be paid off by annual instalments of Rs. 1,000, each payable before the end of January in each year; first instalment of Rs. 1,000 to be paid by the end of January 1898. If default be made in the payment of these instalments, the whole balance of principal with interest thereon at 4½ per cent. should be recovered by the sale of the property mortgaged, without minding the aforesaid instalment clause (" Varil haptache hujar na dharita "). The deficit, if any, to be recovered from the person and the estate of the defendants.

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2. The yearly interest on the aforesaid principal amounts to Rs. 1,980. For the payment of this interest, the defendants to give possession of the mortgaged property to the plaintiff; or the plaintiff to take possession through Court. If there be any obstacle in getting possession, the defendants should remove it. Plaintiff to recover the Vasul of Inam villages—Kablapur and Kenchanhatti and Rs. 90½ out of the Vasul of Inam village Ashte directly from the village officers. Defendants to order the village officers accordingly and to see that the Vasul is so paid to the plaintiff.

3. The possession of non-Inam lands is to be given by making the tenants pass Kabulayats to the plaintiff. If the defendants do not do this before Chaitra Sud 1 every year, if the tenants do not pay the Vasul, if the Vasul fails, or if the plaintiff does not receive the Vasul at all, the responsibility is on defendants' head.

7. If the above written sums of Rs. 6,000(each) be not paid at the appointed time, the plaintiff should recover the same with interest by sale (of the mortgaged property) subject to the lien for the above mentioned mortgage amount; or the plaintiff may recover the same from the defendants personally or he may recover it both ways.

8. The whole mortgaged property, including the whole Inam village Ashte, is subject to the aforesaid sum of Rs. 56,575 with interest thereon, till the whole amount with interest is repaid. The plaintiff has his mortgage lien thereon till full satisfaction."

On January 4, 1901, the plaintiff presented an application for execution and as a result of this, the village of Ashte—one of the properties mentioned in the award decree—was put up for sale by the Court and was purchased by the plaintiff on January 6, 1903. The sale was confirmed on July 11, 1903.

In 1884, one Ramabai, the widow of a deceased coparcener in the family of defendants Nos. 1 and 2, obtained a decree for maintenance against defendants Nos. 1 and 2 and another member of the family. The decree provided for payment of arrears of maintenance, and for future maintenance, and it directed that if the defendants failed to pay regularly, then the plaintiff Ramabai might take possession of certain lands,

and if the defendants failed to pay the maintenance, or to put the plaintiff Ramabai in possession of the lands, then the defendants would be liable personally, and their immoveable property would also be answerable for the decree.

In 1898, Ramabai filed a Darkhast to recover maintenance due by attachment and sale of the defendants' Inami rights in the village of Ashte. In pursuance of this Darkhast these Inami rights were sold, and on September 4, 1901, they were purchased by the defendant No. 3. On November 6, 1901, the sale was confirmed. The defendant No. 3 subsequently applied for possession in virtue of his purchase. He was resisted by the plaintiff and the plaintiff's obstruction was in 1905 removed by the Court.

Thereupon the plaintiff filed suit No. 355 of 1905 against defendant No. 3 for a declaration that the plaintiff's title as auction-purchaser had priority over the defendants' title. That suit was dismissed on May 29, 1909.

On December 2, 1909, the plaintiff filed the Darkhast out of which the present proceedings arose against defendants Nos. 1 and 2 as judgment-debtors and defendant No. 3 as a purchaser of the village of Ashte at the Court-sale.

The defendant No. 3 contended *inter alia* that he was not a proper party to the proceedings as he was not a representative of the judgment-debtors (defendants No. 1 and 2); that the award decree was not capable of execution against him as he was not a party thereto; that the village of Ashte could not be sold over again; and that the Darkhast against him was not in time.

The Subordinate Judge held that the Darkhast was in time and directed that the plaintiff was entitled to

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execute his decree against the village of Ashte bought by the defendant No. 3 at the Court-sale.

The defendant No. 3 appealed to the High Court.

*G. S. Rao* for the appellant:—My client, defendant No. 3, was not a party to the suit or the decree obtained by the plaintiff and, therefore, the present Darkhast cannot lie against him. In 1901, he purchased the village of Ashte at a Court-sale held in execution of the maintenance decree of 1884 obtained by Ramabai and as auction-purchaser defendant No. 3 was not a proper party to the present Darkhast, under section 47 of the Civil Procedure Code, 1908. An auction-purchaser cannot be said to be a representative of the judgment-debtor within the meaning of section 47 of the Civil Procedure Code, 1908. The distinction between a Court-purchaser and a private purchaser has been pointed out by the Privy Council in *Dinendronath Sannyal v. Ramcoomar Ghose*<sup>(1)</sup>. It is said that though the Court purchaser acquires merely the right, title and interest of the judgment-debtor, he acquires that title by operation of law adversely to the judgment-debtor. It is on this ground that a Court-purchaser cannot be regarded as a representative of the judgment-debtor. Our High Court has consistently held that an auction-purchaser is not a representative of the judgment-debtor: *Shivram Chintaman v. Jivu*<sup>(2)</sup>; *Vishvanath Chardu Naik v. Subraya Shivapa Shetti*<sup>(3)</sup>; *Maganlal v. Doshi Mulji*<sup>(4)</sup>; *Narayan v. Umbar*<sup>(5)</sup>; *Pita v. Chunilat*<sup>(6)</sup>; *Gokulsing Bhikaram v. Kisansingh*<sup>(7)</sup>.

The Madras High Court also has followed the Bombay view: see *Nadamuni Narayana Iyengar v. Veerabhadra Pillai*<sup>(8)</sup>.

(1) (1880) L. R. 8 I. A. 65 at p. 75.

(5) (1911) 13 Bom. L. R. 307.

(2) (1888) 13 Bom. 34.

(6) (1906) 31 Bom. 207.

(3) (1890) 15 Bom. 290.

(7) (1910) 34 Bom. 546.

(4) (1901) 25 Bom. 631.

(8) (1910) 34 Mad. 417.

The Calcutta and Allahabad High Courts have taken a contrary view : see *Ishan Chunder Sirkar v. Beni Madhub Sirkar*<sup>(1)</sup> ; *Gulzari Lal v. Madho Ram*<sup>(2)</sup>. The view taken by these Courts has never been accepted by our Court. I, therefore, submit that as auction-purchaser, my client was improperly joined in the Darkhast proceedings.

*Coyajee* with *S. M. Kaikini* for the respondent :—We submit that the village of Ashte is liable to be sold in execution of our decree. At the auction sale in execution of Ramabai's decree, the right, title and interest of defendants Nos. 1 and 2 was sold and purchased by defendant No. 3. We are seeking to enforce the decree against, among other properties, Ashte, that is, against the interest of our judgment-debtor, defendants No. 1 and 2, as it existed prior to the purchase by defendant No. 3.

It is contended that defendant No. 3 cannot be proceeded against in execution proceedings. Assuming that the contention is sound, what is it that the lower Court has done? It only allows us to sell the interests of defendants Nos. 1 and 2 in the village of Ashte, irrespective of the hands which hold it. Under these circumstances we made defendant No. 3 a party in order that he may be heard in his defence. We did not join him as a debtor. We joined him in order to dispose of all the disputes about the property once for all.

Defendant No. 3 bought the property pending execution of our Darkhast and so the doctrine of *lis pendens* would apply : *Byramji v. Chunilal*<sup>(3)</sup> ; *Samal v. Babaji*<sup>(4)</sup>.

<sup>(1)</sup> (1896) 24 Cal. 62

<sup>(2)</sup> (1904) 26 All. 447.

<sup>(3)</sup> (1902) 27 Bom. 266.

<sup>(4)</sup> (1904) 28 Bom. 361.

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As regards section 47 of the Civil Procedure Code, 1908, we rely upon *Ishan Chunder Sirkar v. Beni Madhub Sirkar*<sup>(1)</sup>, *Gulzari Lal v. Madho Ram*<sup>(2)</sup>.

At the most joining defendant No. 3 would be an irregularity not affecting the merits of the case and so would be cured by section 99 of the Civil Procedure Code, 1908 : *Timmanna v. Putabhata*<sup>(3)</sup>.

BATCHELOR, AG. C. J. :—The present appeal, which is brought by the 3rd defendant in the suit, arises out of the same proceedings as those which have been described in the appeal just decided<sup>(4)</sup>. The facts already noticed it is unnecessary to recapitulate. It is enough to refer to the following additional facts. In 1884 one Ramabai, the widow of a deceased coparcener in the family of the defendants Nos. 1 and 2, obtained a decree for maintenance against defendants Nos. 1 and 2 and another member of the family. That decree provided for payment of arrears of maintenance, and for future maintenance, and it directed that if the defendants failed to pay regularly, then the plaintiff Ramabai might take possession of certain lands, and if the defendants failed to pay the maintenance, or to put the plaintiff Ramabai in possession of the lands, then the defendants would be liable personally, and their immoveable property would also be answerable for the decree. In 1898 Ramabai filed a Darkhast to recover the maintenance due by attachment and sale of the defendants' Inami rights in the village of Ashte. In pursuance of this Darkhast these Inami rights were sold, and, on the 4th September 1901, they were purchased by the present appellant, the 3rd defendant. On the 6th of November 1901, the sale was confirmed.

Now in regard to the position of the plaintiff, he, as I have already stated in the foregoing appeal, obtained

(1) (1896) 24 Cal. 62

(3) (1899) 2 Bom. L. R. 90.

(2) (1914) 26 All. 447.

(4) *Ante* p. 309.

a decree on an award on the 17th November 1897. Among the properties put in mortgage by that decree was this village of Ashte. On the 4th January 1901, the plaintiff presented an application for execution, and as the result of it this village of Ashte was put to sale by the Court, and, on the 6th January 1903, was purchased by the plaintiff. The sale was confirmed on the 11th July 1903. The defendant No. 3 subsequently applied for possession in virtue of his purchase. He was resisted by the plaintiff, and the plaintiff's obstruction was in 1905 removed by the Court. Thereupon the plaintiff filed Suit No. 355 of 1905 against the 3rd defendant for a declaration that the plaintiff's title as auction-purchaser had priority over the defendants' title. That suit after some vicissitudes was ultimately dismissed. No appeal appears to have been presented by the plaintiff, but on the 2nd December 1909 he presented this present Darkhast in which he joined the 3rd defendant for the first time.

On behalf of the 3rd defendant Diwan Bahadur Rao's first contention is that under section 47 of the present Code, his client was not a proper or a permissible party to these proceedings. Other objections also were raised by the learned pleader, but as, in my opinion, he succeeds upon this first point, it is unnecessary to consider the other contentions. This objection really depends upon the answer to the small question whether the auction-purchaser is, or is not a representative, within the meaning of section 47 of the Code, of the judgment-debtor. Mr. Rao contends that he is not, and if that contention is justified, then the proceedings as against the 3rd defendant were clearly without authority. It seems to me that by a long course of decisions of this High Court, we are now committed to the view that an auction-purchaser is not a representative of the judgment-debtor within the meaning of section 47 of

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the Code. If that view is wrong, it must be left to the Legislature to correct it. Certainly we could not now correct it. Nor do I think the question is one which needs reference to a Full Bench, for it appears to me, with all respect to the learned Judges of the Allahabad and Calcutta High Courts, where the other opinion has been accepted, that there is at least as much to be said in favour of the Bombay view as in favour of the contrary view. The decisions to which I refer are *Gulzari Lal v. Madho Ram*<sup>(1)</sup> and *Ishan Chunder Sirkar v. Beni Madhub Sirkar*<sup>(2)</sup>. In Madras, however, the decision has gone the other way: see *Nadamuni Narayana Iyengar v. Veerabhadra Pillai*<sup>(3)</sup>. I quite concede that the word "representative" occurring in section 47 cannot be restricted to the sense of the phrase "legal representative," as that phrase is specially defined in section 2, clause (ii), of the Code. It still, however, remains to be considered whether the auction-purchaser at a Court-sale can fall within the definition:

Now in *Dinendronath Sannyal v. Ramcoomar Ghose*<sup>(4)</sup>, their Lordships of the Privy Council observe upon the marked difference which exists in the position of a private purchaser and that of a Court purchaser. "There is", they say, "a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. In the former the price is fixed by the vendor and purchaser alone; in the latter the sale must be made by public auction conducted by a public officer, of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter the purchaser, notwithstanding he acquires merely the

(1) (1904) 26 All. 447.

(3) (1910) 34 Mad. 417.

(2) (1896) 24 Cal. 62.

(4) (1880) L. R. 8 I. A. 65 at p. 75.

right, title, and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor."

It is this distinction which, as I read the cases, lies at the basis of this Court's decisions that a purchaser at a Court-sale cannot be regarded as the representative of a party, adversely to whom he has acquired his position. This is pointed out by Sir Charles Sargent in *Vasanji Haribhai v. Lallu Akhu*<sup>(1)</sup>, where it is said: "There could be no question of estoppel by conduct between the judgment-debtor and the purchaser at auction, who derives his title from proceedings which are entirely *in invitum* as regards the former." In *Shivram Chintaman v. Jivu*<sup>(2)</sup> and *Vishwanath Chardu Naik v. Subraya Shivapa Shetti*<sup>(3)</sup>, we have clear decisions that the Court-purchaser does not possess this representative capacity; and this view has consistently prevailed in this Court, as may be ascertained on reference to such cases as *Narayan v. Umbar*<sup>(4)</sup>, *Pita v. Chunilal*<sup>(5)</sup> and *Gokulsing Bhikaram v. Kisansingh*<sup>(6)</sup>. Some attempt to divert this current of authority seems to have been made by reason of the Privy Council's decision in *Prosunno Coomar Sanyal v. Kasi Das Sanyal*<sup>(7)</sup>. But that this attempt was based upon a misapprehension of their Lordship's ruling is clearly pointed out by Sir Lawrence Jenkins C. J., in *Maganlal v. Doshi Mulji*<sup>(8)</sup>. Sir Lawrence there says, what a study of the Privy Council decision makes plain, that "their Lordships did not hold the auction-purchaser to be a party or a representative: they merely held that his interest in the result did not prevent the question being one between parties." In that case, for

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(1) (1885) 9 Bom. 285.

(5) (1906) 31 Bom. 207.

(2) (1888) 13 Bom. 34.

(6) (1910) 34 Bom. 546.

(3) (1890) 15 Bom. 290.

(7) (1892) L. R. 19 I. A. 166.

(4) (1911) 13 Bom. L. R. 307.

(8) (1901) 25 Bom. 631.

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the sake of the argument then before the Court, Sir Lawrence Jenkins was content to assume that the auction-purchaser filled the representative character. But it must be noticed that the assumption was made only for the purposes of the argument, and the Chief Justice says that "I doubt whether he can claim this character." In view of this uniform course of decisions on this side of India, which appears to me to have a reasonable basis in the words of the Code, I think, that Mr. Rao's argument must be conceded that the auction purchaser here, his client the 3rd defendant, was improperly joined as a party to these proceedings. It follows, therefore, that on this ground, and on this ground alone, the present appeal must be allowed, and the 3rd defendant must have his costs throughout.

*Appeal allowed.*

J. G. R.

## APPELLATE CIVIL.

*Before Mr. Justice Beaman and Mr. Justice Heaton.*

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January 18.

JANARDAN GOVIND KARGUPPIKAR (ORIGINAL PLAINTIFF) APPELLANT v. NARAYAN KRISHNAJI KARGUPPIKAR AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.\*

*Indian Limitation Act (IX of 1908), Article 182, clauses (5) and (6)—Step-in-aid of execution—Application to transfer the decree to the Court of a Native State for execution.*

An application made to a British Indian Court to transfer its decrees for execution to the Court of a Native State, between whom and the British Government there exists an agreement to execute each other's decrees, is a step-in-aid of execution within the meaning of Article 182 of the Indian Limitation Act, 1908.

\* First Appeal No, 107 of 1917.