

KADAR
v.
ISMAIL.

of trust which is by construction of law imposed upon defendant No. 2.

On these grounds, therefore, I would dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan (Officiating Chief Justice) and
Mr. Justice Parker.

SUBBAYA (PETITIONER),

and

YELLAMMA AND OTHERS (RESPONDENTS).*

1885.
September 22.

Decree—Execution—Invalid sale—Possession given to purchaser—Restitution sought in execution by judgment-debtor—Remedy by suit.

Certain land having been attached in execution of a decree by a District Court, S, the representative of the judgment-debtor, preferred a claim to the land in his own right, which was rejected, and the land was subsequently sold to a stranger, and the sale was confirmed on the 23rd February 1884. On the same date the High Court, on appeal by S, set aside the order rejecting his claim.

The District Court, in ignorance of the order of the High Court, having subsequently put the purchaser in possession of the land, S applied for restitution :

Held, that the order of the District Judge confirming the sale was passed without jurisdiction, but that the District Judge had no power to restore possession to S.

THIS was a petition to the High Court under s. 622 of the Code of Civil Procedure against an order of W. F. Grahame, Acting District Judge of Cuddapah, rejecting an application by Voraganti Subbayya (a minor), representative of the judgment-debtor in suit No. 16 of 1876, to be put in possession of certain land which had been sold in execution of the decree in the said suit.

The facts are fully set out in the judgment of the Court (Kernan, Officiating C.J., and Parker, J.).

Rámachandra Ráu Saheb for petitioner.

Krishnasámi Chetti for respondents.

KERNAN, Offg. C.J.—The plaintiff in suit 16 of 1876 obtained a decree against the defendant in that suit for Rs. 5,617-12-0. The defendant died and his son was made party to the suit, as representative of his father, and then that son died and his son,

* Civil Revision Petition 29 of 1885.

the present petitioner, was made party to the suit, as representative of his grandfather, the original defendant.

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In June 1883, the decree-holder attached lands in Vontimitta and in certain villages in Proddatur taluk. The present petitioner filed an objection to the attachment and claimed the attached property as his own. That objection and claim were disallowed by the District Judge by order dated the 20th of August 1883. On the 5th day of December 1883, the petitioner filed civil miscellaneous appeal No. 162 of 1883 in the High Court against that order, and the High Court on the 22nd of February 1884 reversed the order of the District Court of the 20th of August. In the meantime, the lands attached were put up for sale and were purchased; and on the 22nd February 1884, the same day as the High Court set aside the order disallowing petitioner's claim, the District Judge made an order confirming the sale.

At the time the District Court made the order of the 22nd of February 1884, the District Judge was not aware of the order of the High Court; nor does it appear which order was made first in point of time on the 22nd February. The purchaser appears to be a stranger to this suit; he paid his purchase money into Court and is a *bond fide* purchaser. On the 16th of August 1884, the petitioner filed in the District Court a petition No. 217 of 1884, praying that the attached lands might be given to, and put in possession of, the petitioner. The District Judge was referred to ss. 583—590, but said he did not see how they affected the case. He treated the application as one to set aside the sale which had been confirmed and which, he was of opinion, could not be set aside, and dismissed petitioner's petition.

The petitioner now applies to this Court under s. 622 to revise the District Judge's order on the ground that he refused to exercise the authority vested in him to restore petitioner to possession under the order of the High Court and on the ground that the confirmation only was made without jurisdiction. The petitioner also presented an appeal against the order as a question between the decree-holder and petitioner, parties to the suit, relating to execution.

The petitioner could not after the appeal order appeal against the confirmation order under s. 588, as there was no material irregularity in publishing or conducting the sale, s. 311, Procedure Code, and, as no application was made under that section, neither

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could the order for confirmation be set aside, s. 312; and, if the order of the District Judge disallowing petitioner's objection was valid, and if the confirmation order was valid, the sale should have become absolute. But it was not necessary to set aside the confirmation order, as it was void and made without jurisdiction. Until reversed, the order of the District Judge of the 20th of August 1884 was valid; but it was reversed by the order of the High Court of the 22nd February 1884, and from the time that order was pronounced, the order of the 20th August had no legal existence, and the District Judge had no jurisdiction to act on it. If any authority was wanted on this point, see *Basáppá v. Dundáyá*.(1)

The order of reversal of the High Court and the order of confirmation being made on the same day, are subject to the rule that judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done—*Wright v. Mills*.(2) The law does not regard fractions of a day—*R. v. St. Mary, Warwick*,(3) *Lester v. Garland*.(4) In *Pugh v. Robinson*(5) it is said that to avoid injustice the day is divisible; but in this case it seems to be impossible to ascertain which order was made first on the 22nd of February 1884; and as one or other of the two orders must prevail, it is obvious that the order in reversal should. The fact that the District Judge and the purchaser were not on the 22nd of February aware of the order in reversal, is not material, as their ignorance on the subject could not affect the reversal force of the order of the High Court. See *Basáppá v. Dundáyá*.(1)

The purchaser bought while the appeal was pending; under the ordinary rule he took subject to whatever would be the ultimate result of the decision in the pending appeal, whether he knew of the *lis pendens* or not—*Pranjivan Govardhan Das v. Bajú*,(6) *Manual Fruval v. S. Latchmidévamma*,(7) *Mina Kumari Bibee v. Jojat Sattani Bibee* (8). Section 583 enables a party entitled to any benefit under a decree passed in appeal to apply to the Court that passed the decree appealed against, and that such Court shall proceed to execute the decree passed in appeal according to the rules prescribed for the execution of decrees in suit.

(1) I. L.R., 2 Bom., 540.

(2) 1 El. & Bl., 816.

(3) 1 T.R. 116.

(4) 7 M.H.C.R., 104.

(2) 28 L.J. Ex., 223.

(4) 15 Ves., 257.

(6) I.L.R., 4 Bom., 341.

(8) I.L.R., 10 Cal., 220.

The appeal in this case was against an order ; however s. 590 provides that the same procedure prescribed in ch. XLI, viz., s. 583, shall apply to appeals from orders. SUBBAYA
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The petitioner was entitled under the appeal order to the benefit of having the sale and the confirming order treated by the District Judge as no longer of any valid legal existence, and to the benefit of being free from any further proceeding to carry out the sale or put the purchaser in possession.

If the petitioner had at once carried out the order in appeal before the Subordinate Judge, it cannot be doubted that no further proceedings to carry out the sale would have been taken. But the petitioner appears to have taken no steps to bring the appeal order to the notice of the Judge until the 16th of August 1884 when the petition was filed praying for possession of the lands sold. In the meantime the purchaser got an order for confirmation.

The purchaser thus obtained possession under the order of the Court, but such order was made after the order in appeal and was made without jurisdiction. However he acted *bonâ fide* and paid his purchase money and it has been paid out to the creditor.

The petitioner might have applied to the District Court to stay the execution pending the sale, but did not do so, and he might, by diligence, after the appeal order was made have prevented the sale certificate and the possession from being given to the purchaser ; but he did not do so ; under such circumstances, if we had power to order the District Judge to deliver possession to the appellant (and if we had any discretion in the matter) we should be inclined to refuse to do so and to leave the appellant to assert his title against the purchaser by a separate suit. However we do not see that the District Judge had any jurisdiction or authority after possession was given over to the purchaser (who is not one of the parties to the suit) to make an order on him to deliver up possession as prayed for by the appellant. If the plaintiff desires to assert his rights, whatever they may be, he must proceed by separate suit.

We must therefore dismiss the appeal and revision petition with costs.