APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

NARAYANA KOTHAN (DEFENDANT No. 2), APPELLANT,

v.

KALIANASUNDARAM PILLAI (PLAINTIFF No. 2), RESPONDENT.*

1895. April 24. August 28.

Sale in execution—Insanity of judgment-debtor intervening before—Civil Procedure Code, ss. 456, 459, 460—Act XXXV of 1858.

A suit was brought by V. to have it declared that the sale of his property in execution of a decree was void owing to the fact that subsequent to decree and prior to sale he has been declared insane under Act XXXV of 1858. The second defendant was the auction purchaser:

Held by Best, J., that objection can be taken under s. 311, Civil Procedure Code, on the above grounds before the sale has been confirmed and certificate granted.

Held by Subramania Ayyar, J., that these facts only amounted to a material irregularity within s. 311, Civil Procedure Code, and that the plaintiff must prove substantial injury.

SECOND APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in appeal suit No. 824 of 1892, reversing the decree of V. T. Subramania Pillai, District Munsif of Kumbakonam, in original suit No. 275 of 1889.

Ramasami Sastri, defendant No. 1, herein obtained an ex-parte decree on 24th June 1887 against Vythilingam, the first plaintiff, herein in original suit No. 58 of 1887 on the file of the District Munsif of Kumbakonam for Rs. 1,198 on the basis of three promissory notes. Ramasami Sastri put the decree in execution. The District Collector as Agent to the Court of Wards filed a petition on 22nd October 1888 asking for stay of execution on the ground that Vythilingam was of unsound mind, that he was not represented by a guardian and that a suit was going to be filed to have the said decree set aside. This petition was rejected on 22nd November 1888. On 29th July 1889, the Collector brought the present suit against Ramasami Sastri and one Narayana Kothan, second defendant, who had purchased Vythilingam's house in execution of the said decree, but it was dismissed on 17th April 1890. On 16th July 1891, Vythilingam presented a review

* Second Appeal No. 46 of 1894.

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petition against this dismissal and joined his adopted son as second plaintiff and the assignee of the decree in original suit No. 58 of 1887 as third defendant. Whereupon the suit was restored to the file.

In the plaint it was alleged that the three promissory notes had been fraudulently got up by Ramasami Sastri and others, that Vythilingam was sued on them when he was of unsound mind and a decree obtained, that, in execution, Vythilingam's property worth Rs. 1,000 was irregularly sold for Rs. 100, that, as Vythilingam's estate including the property sold was under the Collector's management and as he (the Collector) was not made a party either to the suit or to the execution proceedings, the decree and the sale were invalid and would not bind him (Vythilingam), and that they should therefore be set aside.

Ramasami Sastri, first defendant, contended that the suit was bad for misjoinder of causes of action that the promissory notes were executed by Vythilingam in his proper senses for sums borrowed for family purpose, that as the suit No. 58 of 1887 was brought and decree obtained after Vythilingam was declared by the District Court to be sane, the Collector could not ask for the cancellation of that decree, that, at the time when his property was attached in execution of the decree, Vythilingam objected but his objection was not allowed, and that there was no reason to set aside the decree which was properly obtained, or the sale which was regularly conducted.

Second defendant, the auction purchaser, supported the first defendant.

Third defendant is the assignee from the first defendant of the latter's interest in the decree in suit No. 58 of 1887. The assignment was made on 14th March 1891 and was accepted by the Court on 23rd September 1891.

It appeared from the record that Vythilingam Pillai was found to be insane on 13th March 1885, but was subsequently certified by the District Surgeon to have recovered and was released from confinement.

The Munsif found that (1) on 15th October 1886, Vythilingam was declared *sane* and his property, which was under the management of the Court of Wards, was ordered to be restored to him; (2) that when original suit No. 58 of 1887 was brought, viz., on 12th February 1887 and when decree was passed on 24th June 1887

Vythilingam was sane; (3) that on 25th July 1888, Vythilingam was again declared to be insane by the District Court, subsequent to which the attachment and sale took place; (4) that the execution proceedings were conducted without a guardian being appointed for him, but that this only amounted to an irregularity which did not vitiate the sale in execution. He found that the second defendant purchased *bonâ fide* and that there was no evidence that the property was sold for less than the real value as alleged. He therefore dismissed the suit with costs.

On appeal the Subordinate Judge found that the promissory notes sued on in original suit No. 58 of 1887 were binding, but reversed the decree and set aside the sale. The material portion of his judgment is as follows :—

"It is conceded that the first plaintiff was not represented on "the record at the time the execution of the decree was proceeded "with. He was declared a lunatic and was in the eye of the law "not capable of acting for himself. He was in the same position "as a minor at that time. Under sections 456, 459 and 460, Civil "Procedure Code, he should have been represented by a guardian. "The proceedings, therefore, were null and void being *ultra vires*. "It is not, I think, a mere irregularity as noticed by the District "Munsif. I am inclined to hold that the Court had no jurisdiction "to sell the property in the absence of any body to represent "the defendant on record. See *Ramasami* v. *Bagirathi*(1) and "*Krishnayya* v. *Unnissa Begam*(2) and especially the observation at "page 400. If, therefore, the Court had jurisdiction, then second "defendant is protected and his purchase will be unquestionable "within the principle laid down by the Privy Council in *Rewa* "*Mahton* v. *Ram Kishen Singh*(3). The fact that second defendant "is a *bonâ fide* purchaser, does not, therefore, affect the present "question. I differ from the District Munsif on the second "question and hold that the execution sale was made without "jurisdiction, *i.e.*, without legal authority."

Defendant No. 2 preferred this second appeal.

Rajagopala Ayyar and *Tiruvenkata Chariar* for appellant.

Sankaran Nayar for respondent.

ORDER—BEST, J.—The question for decision in this appeal is whether the Subordinate Judge is right in setting aside the sale

(1) I.L.R., 6 Mad., 180. (2) I.L.R., 15 Mad., 399. (3) I.L.R., 14 Calc., 18.

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held in execution of a decree (in original suit No. 58 of 1887) obtained by one Ramasami Sastri against the respondent's father Vythilingam Pillai. Appellant is the purchaser of the property at the said sale.

The Subordinate Judge's order proceeds on the ground that, at the time of attachment and sale of the property, Vythilingam Pillai was a person adjudged under Act XXXV of 1858 to be of unsound mind and therefore a person who should have been represented by a guardian *ad litem* as required by sections 456 and 460 of the Code of Civil Procedure; and not having been so represented, the sale must be held to be null and void.

In *Ramasami* v. *Bagirathi* (1) and *Krishnayya* v. *Unnissa Begam*(2), it has been held that even where the judgment-debtor dies *after attachment* but before sale, and the sale takes place without making the representatives of the deceased parties to the proceedings, the sale is illegal and must be set aside. If so, *a fortiori* the absence of legal representatives throughout execution proceedings in a case where the judgment-debtor is dead or incapacitated at the date of the attachment, must invalidate the sale. The above Madras cases have, however, been dissented from by a Full Bench of the Allahabad High Court in *Sheo Prasad* v. *Hira Lal*(3). See also *Aba* v. *Dhondu Bai*(4). But appellant rests his case, not so much on the above decisions of the High Court at Allahabad and Bombay as on the ruling of the Privy Council in *Rewa Mahton* v. *Ram Kishen Singh*(5), to the effect that, when a Court having jurisdiction orders a sale in execution of a decree, a purchaser of the property sold is not bound to inquire into the correctness of such order any more than into the correctness of the judgment upon which the execution issues. See also *Mothura Mohun Ghose Mondul* v. *Akhoy Kumar Mitter*(6) and *Rangasami Chetti* v. *Periasami Mudali*(7), where the law is stated to be that, where the defendant is a *bonâ fide* purchaser at a Court sale, any irregularity in the proceedings, which led to the sale, cannot be relied on as a ground for setting aside the sale *after it has been confirmed and a certificate issued.*

Before it is confirmed objection can, of course, be taken under section 311 of the Code of Civil Procedure.

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(1) I.L.R., 6 Mad., 180. (2) I.L.R., 15 Mad., 399. (3) I.L.R., 12 All., 440.
(4) I.L.R., 19 Bom., 276. (5) I.L.R., 14 Calc., 18. (6) I.L.R., 15 Calc., 557.
(7) I.L.R., 17 Mad., 58.

Before we can dispose of this appeal findings are required on the following issues :—

(1) Was the sale confirmed and certificate issued under sections 314 and 316 of the Code prior to objection being taken to the same?

(2) Was the appellant a *bonâ fide* purchaser?

Additional evidence may be admitted on either side and the findings are to be submitted within a month from the date of the receipt of this order and seven days will be allowed for filing objections after the finding has been posted up in this Court.

SUBRAMANIA AYYAR, J.—The question raised before us is as to the validity of the sale of certain immovable property held in execution of the decree in original suit No. 58 of 1887, obtained by the first defendant against the first plaintiff, the alleged adoptive father of the second plaintiff (respondent), the second defendant (appellant) being the purchaser at such sale.

The contention on behalf of the plaintiffs was that, from a time prior to that when the property was attached until long after the sale, the first plaintiff was a lunatic; that the first defendant though aware of the fact took no steps to bring on record a proper person to represent the first plaintiff in the execution proceedings, but proceeded with the execution as if the first plaintiff was of sound mind; that the property was sold for about one-tenth of its proper price and consequently the sale could not bind them. That, as alleged, the first plaintiff was of unsound mind and was not represented in the execution proceedings which culminated in the sale are found by both the lower Courts. The District Munsif held, however, that the latter circumstance made the sale only irregular and, as it was not shown that the plaintiff sustained any injury by reason of the irregularity, the sale could not be cancelled. The Subordinate Judge being of opinion that the absence of any body to represent the first plaintiff in the execution proceedings rendered the sale one made without jurisdiction or legal authority, reversed the District Munsif's decree and set aside the sale.

On behalf of the second defendant, the purchaser, great stress was laid in the Courts below, as well as here, upon the ruling of the Privy Council in *Rewa Mahton* v. *Ram Kishen Singh*(1), where Sir B. Peacock observed that "If the Court has jurisdiction, a purchaser

(1) I.L.R., 14 Calc., 18.; 13 I.A., 106.

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"is no more bound to enquire into the correctness of an order for "execution than he is as to the correctness of the judgment on "which the execution issues." In laying down the rule in the wide terms just quoted, the judicial committee was, I think, only repeating the English law, respecting sales by Court, as it stood before the passing of the Conveyancing and Law of Property Act of 1881, section 70 of which provides that "an order of the Court "under any statutory or other jurisdiction shall not as against a "purchaser be invalidated on the ground of want of jurisdiction "or want of any concurrence, consent, notice or service whether the "purchaser has notice of any such want or not." The principle of the rule laid down by the Privy Council is that, so long as a Court is acting within its jurisdiction, *bonâ fide* purchasers at Court sales ought not to be affected by errors or irregularities in the decree or order for sale or other proceedings connected therewith. For, as observed by Sir Edward Sugden, L. C. in *Bowen* v. *Evans*(1). "It would be extremely dangerous to impress upon the minds "of purchasers under decrees that that which had escaped the "vigilance of the Court, its officers and of the Bar would form a "sufficient ground to set aside a sale." The following passage in the same judgment may also be usefully quoted as indicating the extent of protection accorded by law to a purchaser at such a sale. "A purchaser has a right to presume that the Court has taken the "steps necessary to investigate the rights of the parties and that it "has on that investigation properly decreed a sale; then he is to see "that this is a decree binding the parties claiming the estate; that "is to see that all proper parties to be bound are before the Court "and he has further to see that taking the conveyance, he takes a "title that cannot be impeached aliunde. He has no right to call "upon the Court to protect him from a title not in issue in the "cause and no way affected by the decree: but, if he gets a proper "conveyance of the estate so that no person whom the decree affects "can invalidate his title, although the decree be erroneous and "therefore to be reversed, I think the title of the purchaser ought "not to be invalidated. If we go beyond this, we shall introduce "doubts on sales under the authority of the Court which would be "highly mischievous." Looking to the reason of the rule, as explained in the above extracts, it appears to me that the language

(1) 1 Jo. and Lat., 178.

of the judicial committee already quoted is to be understood, not as limited to the circumstances of the particular case then before it, but, as intended to lay down a broad rule applicable to judicial sales in this country.

Applying the rule, thus enunciated, to the present case, the first point is to see whether the sale was as held by the Subordinate Judge made without jurisdiction. That the Court which passed the decree in original suit No. 58 of 1887 had jurisdiction to pass it and that the decree was in force and capable of execution when the sale took place, are not questioned. The only fact said to vitiate the sale, as already stated, is that the first plaintiff, though insane, was not, after he became so afflicted, represented in the execution proceedings. It is difficult to understand how that fact could be said to have divested the Court of the jurisdiction, which it unquestionably had, to execute the decree before the first plaintiff lost his reason, whatever other effect such fact may have upon the validity of the execution proceedings conducted against him during the period of insanity. I am therefore unable to agree with the Subordinate Judge that the sale was made without jurisdiction.

The next point for consideration is how far, if at all, does the circumstance that the plaintiff was not represented in the execution proceedings which terminated in the sale, affect its validity. In dealing with this point, it may be observed that though the Code of Civil Procedure requires no special notice to be given to a judgment-debtor of an intended sale of his immovable property, yet it does not appear to treat such a sale as a purely ex-parte proceeding. Most probably the legislature thought that, as every proclamation of sale has under section 289 to be published at some place on or adjacent to the property to be sold and a copy thereof has to be fixed up in a conspicuous part of such property (*Kalytara Chowdhrain* v. *Ramcoomar Goopta*(1)), the judgment-debtor would thereby get sufficient notice of the proposed sale. However this may be, there can be no doubt as pointed by Ránadé, J., in *Aba* v. *Dhondu Bai*(2) that the code contemplates the necessity of a judgment-debtor being a party to the sale proceedings. See also the observations in *Sheo Prasad* v. *Hira Lal*(3). The provisions of the code referred to by the learned Judge show that even after a

(1) I.L.R., 7 Calc., 466. (2) I.L.R., 19 Bom., 276. (3) I.L.R., 12 All., 440.

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decree the law gives the debtor many reasonable facilities for saving his property from sale, and if a sale has become inevitable, the law further enables him under proper restrictions to complain of irregularities in connection with it if he could show they have proved prejudicial to his interest. Now how could the interest of a judgment-debtor, who has become insane after the decree was passed, be effectually protected in execution, if it is to go on without his being represented therein. And why should the judgment-creditor in a case like this stand on a different footing from that occupied by a plaintiff or appellant, seeking relief against persons under such disability, neither of them being allowed by law to proceed without taking proper steps for the due representation of the defendant or respondent in the suit or appeal. Though section 463, Civil Procedure Code, is not expressly made applicable to execution proceedings, yet, I think, the procedure laid down therein ought, in reason, to be followed in cases like the present also, as otherwise serious harm might be done to judgment-debtors under such disability, whose helpless condition entitles them to peculiar protection at the hands of the Court directing the sale of their properties in execution. I am of opinion, therefore, that first defendant was bound to see that the first plaintiff was duly represented in the sale proceedings. And as he omitted to do so the sale must be held to have taken place without the due observance of the requirements of law on the point.

Is such a sale void or is it only liable to be set aside at the instance of the party affected? We have not been referred to any direct authority on this point. In England it is quite settled that a contract by a person of unsound mind is not void, but only voidable (See Pollock on Contracts, 6th edition, page 89, and the cases therein cited). When such is the case in respect of transactions into which private parties enter directly with insane persons, it is difficult to see how a different rule is to be laid down with reference to public sales held under the authority of a Court of Justice, it being of the greatest importance, as Sir Edward Sugden observes in the case already referred to that such sales should not be lightly set aside. Against this view it may perhaps be urged that the Indian law as to contracts by persons of unsound mind is different from the English law and that such contracts according to the proper construction of section 12 of the Indian Contract Act are void and not merely voidable. It is not, however, necessary in

this case to express any opinion on this point, for assuming for argument's sake that this construction of the section is correct, the ground on which it rests, viz., incompetency to enter into a contract, is quite inapplicable to proceedings in execution where property of judgment-debtors, whether competent to contract or not, is equally liable to be seized and sold. And considering that in such proceedings Courts could and would hold the scales evenly between judgment-creditors and purchasers on the one hand and judgment-debtors on the other, the proper course is not to treat sales like the present as entirely null, but to hold that they are liable to be set aside for good cause shown (compare *Jungee Lall* v. *Sham Lall*(1)). My view is strongly confirmed by the general tenor of the observations of Muttusami Ayyar, J., in appeal against order No. 128 of 1892 where he appears to consider that in cases concerning the validity of sales under the Civil Procedure Code, the real question is whether the defect in the sale to the confirmation of which objection is taken, resulted in substantial injury to the party affected by the same, it being, in the opinion of the learned Judge, immaterial whether the defect in question is an illegality or something less. I arrive, therefore, at the conclusion that the sale in the present instance is not void but only irregular.

The cases of *Ramasami* v. *Bagirathi*(2) and *Krishnayya* v. *Unnissa Begam*(3) relied upon on behalf of the plaintiffs, are not, in my opinion, in conflict with the above conclusion. The question in both cases was whether a sale of the property of a deceased judgment-debtor without his representative being brought on the record was valid. This Court held it was not. After the death of the judgment-debtors in these cases there was no one that could be said to have been a party to the subsequent proceedings held therein, the representatives of the deceased parties not having been brought on the record; here, however, the judgment-debtor continued to be a party, though he came under a disability. Consequently these cases do not seem to me to be on all fours with the present. Apart from this, the language employed by the Judges who decided the later of the two cases, is hardly consistent with the view suggested by the words used by the Judges who decided the earlier case. In *Krishnayya* v. *Unnissa Begam*(3), PARKER and

(1) 20 W.R., 120. (2) I.L.R., 6 Mad., 180. (3) I.L.R., 15 Mad., 399.

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WILKINSON, JJ., say that "The sale without notice to him of "property belonging to a person not a party to the suit was a "material irregularity and must necessarily cause him substantial "injury." I do not think that I shall be warranted in supposing that in adding the words "must necessarily cause him substantial injury," the learned Judges intended to use the phrase "material irregularity" to denote something that rendered the sale absolutely null and void, a sense so different from the generally accepted interpretation of the term as used in sections 311 and 312 of the Civil Procedure Code. I doubt whether the learned Judges intended to go further than to hold that the defect in the sale they had to deal with was from its nature such as to raise a strong presumption that it was calculated to cause loss to the party whose property was sold without his knowledge (compare *Gur Baksh Lall* v. *Jawahir Singh*(1)). Moreover in *Aba* v. *Dhondu Bai*(2), already referred to, Jardine and Ránade, JJ., after considering the above two cases, treat the sale without the legal representative of a judgment-debtor being made a party as an irregular and not a void proceeding.

The third and last point to be noticed is that urged on behalf of the second defendant to the effect that, upon the view that the sale was not void, it is not open to the plaintiffs to impeach it on the ground of irregularity as he, second defendant, is a *bonâ fide* purchaser and the sale has been confirmed and sale certificate issued to him.

The facts necessary to determine this point are not before us. In concurring with my learned colleague in calling for the necessary findings I wish to draw attention to an aspect of the order confirming a sale that has in my view an important bearing upon the question of second defendant's *bonâ fides*. I refer to the circumstance that an order of confirmation is more than a mere ministerial act, and is a judicial determination, between the purchaser and the judgment-debtor, that none of the objections on which the latter could have sought to set aside the sale before confirmation, exist in the particular case (sections 311 and 312, Civil Procedure Code). Now to hold that the order of confirmation in the present case is binding upon the first plaintiff, notwithstanding the fact that he was not represented at the time it was

(1) I.L.R., 20 Calc., 599. (2) I.L.R., 19 Bom., 276.

passed as he ought to have been, would be to disregard the principle *audi alterum partem*. The disregard of even such a principle seems to be justifiable, provided it is necessary for the protection of *bonâ fide* purchasers at execution sales. But before the second defendant asks the Court to uphold an order obtained in violation of so fundamental a rule of judicial procedure as that stated above, it is incumbent upon him to satisfy the Court that, notwithstanding the exercise of due diligence on his part, he was ignorant that the first plaintiff had become a lunatic; especially, as about the time the sale in question took place, he had been declared to be such under Act XXXV of 1858, and the fact that there was an adjudication to that effect appears to have been communicated to the Court executing the decree by the Collector's petition, dated 22nd October 1888. For, when the second defendant's bid was accepted, he, as one of the persons interested in securing a valid confirmation, became responsible for the regularity of the subsequent proceedings and consequently was, in my opinion, bound to see that the first plaintiff was duly represented therein. From this responsibility he could not escape except by showing that his ignorance of the condition and circumstances of the first plaintiff at the time of the sale and confirmation was not due to any omission on his part to examine the record in the execution proceedings and otherwise to make reasonable enquiries in the matter. In the absence of such proof the second defendant would, I think, fail to establish that he exercised the care and attention necessary to make out he is a *bonâ fide* purchaser as alleged. I agree in requiring the Subordinate Judge to submit findings on the matter specified in the judgment of my learned colleague. Should the findings be against the second defendant, the Subordinate Judge should also record a finding upon the contention raised by the plaintiffs that they sustained substantial injury by the irregularity in the sale.

[On return of findings the parties filed a razinama petition and the suit was compromised.]