

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sadasiva Ayyar.

PASUMARTI PAYIDANNA (THIRD DEFENDANT), APPELLANT,

1914.
April
8, 9 and 17.

v.

GADI LAKSHMINARASAMMA AND FOUR OTHERS (PLAINTIFF
AND DEFENDANTS NOS. 1, 2, 4 AND 5), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), ss. 47 and 50, O. XXI, r. 90—Transfer of decree to another Court—Judgment-debtor, death of—Application to bring in legal representatives—Jurisdiction of such Court—Minor legal representatives—Guardian ad litem, not appointed—Sale in execution—Decree-holder and auction-purchaser, fraud of—Sale, validity of—Application under Order XXI, rule 90—Conversion into a suit—Suit for setting aside, if necessary—Limitation Act (IX of 1908), arts. 12, 95 and 166—Suit for other reliefs on the ground of fraud, if maintainable.

The first defendant obtained decrees in two suits, viz., Original Suits Nos. 555 and 559 of 1903 on the file of the District Munsif's Court of Vizianagram against one S, the husband of the plaintiff and the second defendant. S died subsequent to the passing of the decrees, which were transferred to the District Munsif's Court of Rajam for execution. The first defendant filed an application in the latter Court for bringing on the record the plaintiff and the second defendant as the legal representatives of the deceased judgment-debtor and for execution of the decrees. The Court passed an order as prayed for. The plaintiff (the junior widow of S) was a minor at the time of the application and sale, but she was placed on the record as though she were a major without a guardian ad litem to act for her, though both the first defendant (the decree-holder) and the third defendant (the auction-purchaser) knew at the time that she was a minor. The second defendant (the co-widow) had then ceased to have any interest in her husband's estate. The decree-holder applied for sale in Original Suit No. 555 of 1903 of properties which were attached in both the aforesaid decrees. The third defendant, who bid for the properties for Rs. 601, caused the sale to be stopped in Original Suit No. 555 of 1903; the first defendant in collusion with the third defendant brought them to sale in Original Suit No. 559 of 1903, the reserve price was reduced to Rs. 200 and the third defendant purchased the property for Rs. 301; the executing Court was not informed of the sale in Original Suit No. 555 of 1903 and of the third defendant's bid for Rs. 601 therein. The sale was held on 19th October 1906 and was confirmed on 23rd January 1907. The plaintiff (who attained majority in July 1907) filed an application on the 16th March 1909 in Original Suit No. 559 of 1903 under section 47 of the Code of Civil Procedure for setting aside the sale and for a declaration that the sale was invalid and for other reliefs. The petition was converted into a suit under

* Second Appeal No. 1124 of 1912.

the provisions of section 47 of the Civil Procedure Code. The defendants contended that the sale was valid, that in any event the sale had to be set aside, and that both the application under section 47 of the Civil Procedure Code and the suit were barred by limitation under articles 162 and 12 of the Limitation Act respectively.

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Held, that the plaintiff, who had no guardian *ad litem* appointed for her in the execution proceedings was not a party to the suit in which the sale was made, and was entitled to bring a suit for a declaration that the sale was not binding without regard to the provisions of section 47 of the Civil Procedure Code.

That the plaintiff not having been a party to the suit and not having been sufficiently represented by any one who was a party, the sale was not binding on the plaintiff and did not require to be set aside.

That the suit which was instituted within three years of the plaintiff's attainment of majority was not barred by limitation.

Per SADASIYA AYYAR, J.—When a judgment-debtor has to set aside a sale of his property for fraud of the decree-holder or of both himself and the auction-purchaser, he can only apply under Order XXI, rule 90 of the Civil Procedure Code, subject to the limitation prescribed in article 166 of the Limitation Act; but he may be entitled to bring a suit for other appropriate reliefs on the ground of fraud against the decree-holder and the auction-purchaser, such as for damages or for injunction, subject to the limitation prescribed in article 95 of the Limitation Act.

SECOND APPEAL against the decree of V. V. S. AVADHANI, the acting Temporary Subordinate Judge of Vizagapatam, in Appeal No. 205 of 1911, preferred against the decree of C. R. VENKATESWARA AYYAR, the District Munsif of Rajam, in Original Suit No. 407 of 1909.

The facts of the case appear from the judgment of WALLIS, J.

K. Srinivasa Ayyangar and *V. Ramesam* for the appellant.

The Honourable Mr. *B. N. Sarma* for the first respondent.

WALLIS, J.—This is a Second Appeal from the decrees of WALLIS, J. the lower Courts declaring that the sale in execution of the decree in Original Suit No. 559 of 1902 on the file of the District Munsif of Vizianagram was not binding on the plaintiff. The present plaint was presented as a petition in that suit, but was registered as a plaint in a separate suit under the new provision in section 47, Civil Procedure Code.

The facts may be briefly stated. The present first defendant had obtained decrees against plaintiff's husband in two suits Nos. 555 and 559 of 1903, and after his death, his two widows, the plaintiff and the second defendant were brought on record as his legal representatives by the Court of the District Munsif of Rajam to which the decrees had been transferred for

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execution. One of the grounds taken by the plaintiff is that the Court to which the decrees had been transferred for execution was not the proper Court to bring on legal representatives of a deceased party, as decided by the Full Bench in *Swaminatha Ayyar v. Vaidyanatha Sastri*(1), and that the order was a nullity. It is, however, unnecessary to consider this point, as the sale has been held not to be binding on another ground. The main objection to the sale is that, as found by the lower Courts, at the time when the plaintiff and the second defendant, the co-widow, were brought on the record and at the date of the sale on 19th October 1906 the plaintiff was a minor only attaining her majority in July 1907, while the other widow, the second defendant, had ceased to have any interest in the estate of her deceased husband. The plaintiff was admittedly impleaded as a major though, according to the finding, the first defendant, decree-holder and the third defendant, the auction-purchaser, both knew she was a minor. The attached properties which were subject to mortgages were first put up for sale by the first defendant in execution of his decree in Original Suit No. 555 of 1903 on the 15th October 1906. The properties were put up at Rs. 600 and the sale list (Exhibit H) shows that there were no bidders on the 15th, 16th and 17th and that on the 18th the present third defendant bid Rs. 601. This sale was stopped at the instance, it is said, of the third defendant because certain other decree-holders had applied for rateable distribution in the suit, a matter which was no business of his; and on the following day, the 19th, the first defendant applied orally to the District Munsif in the other suit, No. 559 of 1903, and, on the plea that there were no bidders, got the reserve price reduced to Rs. 200, without telling the District Munsif of the sale in Original Suit No. 555 of 1903 and the bid of Rs. 601 by the third defendant. The properties were then put up to sale in Original Suit No. 559 of 1903 and knocked down to the third defendant for Rs. 301.

The Subordinate Judge has found, in my opinion rightly, that this was a fraud upon the plaintiff. The properties should have been sold in execution of the decree in Original Suit No. 555 of 1903 in which they were first put up for sale, when the

first defendant, as decree-holder in Original Suit No. 559, could if so minded, have applied for rateable distribution of the sale-proceeds; and the conduct of the first defendant and the third defendant in proceeding with the sale in the second suit and getting the reserve price reduced by suppressing from the Court what had happened at the first sale amounted to a fraud upon the plaintiff. This fraud is not without some bearing on the main issue in the case, because, in view of what happened in the absence of any proper representation of the judgment-debtor, it cannot be said that the plaintiff was not prejudiced by the omission to bring her properly on the record.

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The respondent relies on two decisions of the Privy Council in *Khizarajmal v. Daim*(1) and *Rashidunnisa v. Muhammad Ismail Khan*(2) to show that the sales are wholly void against the plaintiff because she was not properly represented, while the appellant relies on the decision of the Privy Council in *Malakarjun v. Narhari*(3) and on certain observations in *Kadir Mohideen Marakkayar v. Muthukrishna Ayyar*(4). In my opinion the decision in *Malakarjun v. Narhari*(3) has no bearing on the present case. In that case a party, who was brought on as legal representative, objected that he was not the legal representative, but the Court decided that he was, and their Lordships held that, in view of this decision which was within the jurisdiction of the Court, the sale could not be treated as a nullity even against the real representatives of the deceased who afterwards came forward. Their Lordships also held that, if the suit could be regarded as one to set aside the sale, it was barred by article 12 of the Limitation Act.

On the other hand in *Khizarajmal v. Daim*(1) one Amirbaksh, a minor, the legal representative of one Naurez, was sued by his guardian, one Alahnauraz, who was not his guardian in fact, and had not been appointed as his guardian *ad litem*, and the Court held that . . . Court sales in execution of the decrees obtained in these suits were not binding on the estate of the deceased Naurez or the minor, but were without jurisdiction and null and void. In the course of the judgment, their Lordships no doubt say that the absence from the record of one of the legal

(1) (1905) I.L.R., 32 Cal., 296 at p. 314 (P.C.).

(2) (1909) I.L.R., 31 All., 572.

(3) (1901) I.L.R., 25 Bom., 337.

(4) (1903) I.L.R., 26 Mad., 230.

PAYIDANNA¹ representatives of a deceased judgment-debtor is not always
 LAKSHMI- sufficient reason for disturbing judicial sales which otherwise have
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 WALLIS, J. say, "have properly exercised a wide discretion in allowing the
 estate of a deceased debtor to be represented by one member of
 the family, and in refusing to disturb judicial sales on the mere
 ground that some members of the family, who were minors, were
 not made parties to the proceedings, if it appears that there was a
 debt justly due from the deceased, and no prejudice is shown to
 the absent minors." But these observations do not cover such
 a case as the present in which, according to the findings, the
 other widow who was brought on the record had ceased to
 have any interest in her husband's estate, and the sale itself was
 a fraudulent one. An endeavour has been made to distinguish
 that case from the present on the ground that the decrees
 themselves were nullities owing to the minor defendant not having
 been properly represented, whereas in the present case the
 decrees were duly obtained against the deceased judgment-
 debtor. The still more recent decision of their Lordships in
Rashidunnisa v. Muhammad Ismail Khan(1) shows that there
 is no substance in this distinction. In that case, as in the
 present, the suit was brought to declare the nullity as against
 the plaintiff of certain sales in execution of decrees against a
 deceased person in which the minor plaintiff had been brought
 on as the legal representative of the deceased judgment-debtor.
 In two instances he had been represented by a woman who,
 as such, was not qualified to act as guardian *ad litem*, and in
 the third by another person whose interests were adverse. Their
 Lordships held that the plaintiff had never been a party to any
 of these suits in the proper sense of the term. They further
 held that a minor brought on in this defective manner was not a
 party to the suit within the meaning of section 244, new
 section 47, Civil Procedure Code, and did not come within the
 operation of that section.

It follows from this decision that the minor here, who had
 no guardian *ad litem* at all, was not a party to the suit in which
 the sale was made, and that she was entitled to bring the
 present suit to declare it not binding without regard to the

(1) (1909) I.L.R., 31 All., 572; s.c., 26 I.A., 168.

provisions of section 47, Civil Procedure Code. It follows also from the two decisions last mentioned that the plaintiff, not having been a party to that suit, and not having been sufficiently represented by any one who was a party seeing that the other widow had ceased to have any interest in the estate, the sale was not binding on her, and does not require to be set aside. What has been already said disposes of the question of limitation as the new article 166 and article 12 are alike inapplicable, and the suit which was instituted within three years of the plaintiff's attainment of majority is not barred. The appeal is dismissed with Costs.

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SADASIVA AYYAR, J.—The third defendant is the appellant. The plaintiff is the principal respondent. The material facts might be shortly stated thus:—

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The plaintiff is the second widow of the judgment-debtor in Original Suit No. 559 of 1903. The decree in that suit was transferred from the Vizianagram District Munsif's Court to the Rajam District Munsif's Court for execution. The Rajam District Munsif's Court on the application of the decree-holder (the present first defendant) allowed execution against the plaintiff (junior widow) and the second defendant (senior widow). Under section 234 of the old Code (section 50, clause 1 of the present Code) it was to the Court which passed the decree to which the application by the decree-holder to execute the decree against the widows of the judgment-debtor ought to have been made and it is that Court which ought to have passed the order allowing execution. However, the Rajam District Munsif's Court somehow passed the order.

Another defect in that order was that, while the two widows jointly represented the estate of the deceased judgment-debtor (each of them representing half the said interest) the decree-holder admitting this fact and knowing that the plaintiff (junior widow) was a minor, represented to the Rajam District Munsif's Court that she was a major, brought her on record as a major and conducted execution proceedings against her and brought to sale the plaint properties including her moiety of the interest thereon as if she was a major. The third defendant purchased the two moieties of the two widows in the Court-auction sale, he also knowing that she (the plaintiff) was a minor. The purchaser (third defendant) and the decree-holder

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(the first defendant) were also guilty of some other fraudulent acts (as found by the lower Appellate Court) in connection with this Court-auction sale.

The sale took place on 19th October 1906 and it was confirmed on the 23rd January 1907. The present suit was brought on the 13th March 1909 praying for the following reliefs:— (a) that the Court-auction sale of 19th October 1906 may be set aside, (b) that it may be declared invalid, (c) that such further or other reliefs might be granted, and (d) that costs might be awarded.

The lower Courts have granted the reliefs prayed for by the plaintiff. I ought to have mentioned that the plaintiff asked for the above reliefs, not by a plaint in a regular suit but by an application put in under section 47 of the Civil Procedure Code, which application was converted into a suit by the District Munsif's Court of Rajam.

So far as the merits are concerned, I need only say that on the findings of the lower Appellate Court, the plaintiff was entitled to a decree as the Court-auction sale was brought about by the fraud of the decree-holder and the Court-auction-purchaser (a fraud having two branches, one directed against the plaintiff, the junior widow of the judgment-debtor, and the other directed against the executing Court which was wilfully kept in ignorance of the fact of the plaintiff's minority and of the offer of the Court-auction-purchaser in another suit (the decree in which was simultaneously executed) of three times the purchase-money for which it was ultimately knocked down. The plaintiff also relied on the contention that the District Munsif's Court of Rajam had no jurisdiction to allow execution against her as the legal representative of her husband as that Court was not the Court which passed the decree. Having regard, however, to the decision of BENSON and MILLER, JJ., in *Thambo Pillai v. Sriramulu Naidu* (1) to the effect that an order of the executing Court allowing execution against the legal representatives of the judgment-debtor is not void, in other words, that the defect of jurisdiction in the executing Court is not such a defect in the larger sense as makes its order wholly ineffectual, I do not think that the plaintiff is entitled to succeed on that technical ground alone.

Another ground on which the plaintiff (respondent) asks us to uphold the decision of the lower Court is that as the plaintiff was not represented by a guardian in the execution proceedings she was no party at all to the proceedings and the sale thereunder, that it is only a person who was a party to the execution proceedings that is obliged to set them aside and that a person in the position of a stranger to the proceedings need only obtain a declaration that the proceedings have not affected her rights. Though the plaintiff also prayed in her plaint for setting aside the sale, that prayer may be treated as a surplusage and the suit may be treated as a mere suit for a declaration of the invalidity of the sale as against the plaintiff's rights in her husband's properties.

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In answer to this contention of the plaintiff, the appellant urged that according to the decision of the Privy Council in *Malkarjun v. Narhari*(1) the legal representative of a deceased judgment-debtor ought to have the execution sale set aside by proper proceedings even though he was not made a party to the execution proceedings and even though a wrong party had been joined as such legal representative; that on similar reasoning, a minor who was brought in as legal representative, but for whom a guardian was not appointed must also have the sale set aside by proper proceedings and should not be allowed to treat it as invalid as against her without a positive cancellation of the sale and that this rule of law applies *a fortiori* in a case like the present where a co-widow, one of the legal representatives, was a major and was on the record. The rejoinder of plaintiff to this contention of appellant is that though in the absence of fraud or collusion, where a Court and a decree-holder treat a person who is not the legal representative of the deceased judgment-debtor as such legal representative or treat one of several legal representatives as the sole legal representative and conduct execution proceedings, such execution proceedings ought first to be set aside by the true legal representative or by those legal representatives who had not been added as such by proper proceedings, that that rule does not apply to a case where the decree-holder and the Court did purport to bring in the proper legal representative (or one of the proper legal representatives) who was a

(1) (1901) I.L.R., 25 Bom., 337 (P.C.).

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minor as representing respectively the whole or a portion of the estate of the deceased judgment-debtor but had not put him or her properly on the record by appointing a guardian to act for him or her in the execution proceedings and that this non-applicability of the rule laid down in *Malharjun v. Narhari*(1), becomes more pronounced as, in this case, it was through the decree-holder's fraud and not through his mere ignorance that the minor legal representative was not represented by a guardian. I think that this contention of the plaintiff in rejoinder ought to be accepted. In the Privy Council case in *Rashidunnisa v. Muhammad Ismail Khan*(2), not only the decrees obtained against a minor without a proper guardian having been appointed for her but even Court auction sales held of the interests belonging to a minor legal representative (among the several legal representatives of a deceased judgment-debtor) were treated and declared invalid in the suit brought by the said legal representative. Mr. V. Ramesam who partly argued the appellant's case with acuteness and persistence contended that *Rashidunnisa v. Muhammad Ismail Khan*(2), did not decide that even such a minor legal representative need not have the sale set aside by proper legal proceedings and need only sue for declaration of the invalidity of the Court auction sales as against her interests. I have carefully read through that judgment. In the Court of First Instance in that case, the suit seems to have been brought (see the report at page 572) for a declaration that the decrees and sales were invalid and also for the relief that they should be set aside so far as the plaintiff was concerned. Thus, as in the present case, there seem to have been prayers for a declaration of invalidity and also for setting aside. (It is not, of course, surprising that plaintiffs in such cases are not clear in their own minds as to whether there is a necessity for a positive cancellation through Court of such sales and decrees or whether mere declaration will do when learned gentlemen of the bar are able to put forward plausible arguments for both views.) In the present case, the plaintiff has been careful to add also a prayer for "further and proper reliefs which the Court may deem fit." In that Privy Council case in *Rashidunnisa v. Muhammad Ismail Khan*(2), the Subordinate Judge seems to have

(1) (1901) I.L.R., 25 Bom., 337 (P.C.).

(2) (1909) I.L.R., 31 All., 572; s.c., 36 I.A., 168.

given both the reliefs (see page 575) which reliefs are however spoken of by the reporter as "the relief she" (the plaintiff) "claimed." Their Lordships of the Privy Council do not make any definite pronouncement on the question whether the sales were void as against the plaintiff and need not therefore be set aside and whether therefore a mere declaration of the invalidity will do, or whether they were *only voidable* by the plaintiff as regards her interests and whether therefore she should ask in the suit for a relief as to their cancellation. At page 583, their Lordships simply restore the decree of the Subordinate Judge.

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While in *Malkarjun v. Narhari*(1), the estate of the deceased judgment-debtor could be treated (owing to the wrong order of the Court which had jurisdiction to pass that order) as sufficiently represented in execution proceedings by the wrong legal representative and hence that the right legal representative should have the sale set aside by taking proper proceedings and could not treat such a sale as completely void, a legal representative who was a minor not represented by a guardian and who could therefore not act at all in the proceedings for the protection of the interests of the estate should be treated *as no party at all to the proceedings*, that the interest in the estate represented by her should also be treated as not put in a position to be legally dealt with by the proceedings in the executing Court and that such a minor legal representative need not bring a suit to have the execution proceedings set aside and might properly content herself with a prayer for a declaration of the invalidity of the execution proceedings as against her and as against the interests she possessed in the deceased judgment-debtor's estate.

I have to deal finally with the contention that the plaintiff's only remedy was by an application under Order XXI, rule 90 (old section 311) of the Civil Procedure Code to have the execution sale set aside and that that application is barred by limitation as not having been brought within the 30 days allowed for that purpose by article 166 of the Limitation Act. As I have remarked before, in this case an application was put in by the plaintiff under section 47 of the Civil Procedure Code and this suit arose out of the transformation of that application into a plaint.

(1) (1901), I.L.R., 25 Bom., 337 (P.C.).

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Before section 311 of the Civil Procedure Code was amended and re-enacted as Order XXI, rule 90 of the Civil Procedure Code, applications to set aside execution sales for fraud were treated as coming under section 244 and not under section 311. By the amended provisions in Order XXI, rule 90, an application to set aside an execution sale for fraud was put on the same footing as an application to set aside an execution sale *on the ground of material irregularity*. It seems no doubt hard upon a judgment-debtor whose properties have been sold for a song by the fraud of the decree-holder that he should be compelled to come in within 30 days though he might not have known of the fraud till after the 30 days had expired. Section 18 of the Limitation Act would not help him in getting an extension of the 30 days unless, after the date of the fraudulent sale, the decree-holder and the purchaser *kept him by fraud from the knowledge of his right* to make the application: especially where the Court-auction-purchaser has joined the decree-holder in bringing about a fraudulent sale, does it seem a denial of justice to hold that the judgment-debtor should apply within 30 days of the sale to have it set aside? But I do not see my way to get over the plain words of article 166 of the Limitation Act and I feel myself constrained to hold that if this suit is treated as an application *to set aside the sale* as distinguished from a suit *for a declaration of the invalidity of the sale as against the plaintiff's rights* it must be treated as barred by limitation. So far as the suit is for the declaration of the invalidity of the sale, it is of course not barred by limitation. The decretal portion of the judgment of the District Munsif (see page 15 of the printed pleadings) and the decree of the District Munsif (see page 38) merely give such a declaration and there is no decree directing the sale to be set aside and hence the decree seems to me to be quite correct. As regards those hard cases which I just now referred to, if the fraud was only on the part of the decree-holder and not of the Court-auction-purchaser, I think the legislature intended that a *bona-fide* Court-auction-purchaser should be protected after 30 days and that an application to set aside the sale should be brought within 30 days of the sale even though the judgment-debtor was ignorant of the sale and of the decree-holder's fraud which brought about the sale. The judgment-debtor in such a

case ought to be left to his remedy for damages caused to him by the decree-holder's fraud.

The case where both the decree-holder and the court-auction-purchaser have been guilty of fraud raises a question of greater difficulty and nicety. Is it reasonable to hold that even in such a case the judgment-debtor should only sue them for damages for the fraud after the expiry of the 30 days and cannot get back his property which had been sold in the Court-auction through the fraud of both the decree-holder and the purchaser. After anxious consideration and with great deference, I am inclined to hold that the judgment-debtor even in such a case cannot apply under Order XXI, rule 90, after the expiry of 30 days for setting aside that sale. As regards *the relief for the setting aside of the sale*, the procedure pointed out by the legislature is only by an application under Order XXI, rule 90. It may be that other appropriate reliefs which in justice are due to the judgment-debtor to get rid of the effects of the fraud practised by the court-auction-purchaser may be open to him by instituting a suit praying for such other reliefs. I do not wish to hold that the Courts are powerless to imagine, invent, and grant other appropriate reliefs in such cases. It may be that the Court without setting aside the sale can give an injunction to the Court-auction-purchaser to reconvey the property to the judgment-debtor. Such injunction would have an effect similar to the effect of a decree for specific performance of a contract to sell. The hands of Courts of Justice are not tied in these matters simply because, to support the grant of a particular appropriate relief, no exact precedent could be quoted.

As regards a suit for such other appropriate reliefs, that suit would be governed by article 95 of the Limitation Act which gives three years from when the fraud becomes known to the party wronged. In the result I would also dismiss the appeal with costs.

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