

## APPELLATE CIVIL.

*Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.*

RAMANATHAN CHETTY AND FIVE OTHERS

(PETITIONERS), APPELLANTS,

v.

ARUNACHELLAM CHETTY (RESPONDENT, ASSIGNEE—  
DECREE-HOLDER), RESPONDENT.\*

*Execution, stay of—Order of, by Appellate Court—No communication to Lower Court, effect of—When order takes effect.*

An order of an Appellate Court staying further proceedings in the Lower Court, such as holding a sale, etc., takes effect from the time it is pronounced and not from the time it is officially communicated to the lower Court and a sale held contrary to such an order whether with or without knowledge of it is liable to be set aside as having been held without jurisdiction.

*Per* SPENCER, J.—The Lower Court should have postponed the sale when having itself had no official information of the order of the Appellate Court it was moved by the party on the ground of such an order.

*Per* SADASIVA AYYAR, J.—The sale under such circumstances is so gravely irregular that it must be set aside even without proof of injury.

*Mulhukumarasami Rowther Minda Nayinar v. Kuppasami Aiyangar* (1910) I.L.R., 38 Mad., 74, dissented from by SADASIVA AYYAR, J., and distinguished by SPENCER, J.

*Hem Chandra Kar v. Mathura Sonthal* (1912) 16 C.W.N., 1081 and *Sati Nath Sikdar v. Ratanmani Nasker* (1912) 15 C.L.J., 335, followed.

APPEAL against the orders of S. RAMASWAMI AYYANGAR, the Subordinate Judge of Ramnad, in Civil Miscellaneous Petitions Nos. 322 and 323 of 1911 in Execution Petition No. 34 of 1911 (in Original Suit No. 125 of 1908) of the Chief Court of Lower Burmah.

The facts are given in the judgment of SPENCER, J., and the other facts connected with the case are given in the judgment of SADASIVA AYYAR, J.

The Honourable Mr. L. A. Govindaraghava Ayyar and A. Viswanatha Ayyar for the appellants.

S. T. Srinivasa Gopalachariar for the respondent.

SADASIVA AYYAR, J.—The facts have been set out in the judgment of my learned brother, and it is unnecessary for me

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\* Civil Miscellaneous Appeals Nos. 210 and 211 of 1911.

to repeat them. The petition put in by the first defendant's RAMANATHAN sons to set aside the Court auction sale is filed by them not on the ground that they are also parties to the decree (in which the sale was held), as represented by their father, the first defendant, but as independent persons who owned shares in the property sold and who are entitled in consequence to file a petition under Order XXI, rule 90 (old, section 311) to set aside the sale on the ground of material irregularity and consequent substantial injury. I agree with the Lower Court in its conclusion that there was no material irregularity in publishing and conducting the sale except that the sale was conducted and concluded after the High Court's order of stay (which is of course a very material irregularity). No substantial injury is proved to have been caused by any such material irregularity. The property was estimated by the Amin as worth only 56,000 and odd rupees and it was sold for 68,000 and odd rupees.

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The first defendant from his conduct in these execution proceedings has clearly proved himself to be a cunning litigant, and the affidavit produced on his behalf is not reliable even though supported by a telegram from one Palaniappa Chetty, who has not been examined. The want of bidders, I am inclined to hold, was due to the litigious nature of the first defendant who had set up his mother-in-law to file claim petitions on behalf of his (the first defendant's) sons, to bring a suit on their behalf, to put in a revision petition on their behalf against the claim order and to do several other acts, more in order to delay and defeat the decree-holder than with the *bonâ fide* object of prosecuting any tenable claim. Purchasers will naturally be chary of making bids for the property belonging to the first defendant and his sons, as they are sure to purchase a protracted litigation along with the property. Appeal Against Order No. 210 of 1911 in which the first defendant's sons are the appellants must therefore in my opinion be dismissed. The parties will bear their respective costs.

Coming to Appeal Against Order No. 211 of 1911, this appeal arises out of a petition filed under section 47, Civil Procedure Code, and also under Order XXI, rule 90, by the first defendant himself. So far as his application to set aside the sale is grounded on irregularity and substantial injury under Order XXI, rule 90, it cannot be granted for the reasons already set out by

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me in Appeal Against Order No. 210 of 1911. The contention under section 47 of the Civil Procedure Code is based on the following facts :—

The first defendant's sons put in a claim petition for release of their shares in the attached houses. The Subordinate Judge dismissed the claim petition on the 15th July 1911. On the 20th July 1911 Civil Revision Petition No. 378 of 1911 was filed in the High Court to revise the Subordinate Judge's order dismissing the claim petition. On that same date (the 20th July 1911) an *ex parte* order was obtained from a Judge of this Court stopping all further proceedings in the matter of bringing the attached houses to sale in execution of the decree. Notwithstanding the stay-order, the sale of the properties was concluded on the 21st July 1911. The question is whether such a sale is not wholly illegal as having been conducted by the Subordinate Judge's Court in violation of an order from a superior Court staying the sale. In *Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar*(1), it was held following *Bessesswari Chowdhurany v. Horro Sundar Mozumdar*(2), that the stay-order passed by a superior Court does not become effective till it is communicated to the inferior Court, and that an execution sale made by the inferior Court in ignorance of the stay-order is a legally valid sale. With the greatest respect, I am unable to agree with this decision though it is in accordance with *Bessesswari Chowdhurany v. Horro Sundar Mozumdar*(2). It seems to me that, unless the order of stay or order of injunction passed by the superior Court made it a condition that that order shall take effect only from the date of its communication to the Lower Court, or to the party enjoined (as the case may be) such an order suspends the power and jurisdiction of the Lower Court to conduct further proceedings *from the moment when the order of superior Court was passed*. I do not think that I could put the reasons for this view better than they have been enunciated in the judgments in *Sati Nath Sikdar v. Ratanmani Naskar*(3) and *Hem Chandra Kar v. Mathura Santhal*(4), and I shall therefore not attempt it. In the result, I would set aside the sales concluded on the 21st July 1911, by the Subordina

(1) (1910) I.L.R., 33 Mad., 74.

(3) (1912) 15 C.L.J., 335.

(2) (1892) 1 C.W.N., 226.

(4) (1912) 16 C.W.N., 1031.

Judge's Court of Ramnad as having been held without jurisdiction after the passing of the order of this Court staying the sale, which order was dated the 20th July 1911, and I would direct that a fresh sale be held after fresh proclamation. A sale held without jurisdiction may, in a sense be said to be a sale vitiated by material irregularity, but it is unnecessary to rely on section 311 (Order XXI, rule 90) in order to set aside such a sale, that is, it is unnecessary to prove substantial injury also; but the irregularity is so grave that, in the words of their Lordships of the Privy Council in *Malkarjun v. Narharu*(1) "it is sufficient by itself, to entitle" the judgment-debtor "to vacate the sale." Parties will bear their respective costs in both Courts. I might be permitted to remark that in respect of a stay order passed by an appellate Court, it seems to me advisable, in order to avoid future complicated litigation to provide usually that the order shall take effect only from when the order is communicated to the lower Court which has to guide itself in accordance with such order.

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SPENCER, J.—The facts, which are not denied, are that a sale of the appellant's immoveable properties in execution of decrees was commenced on July 17 and concluded on July 21, 1911.

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On July 20 an order was passed in the High Court directing an *ad interim* stay of the sale. A telegram was sent by the vakil in Madras to the vakil in Madura informing him of the result of the petition in the High Court, and it reached Madura soon after noon the same day. The Subordinate Court of Ramnad was thereupon moved by a petition accompanied by affidavit to stay the sale.

The Subordinate Judge refused to act on the telegram when he had not received official confirmation of the information, rejected the application and directed the sale to proceed. The sale was completed on the following day and was subsequently confirmed on September 2 after the High Court's stay order had been received. Meanwhile, the stay order having proved ineffective was cancelled by the High Court on August 3. Applications to set aside the sale were dismissed by the Subordinate Judge on August 29, and the judgment-debtor and his sons now appeal.

(1) (1902) I.L.R., 25 Bom., 337 at p. 348 (P.C.),

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Arguments have been addressed to us on the questions (1) whether the stay order of the High Court took effect from the time when it was pronounced or from the time when it was officially communicated to the Court under whose orders the sale was held, (2) whether the sale that was completed in spite of such an order was thereby invalidated, or whether a mere irregularity has been committed for which the judgment-debtors must prove that they have sustained substantial injury before they can claim to have the sale set aside.

The first of these questions has been the subject of judicial decisions in *Muthukumarasami Bowther Minda Nayinar v. Kuppusami Aiyangar*(1), *Bessesswari Chowdhurany v. Horro Sundar Mozumdar*(2), *Hukum Chand Boid v. Kamalanand Singh*(3) and *Mian Jan v. Man Singh*(4).

In the above-mentioned judgment of this High Court the earlier decision of the Calcutta High Court which declared that an order of an appellate Court under section 545, Civil Procedure Code (now Order XLI, rule 5) to stay execution of a decree from which an appeal is pending, being of the nature of a prohibitory order, would only take effect when communicated, was followed in preference to the later decision of the same High Court.

In Freeman on Executions, articles 32 and 33, it is stated : " A supersedeas, properly so called, is a suspension of the power " of the court below to issue an execution on the judgment or " decree appealed from ; or, if a writ of execution has issued, it " is a prohibition emanating from the court of appeal against " the execution of the writ. It operates from the time of the " completion of those acts which are requisite to call it into " existence." The effect of an execution issued pending a stay thereof granted by the Court is considered and declared to be, of course, irregular and capable of being quashed on motion. The author then proceeds to make the following observation : " But it may happen that for want of such motion the execution " is never arrested, and property is seized and sold thereunder. " In such case, as in all other cases of irregular execution, the " authorities are conflicting, some asserting that the writ, having " erroneously issued, remains in force till the error is corrected,

(1) (1910) I.L.R., 33 Mad., 74.

(3) (1906) I.L.R., 33 Cal., 927.

(2) (1892) 1 C.W.N., 226.

(4) (1880) I.L.R., 2 All., 686.

“and others maintaining that, the court for the time being RAMANATHAN  
 “having no power to issue the execution, the writ is void.” v.  
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I consider that there is much force in the observation of SPENCER, J.  
 Woodroffe, J., in *Hukum Chand Boid v. Kamalanand Singh*(1) that there is no reason why the operation of an order of the High Court should be made contingent, say, upon the due performance of the duties of the Post Office.

To adapt the words of that learned Judge to the circumstance of the present case, before the lower Court completed the sale, this Court had ordered that it should not be done. In the same case, Mookerjee, J., observed that the moment that the High Court has made an unconditional order for stay of execution, it becomes an operative order and suspends the power of the Subordinate Court to carry on further the execution proceeding.

The same idea found expression in the words of Westbury Lord Chancellor in *In re the Risca Coal and Iron Company*(2): “I shall abide by a rule of convenience; certainty in the matter is convenience; certainty you attain by abiding by the date of the order; uncertainty you introduce when you depart from that date. A variation from the common rule of abiding by the record is introduced by a departure from that date. Great laxity of practice would be introduced and encouraged by a departure from that date.”

It is not necessary in these proceedings that we should go to the length of deciding whether the view taken in *Muthukumara-sami Rowther Minda Nayinar v. Kuppasami Aiyangar*(3), that the order only became effective when communicated to the Subordinate Court was right or wrong. The circumstances of that case were sufficiently dissimilar to distinguish it from the present case. In that case there was no communication of the order received at all when the sale took place. In this case the Court had information, though of an unauthenticated character, and it was moved to stay the sale.

In *Bessesswari Chowdhurany v. Horro Sundar Mozumdar*(4), it was held that a sale was not void in law if held under circumstances in which there was nothing to fix the decree-holder with any knowledge that the sale was ordered to be

(1) (1906) I.L.R., 33 Calc., 327.

(3) (1910) I.L.R., 33 Mad., 74.

(2) (1861) 31 L.J.Ch., 429.

(4) (1892) 1 C.W.N., 226.

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postponed ; the Court executing the decree knew nothing of it, there was a valid subsisting order for sale and the sale took place in pursuance of that order. It is implied that it would not be so if the Court and the decree-holder were aware of the order of postponement. As stated in Mr. Freeman's book [at page 125 " The plaintiff and the officer charged with the execution of a " writ, on being informed of a stay of execution, whether result- " ing from an order of Court or from such a compliance with the " law as to create such a stay, should discontinue their proceed- " ings. If they persist in disregarding the stay and in acting " under the execution, they are no longer entitled to its protec- " tion,"

I am decidedly of opinion that the Lower Court in the present instance acted injudiciously in not postponing the sale in order to ascertain the truth of the information brought to its notice that the High Court had directed the sale to be stopped, if any doubt was felt as to the authenticity of the telegram.

This was the view taken by the Calcutta High Court in *Hem Chandra Kar v. Mathura Santhal*(1), a case where a Subordinate Court refused to take any notice of a telegram from the petitioners' vakil in the High Court intimating the orders of the High Court. Similarly in *Sati Nath Sikdar v. Ratanmani Naskar*(2), where a District Munsif refused to act on an affidavit accompanied by a letter written by a vakil of the High Court that the High Court had ordered an *ad interim* stay of proceedings for the ascertainment of mesne profits, it was held that the act of the Munsif amounted to a contempt of the authority of the High Court, and that the arm of the High Court was long enough to reach any person who behaved in such a manner, and that the order was wholly without jurisdiction and should be cancelled.

In *Mian Jan v. Man Singh*(3), it was held that a sale held notwithstanding an order of postponement was unlawful and invalid and should not have been confirmed seeing that it was wholly illegal. In *Nonidh Singh v. Mussumat Sohun Koor*(4) the sale was not treated as void but was set aside by the Court treating the order for postponement as invalidating the sale

(1) (1912) 16 C.W.N., 1031.

(2) (1912) 15 C.L.J., 335.

(3) (1880) I.L.R., 2 All., 636.

(4) (1872) 4 N.W.P.H.C.R., 135.

notification, in the publication of which there was consequently considered to be an irregularity. This course must be adopted here. There can be no doubt that a substantial rumour that the High Court had ordered that the sale should not proceed was calculated to affect the freedom with which intending bidders would be tempted to come forward and offer bids, if they possessed a knowledge that the whole proceedings were likely to be rendered infructuous in consequence of the order already made.

In this case also the auction lists printed in Civil Miscellaneous Appeal No. 211 of 1911 show that the plaintiff's wakil was the only bidder on the 20th and 21st July. I therefore think that there is ground to suppose that the judgment-debtors sustained substantial injury by the properties sold on these two days being knocked down to the plaintiff. The Subordinate Court may also be treated as having acted without jurisdiction when it continued a sale which the High Court had ordered to be stopped. I would allow both these appeals to the extent of setting aside the sales held on July 20th and 21st, and I would order the parties in these appeals to bear their respective costs in both Courts in consideration of the obstructive attitude of the judgment-debtors throughout the execution proceedings.

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## APPELLATE CRIMINAL.

*Before Mr. Justice Sadasiva Ayyar.*

*Re K. R. LEWIS (SECOND ACCUSED), PETITIONER.\**

1913.  
December 12.

*Indian Penal Code (XLV of 1850), ss. 40 and 79—Madras Forest Act (V of 1882), offence under—Justification, plea of, not available.*

The plea of justification provided by section 79 of the Indian Penal Code (XLV of 1860) is available only for an offence punishable by the Penal Code and not for offences punishable by any special or local law and hence the belief of the accused that he was justified in his act does not exculpate him from punishment for his guilt under section 21 of the Madras Forest Act.

*Emperor v. Kassim Isab (1912) 14 Bom. L.R., 365, dissented from.*

*In re Penchul Reddi (1899) 9 M.L.T., 216, followed.*

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\* Criminal Revision Case No. 274 of 1913.