that a party is entitled as a matter of right to claim that a statutory disregard by him should not count against him. All that was said in these cases was, that the particulars called for were not of such a nature as would have prevented the Court from acting on the petition. I am in entire accord with the proposition enunciated in *Pachiappa Achari* v. *Poojali Seenan*(1) that if an application is so defective that a Court cannot pass orders thereon in execution, it should not be regarded as being one in accordance with law: see also *Srinivasa Iyengar* v. *Tirumalai Chetty*(2). In the present case, I am not satisfied that the party failed to supply any information which the Code makes it incumbent upon him to furnish.

I would, therefore, set aside the order of the District Judge and remand the application to him for disposal on the merits.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Napier.

PETHU AYYAR (PLAINTIFF), APPELLANT,

v.

SANKARANARAYANA PILLAI AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

1916, December, 20.

Transfer of Property Act (IV of 1882), sec. 52—Lis Pendens—Attachment before judgment—Claim to attached property by third party, allowed—Suit by decree-holder against claimant to establish his right to attach—Suit dismissed—Appeal by decree-holder—Judgment-debtor, not a party to suit or appeal—Sale in execution of another decree by another decree-holder pending appeal—Decree on appeal—Subsequent sale in execution—Validity of prior sale.

A decree-holder had attached the property of his judgment-debtor before decree in his suit, and, while he was seeking to establish his right to attach and sell such property as the property of his judgment-debtor by suit against a successful claimant, another decree-holder attached the same property and brought it to sale during the pendency of the appeal in the claim suit. The judgment-debtor was not made a party to the claim proceedings or the subsequent suit or appeal. The property was again sold in execution of the decree of the former decree-holder who purchased it and sued to recover possession.

(1) (1905) I.L.R., 28 Mad., 557. (2) (1914) M.W.N., 372

* Second Appeal No. 720 of 1915.

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Held, that the auction purchaser in the prior sale was not affected by the doctrine of *lis pendens* and his purchase was valid as against the purchaser in the subsequent auction sale.

Per WALLIS, C.J.—The doctrine of *lis pendens* was inapplicable on the ground that the judgment-debtor was not a party to the claim proceedings or the subsequent suit and could not be considered to be represented in that suit by the plaintiff therein.

Lalu Mulji Thakar v. *Kashi Bai* (1886) I.L.R., 10 Bom., 400, referred to.

Even if the judgment-debtor was a party thereto, there is no *lis pendens* as the doctrine of *lis pendens* applies only to alienations which are inconsistent with the right which may be established by the decree in the suit: here as the sale in execution proceeded on the very footing that the property belonged to the judgment-debtor, the doctrine is inapplicable.

Per NAPIER, J.—The doctrine of *lis pendens* does not apply as the judgment-debtor was not actually or constructively a party to the claim suit.

Phul Kumari v. *Ghanshyam Misra* (1908) I.L.R., 35 Calc., 202 (P.C.), explained.

Krishnappa Chetty v. *Abdul Khader Sahib* (1915) I.L.R., 38 Mad., 535, dissented from.

SECOND APPEAL against the decree of A. N. ANANTARAMA AYYAR, the Subordinate Judge of Tinnevelly, in Appeal No. 84 of 1914, preferred against the decree of K. S. GOPALARATNAM AYYAR, the District Munsif of Ambasamudram, in Original Suit No. 48 of 1913.

The first defendant obtained a decree in Small Cause Suit No. 1766 of 1907, against the third defendant and in execution of the said decree, the suit properties were sold in auction and purchased by the first and second defendants on the 20th November, 1908 and in October, 1909. The plaintiff had brought a suit (Original Suit No. 144 of 1907) against the third defendant and obtained an attachment before judgment of the same properties in 1907. The third defendant's wife put in a claim petition in the said suit in respect of the attached properties. The petition was allowed in her favour on the 28th August, 1907. The plaintiff thereupon filed a suit (Original Suit No. 127 of 1908) against her The third defendant was not made a party either to the claim proceedings, or to the subsequent suit. The latter suit was dismissed on the 28th October, 1908; but the plaintiff filed an appeal which was allowed in his favour on the 8th September, 1910. The plaintiff, having obtained a decree in his suit (Original Suit No. 144 of 1907) against the third defendant, applied for attachment and sale of the properties and purchased the same in auction on the 10th November, 1911,

The plaintiff, as purchaser in auction in execution of his decree, sued to recover the properties from the first and second defendants, who were the purchasers in auction in 1908 and 1909 in execution of the decree in the Small Cause Suit above mentioned during the pendency of the appeal in the claim suit. The plaintiff contended that the auction sale to the first and second defendants was void under the rule of *lis pendens*. Both the lower Courts dismissed the suit; the plaintiff preferred a Second Appeal.

S. Ramaswami Ayyar for the appellant.

K. V. Krishnaswami Ayyar for respondents Nos. 1 and 2.

WALLIS, C.J.—This appeal raises the following question. If, when a decree-holder has attached the property of the judgment-debtor in execution of a money decree and while he is seeking to establish his right to attach and sell such property as the property of the judgment-debtor by suit against a successful claimant, the judgment-debtor not being a party to the claim proceedings or the subsequent suit, another decree-holder attaches the same property and brings it to sale, is the auction-purchaser affected by the doctrine of *lis pendens* so that a subsequent purchaser at a Court auction in execution of the decree in execution of which claim proceedings were taken acquires a good title as against him? In this case the first sale took place while the claim proceedings were pending at a stage when the claimant had succeeded in the suit and an appeal had been filed by the judgment-creditor, which was afterwards successful. The sale was in execution of a decree against the judgment-debtor and the claimant, and must be taken to have been of both their interests; but, as it has since been found that the claimant had no interest, the sale may be treated merely as a sale of the judgment-debtor's interest. The case does not come within section 64, Civil Procedure Code, which only avoids private transfers and deliveries contrary to the attachment as against all claims enforceable under the attachment, and must, I think, be held applicable to private transfers between the date of the attachment and the final decision in any claim proceedings and the subsequent suit thereon, as held in *Sukhdeo Prasad* v. *Jamna*(1). Again private alienations by the claimant though not strictly within the words of the section 64 must also be held

(1) (1901) I.L.R., 23 All., 60.

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WALLIS, C.J.

to be subject to the result of that litigation, as held in *Krishnappa Chetty* v. *Abdul Khader Sahib*(1). The present case, however, is one of a sale in execution and it is quite clear that under the Code attachment was not intended in any way to affect attachments and sales in execution of other decrees. The Code contemplates co-existing decrees and orders for sale, and contains provisions as to the Court which in such a case is to have the conduct of the sale, and as to rateable distribution of the sale-proceeds among the various decree-holders. This being so, can it be that the filing of a claim-petition in one of the suits questioning the right to attach and the subsequent suit in which strictly speaking the only question at issue is the judgment-creditor's right to attach the property as the property of the judgment-debtor operate under the doctrine of *lis pendens* against all sales in execution of other decrees against the judgment-debtor, so as to make the auction purchaser's title dependent on the result? Where the right to attach the property as the property of the judgment-debtor is admitted, a prior attachment in one suit does not affect a sale under a later attachment in another suit; and it is difficult to see why the fact that the right to attach is being questioned by a stranger to the suit should make any difference. The effect of answering the question in the affirmative would be to interfere with the due working of the provisions of the Code for the simultaneous execution of several decrees against the same judgment-debtor, and if it had been intended that any such result should follow when the right to attach is questioned by claim proceedings, it would have been expressly provided for. This question was decided in *Lalu Mulji Thakar* v. *Kashibai*(2), in the case of a judgment-debtor named Pitambar, where the Court held that the doctrine of *lis pendens* was inapplicable on two grounds, one that the purchaser at the execution sale did not derive title from Pitambar, and the other that Pitambar was not a party to the claim suit and was not represented therein by the plaintiff simply because the plaintiff sought to establish his right to attach and sell the property as the property of Pitambar. In this case also the judgment-debtor was not a party to the claim proceedings and the attaching creditor's subsequent suit, and the decision

(1) (1915) I.L.R., 38 Mad., 535. (2) (1886) I.L.R., 10 Bom., 400.

that he could not be considered to be represented in that suit is entirely in accord with the subsequent decisions of this Court in which the question has arisen in other connexions. This ground would therefore be sufficient to dispose of the present case. But even supposing the judgment-debtor to have been a party, I do not consider that that would make any difference. The observations of the learned Judges that the purchaser at the Court auction did not derive title from the judgment-debtor are not in accordance with the view now prevailing. There is however a broader principle which is sufficient to take the case out of the operation of section 52 of the Transfer of Property Act, and that is that, as held in *Muniswami* v. *Dakshanamurthi*(1), the doctrine of *lis pendens* applies only to alienations which are inconsistent with the right which may be established by the decree in the suit. Here the sale in execution proceeded upon the very footing that the property belonged to the judgment-debtor and the doctrine is therefore inapplicable to the case. The scheme of the Code as already observed is to allow executions of money decrees to go on simultaneously, and to hold that the sale in any one suit may be made available in other suits by way of rateable distribution. The lower Court was right and the second appeal must be dismissed with costs.

NAPIER, J.—The question that arises in this appeal is whether the sale of certain properties by Court auction which were purchased by defendants Nos. 1 and 2 in execution of a decree obtained by the first defendant in Small Cause Suit No. 1766 of 1907 is good against the subsequent purchase of the same properties by the plaintiff in execution of his decree in Original Suit No. 144 of 1907. It is contended by the plaintiff that the properties in question were bought by the defendants in circumstances that enable him to plead that the sale is void by virtue of the doctrine of *lis pendens*. The suit by the plaintiff was brought against the third defendant and he had attached the properties in question before judgment. The suit in which defendants Nos. 1 and 2 bought the properties was brought by the first defendant against defendants Nos. 3 and 4 who are husband and wife some time after the plaintiff's suit. Prior to the plaintiff obtaining a decree the fourth defendant, wife of the

(1) (1882) I.L.R., 5 Mad., 371.

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third defendant, put in claim petitions (Exhibits E and F) with respect to the attached properties. To these petitions she made the plaintiff a party, but not the third defendant, her husband, who was the defendant in the suit. The District Munsif held an enquiry and on the 28th August 1907 allowed the claim and directed the release of the properties from attachment before judgment (vide Exhibit C). The plaintiff then filed the suit, Original Suit No. 127 of 1908, against the fourth defendant, the claimant, not making the third defendant, her husband, a party under section 283 of the old Civil Procedure Code (Order XXI, rule 63 of the new Code) to establish the right which he claimed, viz., the right to attach. This suit was dismissed by the District Munsif on the 28th October 1908, but the decision was reversed in appeal on the 8th September 1910. The plaintiff then applied for attachment and sale, he having meanwhile got a decree against the third defendant and he purchased the properties on the 10th November 1911 in the sale in execution of his decree. Three years before this, on the 20th November 1908, the first defendant purchased the first item in Court-sale by himself in execution of his Small Cause Suit decree against defendants Nos. 3 and 4; and in October 1909 the second defendant purchased the second item in execution sale by the first defendant in the said small cause suit. There has been some contention before us as to whose interests were purchased in these last Court sales, but I am satisfied that the interests of both the defendants Nos. 3 and 4 in the properties were sold. The result of the appeal in the claim suit is that the fourth defendant has been found to have had no interest in those properties. So we are only concerned with the effect of these sales on the interest of the third defendant, the judgment-debtor in the original suit brought by the plaintiff. It is contended for the appellant that this sale was subject to his rights in the third defendant's properties and that therefore he is entitled to the properties. Mr. Krishnaswami Ayyar raises two defences to this contention, viz. (1) that as the judgment-debtor was not a party to either the claim proceedings or the claim suit, section 52 of the Transfer of Property Act does not apply; and (2) as the only claim made by the plaintiff was a right to attach, that was not a right to immoveable property within the meaning of section 52, Transfer

of Property Act, and so could not be affected by the transfer by court sale. It is now beyond dispute that involuntary sales by decree are covered by the mischief of the doctrine, though I do not think it has been decided that such sales come within the actual purview of section 52, Transfer of Property Act. I am inclined to think that they do not, as under section 2, proviso (*d*) of the Act,

"Nothing herein contained shall be deemed to affect any transfer by operation of law or by, or in execution of, a decree of a Court, save as provided by section 57 and Chapter IV of the Act",

neither of which apply to section 52. I will take it however that the doctrine is as stated in the language of the section.

It has been argued for the appellant, first that the judgment-debtor was a party to the claim proceedings. I cannot accept this contention as there is no evidence of any notice being served on him and it is clear that he did not appear. The fact that his name together with that of nine other defendants appears in the heading of the claim petition, only means that the petition was in a suit to which he and the other defendants were parties. In this view, the plaintiff must fail. But I am of opinion that even if the judgment-debtor had been a party to the claim proceedings, the position of the plaintiff would have been no stronger. Admittedly he was not a party to the claim suit. It is contended, however, on behalf of the appellant that he was constructively a party, being represented by the plaintiff; and reliance is placed on two decisions of this Court—*Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*(1) and *Krishnappa Chetty* v. *Abdul Khader Sahib*(2). The first of these cases only decides that where on the application of the plaintiff, a certain person is entered on the record in the place of a deceased defendant as his legal representative and that person raises no objection that he was not the sole legal representative of the deceased defendant and that there were others who ought to be joined, and where no other person claiming to be co-heir has applied to have his name joined as legal representative then that person who was so brought on the record sufficiently represents the estate of the deceased for the purpose of the suit, and in the absence of any fraud or collusion the decree passed in such suit will bind

(1) (1903) I.L.R., 26 Mad., 230. (2) (1915) I.L.R., 38 Mad., 535.

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the estate. This proposition has been affirmed by the Privy Council as being necessary to protect bona fide purchasers at court auction. But it is no authority for the proposition now contended for. *Krishnappa Chetty* v. *Abdul Khader Sahib*(1) is however in point. In that case Mr. Justice SADASIVA AYYAR thought himself bound by the decision of the Privy Council in *Phul Kumari* v. *Ghanshyam Misra*(2) to hold that the claim suit is only a continuation of the claim proceedings and that therefore a series of cases beginning with *Narainan, K. I.* v. *Nilakandan Nambudri, K. I.*(3) in which the contrary view was taken, must be held to be overruled. The reasons given by the learned Judge for coming to that conclusion will be found stated at pages 541 to 545. The proposition which he considers to have been established by the decision of the Privy Council, is stated by him at page 544.

> "Suits of this class though called original suits, are not in their essence original actions but merely forms of appeal allowed by the Civil Procedure Code to be brought in the guise of original suits."

With due deference to the learned Judge, I do not think that the language used by the Privy Council compels us to hold that a judgment-debtor who was a party to claim proceedings is constructively a party to a claim suit between the claimant and the attaching creditor. What was actually decided in *Phul Kumari* v. *Ghanshyam Misra*(2) was that a claim suit was properly stamped with a court-fee of Rs. 10 as a suit to

> "alter or set aside a summary decision or order"

of a Civil Court within the meaning of sub-section (1) of Article XVII, Schedule II of the Court-fees Act (VII of 1870). It had been contended in the High Court that the proper fee was one calculated on the value of the decree in execution of which the claimant's property had been wrongly attached, and the High Court held that the suit was one in which consequential relief was prayed for and therefore subject to an ad valorem court-fee. Their Lordships of the Privy Council point out that the cause of action is the order passed on the claim petition and decide that it comes exactly within the words,

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(1) (1915) I.L.R., 38 Mad., 535. (2) (1908) I.L.R., 35 Calc., 202 (P.C.).
(3) (1882) I.L.R., 4 Mad., 131.

"to alter or set aside an order."

In explaining the action, their Lordships use the following language :—

"Section 283, Civil Procedure Code, recognizes such a suit as not merely an appropriate but the only mode of obtaining review in such cases."

Now it is clear that in this sentence their Lordships are not using the term 'review' in the technical sense given to it by the Civil Procedure Code. A little further on, their Lordships say :

"Misled by the form of the action directed by section 283, both parties have treated the action as if it were not simply a form of appeal, but as if it were unrelated to any decree forming a cause of action."

I do not think that in using the words "a form of appeal," their Lordships intended to do more than indicate that this was the method by which the effect of the order could be got rid of. Nowhere in their judgment do their Lordships express any opinion that the attaching creditor represents the judgment-debtor and no such question arose in that suit. It seems to me that all that their Lordships have decided is that the words in section 283, viz.,

"may institute a suit to establish the right which he claims to the property in dispute,"

come within the words,

"to alter or set aside an order of a Civil Court,"

because the order of a Court on a claim petition is one passed in proceedings to establish the same right which is claimed to the property in dispute. In the view I have taken on the first point, I do not think it necessary to express any opinion as to what would have been the result if the judgment-debtor had been made a party to the claim suit. The appeal will be dismissed with costs.

K.R.