

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

VEYINDRAMUTHU PILLAI, APPELLANT IN ALL THE APPEALS
(RESPONDENT),

v.

MAYA NADAN (PETITIONER), RESPONDENT IN APPEAL AGAINST
ORDER NOS. 188 AND 260 OF 1918 AND

SUBBIYA NADAN (PETITIONER), RESPONDENT IN CRIMINAL NO. 315
AND CIVIL REVISION PETITION NO. 1227 OF 1918. *

Civil Procedure Code (Act V of 1908), Order XXI, rule 103 and Order XXXIV, rule 1—Transfer of Property Act (IV of 1882), ss. 52 and 91, Clause (f)—Lis Pendens—Sale in execution of a money decree pending a suit on mortgage of the property sold—Possession obtained by purchaser—Sale in execution of mortgage decree—Right of the latter purchaser to oust the former from possession—Order as to possession—Appeal—Suit.

Where lands were attached in execution of a money decree, and afterwards a suit for sale on a mortgage of the same lands was filed, but the attaching creditor was not made a party thereto, the purchaser of the lands in execution of the money decree is not entitled to retain possession of them as against a subsequent purchaser in execution of the mortgage decree.

Where claim proceedings under Order XXI, Civil Procedure Code, fall also under section 47 of the Code, Order XXI, rule 103, does not prevent an appeal against an order therein, as it falls under section 47 of the Code.

APPEALS against and Petitions to revise the orders of P. SUBBAYYA MUDALIYAR, the Subordinate Judge of Rāmnād at Madura, in Execution Application No. 374 of 1918, in Execution Application No. 322 of 1918, in Execution Petition No. 269 of 1917, in Original Suit No. 64 of 1916 (on the file of the Court of the Temporary Subordinate Judge of Rāmnād at Madura), in Execution Application No. 36 of 1918, in Execution Petition No. 1 of 1918, in Original Suit No. 64 of 1916 (on the file of the Court of the Temporary Subordinate Judge of Rāmnād at Madura) and in Miscellaneous Petition No. 165 of 1918, in Execution Application No. 157 of 1918, in Execution Petition No. 269 of 1917, in Original Suit No. 64 of 1916 (on the file of the Court of the Temporary Subordinate Judge of Rāmnād at Madura), respectively.

* Appeal Against Orders Nos. 188, 260 and 315 of 1918 and Civil Revision Petitions Nos. 515, 694 and 1227 of 1918.

The material facts and contentions appear in the Order of Reference and the opinion of the Full Bench reported in I.L.R., 43 Madras, 107 (F.B.).

T. R. Venkatarama Sastriyar for the appellant.

S. T. Srinivasagopala Achariyar for the respondent.

VEYINDRA-
MUTHU
PILLAI
v.
MAYA
NADAN.

OLDFIELD, J.—The opinion of the Full Bench has established that section 47, Civil Procedure Code, is applicable to these proceedings. It is, however, objected further that they are covered also by Order XXI, rule 103, and that in accordance with it in the absence of a suit the order of the lower Court is conclusive. It is to be observed that the reference to ‘any party’ in the rule is to any party to the petition, not to the decree under execution. This is clear in view of the form of the provision in the previous code and the division of the former section 335 into two parts, of which the present rule represents the second. The expression ‘any party’ being interpreted in the manner suggested, there is no reason for holding, as has been held in connexion with the similar claim petition procedure, that the rule excludes the application of section 47 to cases such as the present between parties or their representative.

OLDFIELD, J.

To turn next to the merits, the material facts are that the appellant is or represents the purchaser at a Court sale held in execution of a money decree. After the attachment, but before the sale, a suit was instituted on a mortgage of the properties sold and was pending at the date of the appellant's purchase. Later a decree for sale was passed and the respondent bought, when the sale took place. On his claiming delivery he found the appellants already in possession and the decisions under appeal depend on the lower Court's conclusion that, as they were there in virtue of a purchase *pendente lite*, the respondent was entitled to oust them, their right, if any, to redeem the mortgage decree and obtain possession being enforceable if at all by means of a separate suit, which they were at liberty to bring.

Argument has been based to a great extent on the fact that the attaching creditor, with reference to section 91 of the Transfer of Property Act should have been made a party to the mortgage suit and that as he was not, the appellants purchasing at the sale held under his attachment, are in some manner

VEYINDRA
MUTTU
PILLAI
v.
MAYA
NADAN.
—
OLDFIELD, J.

entitled to treat the proceedings in the mortgage suit as not binding on them. But neither section 91 nor Order XXXIV, rule 1, which is also relied on, confers on an attaching creditor any interest in the equity of redemption in the mortgage property; they are merely statutory provisions for his right to redeem and to be impleaded in proceedings on the mortgage. Independently of these provisions and as an attaching creditor, he obtained no interest in the property and nothing to which any equity in his favour founded on the infringement of those provisions could be annexed or which could pass from him to the purchaser at the sale held at his instance or which he could, after he had purchased himself (as he has done here) rely on as improving his title. This was the view taken in *Shananda Chandra Pal v. Sri Nath Ray Choudury*(1) and I concur with the learned Judges responsible for that decision in dissenting from *Ghulam Husain v. Dina Nath*(2) to this extent and for the reasons they give. Reliance also has been placed on *Venkata-Seetharamayya v. Venkataramayya*(3) in which *Ghulam Husain v. Dina Nath*(2) was followed, and on the references in it to the interest of the attaching creditor.

But whilst it may be doubted whether those references were an accurate description of the attaching creditor's position, it is material that the question before the Court was whether he was entitled to bring the property to sale, not whether the purchaser at such a sale was entitled to retain possession.

The right of the attaching creditor to bring the property to sale, notwithstanding the pendency of mortgage proceedings, may in fact be conceded without effect on the argument, on which the decision under appeal is founded. That argument is based on section 52 of the Transfer of Property Act; and what it does affect is not the attaching creditor's right to a sale, but the extent of the interest which such a sale would pass. For section 52 does not invalidate a sale held *pendente lite*, but only subjects the property in the purchaser's hands to the decree in which the pending litigation may end, as though no transfer has taken place. That is, it makes it liable for the mortgage amount

(1) (1912) 17 O.W.N., 871.

(2) (1901) I.L.R., 23 All., 467.

(3) (1914) I.L.R., 87 Mad., 418.

and imposes on the purchaser the same obligation to pay that amount in order to protect it, as would have been imposed by the decree, if no transfer had taken place. In the present case the mortgagor has made no such payment, but has allowed the property to be sold and, as he would not have been entitled to retain possession against the mortgage-decree purchaser, the appellant cannot do so either.

VEYINDRA-
MUTHU
PILLAI
v.
MAYA
NADAN.

OLDFIELD, J.

This entails acceptance of the lower Court's conclusion; and in accepting it I endorse its refusal to express an opinion as to the appellant's right to redeem by taking separate proceedings. This result entails dismissal of all the appeals. The appellant will pay the respondent's costs in each.

The connected Civil Revision Petitions are dismissed but without costs.

SESHAGIRI AYYAR, J.—I agree. Notwithstanding the conclusion of the Full Bench that the question should be dealt with under section 47 of the Civil Procedure Code, Mr. Srinivasagopala Achariyar contended that no appeal lay because of Order XXI, rule 103. There has been a change in the language between the old and the new codes in this matter and a first reading of rule 103 suggests that unless the resistance is by the judgment-debtor the only remedy of the resisting party is by way of suit. But this Court has always held, with reference to the provisions relating to claims, that if the claimant comes under section 47, the fact that a remedy by suit is given to him *qua* his rights as a claimant would not take away his right under section 47. The definition section includes in the definition of decree "the determination of any question within section 47". Therefore in my opinion, an appeal lies. I respectfully dissent from *Zipru v. Hari Supdushet*(1).

SESHAGIRI
AYYAR, J.

The main question is whether an auction purchaser under a money decree who has obtained possession can compel a mortgagee or a purchaser under the mortgage decree to leave his possession undisturbed provided he is willing to redeem the mortgage. The only decision in which there are observations in point on this subject is *Ghulam Husain v. Dina Nath*(2). That has been dissented from in *Shananda Chandra Pal v. Sri*

(1) (1918) I.L.R., 42 Bom., 10.

(2) (1901) I.L.R. 23 All., 467.

VEYINDRA-
MUTHU
PILLAI
v.
MAYA
NADAN.
—
SESHAGERI
AYYAR, J.

Nath Ray Choudury(1). In these circumstances, it is desirable to examine the basis of the contention put forward on behalf of the auction purchaser. Under section 91 of the Transfer of Property Act, an attaching decree holder has got the right to bring a suit to redeem the mortgage. Does this give him an interest in the property? The question is now settled that an attachment confers no interest in the property attached. Reading section 91 (f) with this well-recognized rule, the proper construction to be put on the section is that by virtue of his right to bring the equity of redemption to sale, he is given the privilege of instituting a suit for redemption and no more. I do not think that any interest in property, as in the case of a puisne mortgagee can be ascribed to the attaching decree holder. Mr. Venkatarama Sastriyar referred to the language of Order XXXIV, rule 1 and asked us to hold that section 91, clause (f) of the Transfer of Property Act was intended by the legislature to give an interest in the property to the attaching creditor. Rule 1 of Order XXXIV refers to the substantive right mentioned in section 91 of the Transfer of Property Act and cannot and does not enlarge that right. In my opinion, the right which the attaching creditor possesses of suing to redeem is not an interest in property. The learned vakil for the appellant contended that this conclusion would militate against *Venkata Seetharamayya v. Venkataramayya*(2). As I understand that judgment what the learned judges had to decide was whether a mortgagee purchaser who failed to implead an attaching creditor can sue for a declaration that the latter is not entitled to pursue his further remedies under the attachment. They held that as he was a necessary party and was not made a defendant, his rights were not affected. What those rights may result in need not be considered now and was not considered then. The decision rests upon the broad proposition recognized by section 85 of the Transfer of Property Act and re-enacted in Order XXXIV, rule 1, that a person who ought to have been sued is not affected by any decree that may be passed behind his back. He can regard the result of the suit as infructuous so far as his rights are concerned and proceed to enforce them, notwithstanding the decree in the suit. The principle is that a person who ought to

(1) (1912) 17 C.W.N., 871.

(2) (1914) I.L.R., 37 Mad., 418.

have been brought before the Court and was not, should be placed in *status quo ante*. That, I understand, is the principle which underlies *Mulla Vittil Seethi v. Achuthan Nair*(1). That was a case of a puisne mortgage in possession; it was held that the sale obtained in a suit brought by the first mortgagee without impleading the puisne mortgagee did not affect the latter's possession. The decision in *Lakshpat Rai v. Fakhr-ud-din*(2) may also be cited as showing that a money decree purchaser cannot claim to retain possession merely because he purchased the property first.

VEYINDRA-
MUTHU
PILLAI
- v -
MAYA
NADAN.
SESHAGIRI
AYYAR, J.

The learned vakil contended that the true principle applicable to such cases is to hold that the first purchaser is entitled to retain possession against subsequent purchasers. This principle, is no doubt well-established as regards competing purchasers under money decrees. It has also been accepted as regards contending mortgage decree purchasers. Is the extension of this doctrine justifiable when the competition is between a purchaser under the money decree and a purchaser under a mortgage decree? Having regard to the fact that no interest is transmitted by the money decree holder to his auction purchaser, I do not think such an extension is warranted. Let us see what the result of upholding such a contention would be. The attaching decree holder who had the right to sue to redeem would have his rights enlarged on account of the failure to include him as a party defendant. On what principle is this addition to his rights to be justified? Mr. Venkatarama Sastriyar suggested that as, if the money decree holder had put up the equity of redemption to sale, the purchaser standing in the shoes of the mortgagor can compel the mortgagee to grant him time to redeem, the fact that he purchased during the pendency of the mortgage suit should not affect this right. This argument necessitates the examination of the theory that the attaching creditor is not affected by *lis pendens*. It was contended on the authority of *Krishnaya v. Mallya*(3) that a person who ought to have been impleaded is not affected by the doctrine of *lis pendens*. That was a case of the application of the doctrine to co-defendants. The learned Chief Justice applied the analogy

(1) (1911) 21 M.L.J., 213 (F.B.).

(2) (1917) I.L.R., 39 All., 536.

(3) (1918) I.L.R., 41 Mad., 458.

VEYINDRA-
MUTHU
PILGAI
v.
MAYA
NADAN.
—
SEERAGIRI
AYYAR, J.

of *res judicata* to that case. I do not think it was intended to lay down that all the rights and infirmities applying to *res judicata* were attracted by *lis pendens*. No doubt section 52 of the Transfer of Property Act is not in terms applicable to Court sales. The reason being that where a competent Court having jurisdiction to do so sells property, that sale is not vitiated by the fact that another Court had *scisin* of a suit relating to the same property. But the principle underlying the section is applicable to a person who with knowledge that a suit is pending relating to the property deliberately ignores such a suit and purchases the property. True knowledge is not a factor which affects the applicability of *lis pendens*. But in estimating the value of the rights acquired by such a purchaser is it inequitable to say

“you knew that a suit was pending and if you purchased with knowledge of such a pending litigation you cannot claim to supercede the right of the mortgagee in that suit.”

I am inclined to the view that the principle of first purchase is not applicable under these circumstances; and where it conflicts with the reason underlying Order XXXIV, rule 1, namely, that a failure to implead places the respective claimants only in *status quo ante*, I am prepared to give precedence to the latter right. The decision in *Chinnu Pillai v. Venkatasamy Cheltiar*(1) turned upon the interest in property possessed by a puisne mortgagee and therefore is not inconsistent with the view I have taken.

For these reasons, I agree with the conclusion of my learned brother that the Civil Miscellaneous Appeals should be dismissed with costs and also with the order as to Civil Revision Petitions.

K.R.

(1) (1917) I.L.R., 40 Mad., 77.