I would therefore confirm the decree of the Appellate Court as regards this item and dismiss the second appeal with costs.

The memorandum of objections is allowed with costs throughout. As we have allowed the memorandum, the lower Appellate Court's direction as regards the mesne profits with reference to item 2 will apply to item 1 also. The first Court will hold an enquiry and pass a decree accordingly.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Madhavan Nayar.

MUTHUKUMARASWAMI PILLAI, APPELLANT (PETITIONER),

v.

MUTHUSWAMI THEVAN, RESPONDENT (RESPONDENT).*

1926, September 29.

Execution—Sale of property not belonging to judgment-debtor and purchase by decree-holder and satisfaction—Art. 166, *Limitation Act* (*IX of* 1908)*—Application by decree-holder to set aside sale and for further execution, after thirty days after sale—Maintainability of.*

A decree-holder got the properties of some one other than the judgment-debtor sold in execution of his decree, purchased them himself and entered up satisfaction. More than thirty days after the sale, he found out his mistake and applied for further execution by setting aside the sale.

Held, that the application for further execution was unsustainable as the sale though of a stranger's property was not void and as the prayer for setting it aside, which was a necessary preliminary for further execution, could not be granted, being barred by article 166 of the Limitation Act. *Thakur Barmha* v. *Jiban Ram Marwari* (1914) I.L.R., 41 Calc., 590 (P.C.) and

* Appeal against Appellate Order No. 94 of 1924.

MUTHU-KUMARASWAMI PILLAI v. MUTHUSWAMI THEVAN.

Tirbhuvan Bahadur Singh v. *Rameshar Baksh Singh* (1906) I.L.R., 28 All., 72 (P.C.), distinguished.

APPEAL against the Order of the Second Additional Subordinate Judge of Tinnevelly in Appeal Suit No. 52 of 1923 (Appeal Suit No. 316 of 1923 on the file of the District Court of Tinnevelly) preferred against the order of the Court of the District Munsif of Tenkasi in E.P. No. 536 of 1922 (in S.C.S. No. 619 of 1915 on the file of the Court of Subordinate Judge of Tinnevelly).

The facts are given in the judgment.

P. N. Marthandam Pillai for appellant.

R. Krishnaswami Ayyangar for respondent.

JUDGMENT.

This Civil Miscellaneous Second Appeal is against the Order of the lower Appellate Court declining to grant an execution application of the appellant under the following circumstances :—

The appellant obtained a decree against one Muthusami Thevan. In execution of that decree he attached certain property, brought it to sale and purchased it in Court auction himself on 6th October 1922. He was under the *bona fide* impression that the property belonged to his judgment-debtor, whereas it has now turned out that it really belonged to a *dayadi* of the judgment-debtor of the same name. When the Court sale was confirmed, satisfaction of the decree was recorded on 8th November 1922. Appellant, having discovered his mistake on 18th December 1922 applied to the executing Court to have the sale and the proceedings of the Court in satisfaction set aside and applied for further execution by way of attachment and sale of the real property of the judgment-debtor. Both the lower Courts have held that the application is out of time, holding that the appellant cannot succeed unless he has the sale set

aside under Order XXI, rule 91, Civil Procedure Code, the limitation for which application is 30 days from the date of sale under article 166 of the Limitation Act.

The appellant's main contention is that the execution sale being *ex-hypothesi* a sale of property which was not the judgment-debtor's property, is void and without jurisdiction, and therefore it is not necessary for him to set aside at all. If this view is negatived, then he falls back on the argument that, as his present application is an ordinary execution application, the time limit for which is three years, it is not governed by the thirty days' limitation prescribed for the application under Order XXI, rule 91, Civil Procedure Code.

As to the first contention, we are clear that the sale is not a void one. The argument put forward is that the Court has no jurisdiction to sell in execution any property which is not the property of the judgment-debtor and section 60, Civil Procedure Code, is called in aid. We do not think that is the proper section which gives the Court power to attach and sell property in execution of a decree. That is merely a section which distinguishes which species of a judgment-debtor's property may be sold in execution of a decree. The more proper section is section 51 (*b*), which is general in its terms and empowers the Court on the application of the decree-holder to attach and sell in execution any property. This section of course has to be interpreted with some common sense and does not mean that the Court is empowered to attach and sell property which it and all the parties know before the attachment to be not the property of the judgment-debtor. The common sense interpretation is that the Court has authority and jurisdiction to attach and sell in execution any property which the decree-holder puts forward as the property of his judgment-debtor, for attachment and sale. If the contention of the appellant were

MUTHU-KUMARASWAMI PILLAI v. MUTHUSWAMI THEVAN.

accepted, it would mean that a Court in selling property in execution gives a guarantee that the property sold is the property of the judgment-debtor, which is opposed to one of the fundamental principles of Court sale. It has been invariably laid down in this country and elsewhere that a Court sale carries no guarantee, that the property is the property of the judgment-debtor and that the auction-purchaser takes the risk, and bears the loss if it is subsequently discovered not to be the property of the judgment-debtor. There is therefore no warrant for the proposition that a sale by the Court of property which subsequently turns out not to belong to the judgment-debtor is void, and, in this view, it makes no difference that the auction-purchaser is the decree-holder. The principle of *caveat emptor* will apply to the decree-holder auction-purchaser equally as to any other auction-purchaser. The appellant cites a ruling in *Radha Kishun Lal* v. *Kashi Lal*(1), for the proposition that a decree-holder is in a more favourable position than a stranger auction-purchaser. But, if the decree is satisfied, the decree-holder is no longer in the position of a decree-holder; his status has altered into that of auction-purchaser. Suppose, for example, that he had had to pay more for the property than the decree amount, he is not the decree-holder in respect of that sum and in the matter of any claim to refund of that amount on the sale being set aside he is only in the position of auction-purchaser and could not under the present law recover it unless he had applied within thirty days of the sale. We are not able to accept the distinction drawn in the above Patna case. In fact, it is one of the decree-holder's duties to see that the property sold was the property of his judgment-debtor, and if he makes a mistake he must take the consequence. The law does not permit him to treat his sale as a void sale

(1) (1923) I.L.R., 2 Pat., 829.

and ignore it and put in a further execution application as if it had never taken place. It cannot be reasonably contended that the question whether a Court has jurisdiction or not to sell the property rests on the problematic decision of a problematic claim, and that a Court which allows a claim to property sold thereby declares its own lack of jurisdiction in the proceedings of an attachment and sale which led up to the claim proceeding. The logical result of that would be that the Court had no jurisdiction to decide the claim and therefore no jurisdiction to decide that it had no jurisdiction, a topsy-turvy result.

It follows then that, before appellant can again apply to execute the decree, which has been recorded as satisfied by the previous Court sale, he must have the sale set aside, the ground for the application being naturally that his judgment-debtor had no saleable interest in the property sold. To such an application Order XXI, rule 91 in terms applies and it must be put in within thirty days of the sale. Admittedly, appellant's application was not put in within that time. He says, however, that because his main relief sought for is further execution, he is entitled to a larger period of limitation for such a further execution application, and puts forward the analogy of a suit for possession by a person who cannot get possession unless he sets aside an adoption, in which case it has been held by the Privy Council that the Limitation for the suit is not the lesser period for the suit for a declaratory decree that the adoption is invalid but the larger period of twelve years—See *Tirbhuwan Bahadur Singh* v. *Rameshar Bakhsh Singh*(1) and *Velaga Mangamma* v. *Bandlamudi Veerayya*(2). We can see no analogy between that

(1) (1906) I.L.R., 28 All., 727 (P.C.).
(2) (1907) I.L.R., 30 Mad., 308.

MUTHU-KUMARASWAMI PILLAI v. MUTHUSWAMI THEVAN.

case and the present. In the present case we are concerned with the processual law which obviously prohibits execution being taken out for a satisfied decree unless the proceedings which resulted in the record of satisfaction are set aside, and the same law says that such proceedings can only be set aside by an application within thirty days of the sale. Appellant cannot get round this limitation period by merely putting in a fresh execution application. The whole purpose of Article 166 will be defeated if such a contention is upheld. When no application has been put in within the time fixed in rule 91, the sale is confirmed and becomes absolute under rule 92, and no one can disturb it on the grounds mentioned in rule 91.

The appellant relies strongly on a passage in a decision of the Privy Council in *Thakur Barmha* v. *Jibhan Ram Marwari*(1). In that case a share of a Mahal had been proclaimed for sale subject to a mortgage and it was pleaded that, notwithstanding the words of the proclamation, the sale was not subject to the mortgage, since a correction had been published before the sale in the local gazette. The Privy Council held that what was sold was what was proclaimed, and then remarked :

> "if by a mistake the wrong property was attached and sold, the only course was for the decree-holder to commence execution proceedings over again."

No question of the period of limitation within which this could be done and no question whether the sale was a void sale and could be ignored was raised in that case, and we do not therefore find it of any assistance. Nor does the case in *Sivarama* v. *Rama*(2) help. That turned on the language of section 315 of the old Civil Procedure Code, which gave an auction-purchaser two

(1) (1914) I.L.R., 41 Calc., 590 at 599. (2) (1885) I.L.R., 8 Mad., 99.

chances of recovering his money if the judgment-debtor had no saleable interest in the property sold, viz., a chance under section 313 within thirty days before the confirmation of the sale, and another under section 315 by application after the confirmation of the sale. But the latter remedy has been omitted in the present Code and, therefore, is no longer available. This is clearly pointed out in *Tirumalaisami Naidu* v. *Subramanian Chettiar*(1), *Ram Sarup* v. *Dalpat Rai*(2), and *Habib-ud-din* v. *Hatim Mirza*(3). The ruling in *Ramineedi Venkata Appa Rao* v. *Lakkoju China Ayyanna*(4) was also governed by the provisions and principles of the old Civil Procedure Code. The other cases cited by the appellant seem to us to have no useful bearing on the matter.

Respondent contended before us that no Civil Miscellaneous Appeal lies. Even if it does, we consider that the lower Appellate Court was right and dismiss this appeal with costs. The Civil Revision Petition is also dismissed.

N.R.

(1) (1917) I.L.R., 40 Mad., 1009.
(2) (1921) I.L.R., 43 All., 60.
(3) (1925) I.L.R., 6 Lah., 283.
(4) (1907) I.L.R., 30 Mad., 209.