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the first defendant-appellant will be entitled, if so advised, to require that the previous suit be reopened and adjudicated in accordance with law as against the first plaintiff. The costs of this appeal will be reserved and disposed of by the lower Appellate Court.

K.R

APPELLATE CIVIL.

*Before Mr. Justice Madhavan Nayar and
Mr. Justice Curgenvin.*

August 11,
1927.

BODAPATI ADENNA (PLAINTIFF—COUNTER-PETITIONER—
FIRST RESPONDENT), PETITIONER,

v.

BODAPATI CHINNA RAMAYYA AND OTHERS
(APPELLANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Sale of property in court-auction—Lease of property executed prior to sale—Application by lessee to set aside sale under O. XXI, r. 89, whether competent—Auction-sale, subject to lease, whether affects right to apply.

Under Order XXI, rule 89, Civil Procedure Code, a lessee, subject to whose lease immovable property was sold in Court-auction, can apply to have the sale set aside.

The word "property" in rule 89 means the tangible immovable property sold, whether or not persons other than the judgment-debtor have any interest in it, and it does not mean merely the right, title and interest of the judgment-debtor alone.

PETITION under section 115, Civil Procedure Code, and Civil Miscellaneous Second Appeal against the order of the Subordinate Judge of Bapatla, preferred against

* Civil Revision Petition No. 326 of 1925, Appeal Against Order No. 25 of 1925.

the order of the District Munsif of Ongole in C.M.P. No. 647 of 1923 in O.S. No. 712 of 1922.

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The material facts appear from the Judgment.

P. Venkataramana Rao for petitioner.

V. S. Narasimhaachar for respondents.

JUDGMENT.

The question for our decision in this civil miscellaneous second appeal (with which has been filed a civil revision petition) is whether a lessee, subject to whose lease immovable property has been sold in Court-auction, can apply under Order XXI, rule 89, of the Civil Procedure Code, to have the sale set aside. The District Munsif dismissed the application, but it was allowed by the Subordinate Judge on appeal.

Rule 89 of Order XXI runs as follows:—

“Where immovable property has been sold in execution of of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside”

upon complying with certain conditions. The argument addressed to us is two-fold:—

(a) that a lease obtained before a sale is not an “interest” held in the property by virtue of a “title acquired” before such sale; and (b) that the property sold excluded the lessee’s right and therefore that the lessee cannot be said to have an interest in that property

(a) According to section 105 of the Transfer of Property Act, a lessee is a transferee of a right to enjoy the property leased, and there is enough authority (see *Secretary of State for India v. Karuna Kanth Chowdhry*(1), and *Mohipal Sing v. Lalji Sing*(2), for the position that a lease amounts to a transfer of interest in the

(1) (1908) I.L.R., 35 Calc., 82 (F.B.) at 99.

(2) (1912) 17 C.W.N., 166.

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property, and, if there was a transfer of interest, there was, as the rule also requires, a "title acquired". In *Potti Nayaker v. Suppammal*(1), VENKATASUBBA RAO, J., went so far as to express the view that even a trespasser has an interest which would allow him to come under this rule, a view which was dissented from by the other learned Judge who composed the Bench, OLDFIELD, J. It is unnecessary for us to offer an opinion upon this point, and we mention the case rather because the view is expressed in it that a lessee may apply, an opinion also to be found in the judgment of AMEER ALI, J., in the Calcutta Full Bench Case, *Peresh Nath Singha v. Nabogopal Chattopadhyaya*(2). We can see no good reason why, if a mortgagee has an interest which enables him to apply, a lessee should not equally have an interest.

(b) The argument under this second head virtually amounts to this, that the rule does not bear what appears to be its plain meaning and that in the term "interest" is comprised only the right, title and interest of the judgment-debtor which is sold and not any other interest subject to which the sale takes place. The corresponding provision in the Code of 1882, section 310(A), has the words "any person whose immovable property has been sold" and it can hardly be questioned that the language in the present rule is of a wider scope. Nevertheless it was held by the Full Bench in *Paresh Nath Singha v. Nabogopal Chattopadhyaya*(2) that under the old wording a mortgagee was a person who could apply, although, no doubt, that decision proceeded on the footing that the auction-purchaser would be in a position to annul the mortgage. Although it is not expressly so stated, the

(1) (1920) 30 L.W., 31.

(2) (1902) I.L.R., 29 Calc., 1 (F.R.)

judgments of the learned Judges who composed the majority in that case do give some ground for the inference that the application could be made because the mortgagee's was a right which might be affected by the sale. But that decision is not upon the language of the rule as it now stands, and we cannot avoid the conclusion that MOOKERJEE, J., when in *Dulhin Mathura Koor v. Bangsidari Singh*(1) he construed the rule as relating only to a person whose interest would be "affected", in the strictly legal sense of that word, by the sale, read into it something which it does not contain and which might have been clearly expressed if it had been intended so to restrict it. Whatever may have been the reason for amending the phraseology, we think that, as the rule stands, the word "property" must mean the tangible property sold, whether or not persons other than the judgment-debtor have any interest in it, and that it does not mean merely the right, title and interest of the judgment-debtor alone. This is clearly the meaning which must be given to the word "property" in rules 62 and 91 of Order XXI, and it is the meaning which KRISHNAN, J., attached to it in *Kandaswami Asari v. Swaminatha Stapathi*(2). Any more restricted meaning would apparently limit resort to the rule to the judgment-debtor or to one of several joint judgment-debtors, or in the very unusual case of a mortgagee-decree holder applying to have the sale under his own decree set aside. Its application to the case of a sale free of a prior mortgage could hardly arise, as, under rule 12 of Order XXXIV, the consent of the prior mortgagee is necessary to that course. We think, accordingly, that there are no sufficient grounds to limit the application of the rule in the manner suggested but

(1) (1912) 15 C.L.J., 83.

(2) (1919) 10 L.W., 556.

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rather that its purpose is to include among those who can apply such persons as mortgagees and lessees of the property, who may be concerned to avoid a transfer of the judgment-debtor's title, although their own interest may not be "affected", using that word in its strictly legal sense. Accordingly we confirm the order of the Subordinate Judge and dismiss the Civil Miscellaneous Second Appeal and the Civil Revision Petition, the latter with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss.

1927,
October 18.

BATCHA CHINNA VENKATARAYUDU AND OTHERS
(PETITIONERS), PETITIONERS,

v.

THE MAHARAJA OF PITHAPURAM AND OTHERS
(RESPONDENTS), RESPONDENTS.*

Madras Estates Land Act (I of 1908), ss. 192, 125—Civil Procedure Code (Act V of 1908), O. XXI, r. 58—Claim petition by mortgagee—Rent decree in a Revenue Court—Execution proceedings in Revenue Court—Mortgage created before the Act—Decree on such mortgage before the Act—Claim petition by mortgagee, filed before the Revenue Court, whether can be entertained—O. XXI, r. 58, whether applicable under the Act.

Under section 192 of the Madras Estates Land Act, the provisions of the Civil Procedure Code, excepting a few provisions, are made applicable to proceedings under the Act; and there is no express provision which exempts Order XXI of the Code from applying to proceedings in execution in the Revenue Court of rent decrees under the Act.

* Civil Revision Petition No. 308 of 1926.