Sangiah five inches below the knee and shattered the bones. He had said, "why do you shoot him who was keeping quiet," and for that innocent protest was shot. Mr. Nugent Grant says that the murderer only hoped to maim him, only hoped perhaps to cripple him for life. It was a murderous act, without the smallest justification and it resulted in murder. We see no reason to interfere.

It cannot be said that any of the appellants has been treated with undue severity, and we dismiss their appeals.

B.C.S.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

KUMMAKUTTY AND ANOTHER (FIRST AND SECOND DEFENDANTS), APPELLANTS,

1930, March 10.

v.

NEELAKANDAN NAMBUDRI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Application under rule 89—Money specified in the rule, deposited in Court—Security bond taken by order of Court from the decree-holder for repayment of amount—Suit by applicant to establish his title to property sold, decreed in his favour—Suit by applicant to recover money on the security bond, if maintainable—Security bond, if valid—Competency of Court to take the security bond.

Where a person, other than the judgment-debtor, entitled to apply under Order XXI, rule 89, Civil Procedure Code, to set aside a sale in execution of a decree, applies and pays the amount specified in the rule, the Court has no jurisdiction to direct the

* Second Appeal No. 1521 of 1928.

KUMMAKUTTY v. NEELAKANDAN NAMBUDIRI.

decree-holder to execute a security bond for repayment of the amount to the applicant in the event of the latter succeeding in a suit instituted by him to establish his right to the property sold in execution; and the security bond is not legally enforceable in a suit by the applicant against the executant; *Narayan* v. *Amgauda*, (1920) I.L.R., 45 Bom., 1094, followed.

Where it appeared that the applicant was a purchaser of the property from the judgment-debtor, that he undertook to pay the debt of the decree-holder and had improperly obstructed and refused to pay the debt, there was no ground of equity to entitle him to enforce the security bond executed under the order of the Court.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of South Malabar in Appeal Suit No. 131 of 1927, preferred against the decree of the Court of the District Munsif of Tirur in Original Suit No. 619 of 1923.

K. P. Ramakrishna Ayyar for appellant.

A. Parameswaran for respondent.

JUDGMENT.

This appeal raises a question in regard to Order XXI, rule 89, Schedule I, Civil Procedure Code. If a person other than a judgment-debtor pays money into Court under that section, can he insist that the decree-holder shall not draw the sum out without furnishing security? The facts of the case take us so far back as 1905. One Sri Devi of Mudathode Illam conveyed in jenm to Thuppan Nambudiri, the brother of the plaintiff, her entire property (consisting of 140 items). The sale-deed (Exhibit I), is dated 16th October 1905 and mentions the consideration as Rs. 16,000. The purchaser by that deed is directed to pay certain specified debts of the vendor and it then provides that he shall also be bound to pay up all other lawful debts due by her. Eramutti, the brother of the first defendant, filed against Sri Devi, O.S. No. 561 of 1905, claiming a certain amount

as due. It was to Thuppan's interest, having regard to Exhibit I, to get the suit dismissed. He accordingly fought the case on behalf of Sri Devi and lost it in spite of his vigorous defence. As the District Munsif points out, the case was fought out up to the High Court and it was decided that the debt claimed by Eramutti was due. Thuppan then became, under the terms of Exhibit I, instantly liable to discharge this decree-debt. He, however, committed default and the decree remained unsatisfied. Sri Devi, as I have said, by the sale deed completely deprived herself of all property. Eramutti, in the circumstances, followed the only course open to him, that of attaching some items bought by Thuppan. The latter, thereupon, preferred a claim under Order XXI, rule 58. The Court rejected it, observing that, the debt not having been discharged, the property conveyed under Exhibit I remained liable. Even then, Thuppan did not honestly pay up the debt. He filed a regular suit (O.S. No. 414 of 1911) contesting the order rejecting the claim. In the meantime the attached property was brought to sale. Thuppan applied in his suit that the sale might be stopped. On 23rd October 1911, his application was dismissed. Every dilatory method was resorted to; he next applied that the sale might be adjourned. The petition he filed (Exhibit 3) contains the following significant statement:—

"The properties obtained by me from the defendant are proclaimed. The sale must be adjourned to enable me to produce the decree amount."

This application met with the same fate as the previous one. Thuppan then, determined to save his property, applied under Order XXI, rule 89, for the setting aside of the sale. He made the deposit prescribed by that rule. But, before it could be drawn out by the persons entitled, he applied that security should be taken

KUNHAKUTTY v. NEELAKANDAN NAMBUDRI.

from the decree-holder. The Court, for some reason not disclosed, complied with this request and directed that security should be furnished. Exhibit A, dated 18th December 1911, was thereupon executed by the heirs of Eramutti, including the first defendant. It contains the clause that they would bring back the amount into Court, if Thuppan should succeed in the regular suit then pending. The rest of the story may be briefly told. Thuppan won O.S. No. 414 of 1911, which dragged a weary length. The case went up as far as the High Court. All the Courts, that dealt with the suit in its various stages, held that the sale was valid; but the point to note is that the sale was upheld on the sole ground that Sri Devi acted honestly and got Thuppan to undertake by the deed to discharge her debts. There is one further fact which is important. Sri Devi's reversioners (Attaladakkam heirs) filed a suit questioning the alienation evidenced by Exhibit I. Thuppan having died, his brother, Nilakandan, the present plaintiff, filed a written statement (Exhibit 4). Seeking to justify the sale, he asserts that the terms of the sale-deed were carried out *and that the amount due to Kunhutti was fully paid up*. This statement (made in March 1921) implies that the deposit made by Thuppan under Order XXI, rule 89, had the effect of discharging the decree debt. Whether this result follows in law or not, it shows that the plaintiff was conscious that he was under a moral duty to pay up the debt. It now suits him to suggest that he made a false allegation in the written statement, to defeat the claim of the reversioners. In any event, that allegation is inconsistent with the present claim based on the security bond. That claim is shortly this. Under the bond, if Thuppan's suit was decreed, the executants bound themselves to bring back the money. Now, Thuppan having

succeeded, the plaintiff seeks to enforce the bond and claim the amount from the first defendant. It may be mentioned that this suit was filed in 1923.

The first question that arises is, was it competent to the Court to have taken the bond in question? To answer this question, one must have regard to the object and scope of Order XXI, rule 89. The Code, in various sections, lays down in what circumstances a judgment-debtor may contest the sale of his property. Similarly, there are sections under which, a person claiming adversely to a judgment-debtor, may object to attachment and sale. But Order XXI, rule 89, enacts a special provision. Its object is to put an end to every kind of contention and dispute. The judgment-debtor is saved from the threatened deprivation of his property; the decree-holder's claim is satisfied and the auction purchaser is compensated. The section would be frustrated if the person paying money under it is permitted to do so under protest. Clause 2 of rule 89 enacts:—

> "Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule."

This shows that the two proceedings referred to in this clause are utterly incompatible. If the debtor wants to keep a dispute open, he cannot claim the benefit of this section. In fact, this accords to him a special indulgence. While he is thus favoured, care is taken to provide that the interests neither of the decree-holder nor of the purchaser are sacrificed. It follows from this that, when the judgment-debtor pays the amount specified, he pays it unconditionally. The payment followed by the order setting aside the sale has the effect of automatically extinguishing the decree debt. If an application is made under rule 89 and the

KUMMIKUTTY v. NEELAKANDAN NAMBUDRI

deposit required by that rule is made within thirty days from the date of the sale, the Court has no option but to make an order setting it aside. (See rule 92.) This assumes that the decree-debt is discharged and the decree-holder's remedy is gone. The section, then, is inconsistent with the notion that payment can be made either under protest or coupled with conditions. I have so far dealt with the question on the footing that the person making the deposit is a judgment-debtor; but, under the rule, any person owning an interest in the property by virtue of a title acquired before the sale can make the application. Supposing such a person happens to be not a judgment-debtor but a third party, even then he is subject to the same restrictions. If the property is not liable to be attached for the debt, he can ignore the attachment and sale. If, on the other hand, it is liable, or he believes it to be liable, he can avail himself of this provision and get rid of the sale. But, in that case, he must be taken to have admitted the validity of the sale and it is not open to him either to dispute the sale or to get back the money. Take the case, for instance, of a debtor who, before the decree, had conveyed his property to trustees for the benefit of his creditors. The trustees, if they choose, may dispute the attachment and the Court-sale. But they may gain nothing by such a course, and, being under a duty to pay up the debt, may choose to take advantage of this provision. To hold that they would still be entitled to contest the sale or to claim a refund of the money would be wholly opposed to the principle underlying the section.

This view receives support from several decisions. In *Narayan* v. *Amgauda*(1), the property was sold in

(1) (1920) I.L.R., 45 Bom., 1094 at 1100.

execution of a decree obtained by the defendant against a third party, and purchased by the former. The plaintiff, claiming to be the owner of the property, protested against the sale and ultimately got it set aside under Order XXI, rule 89, by paying the required amount into Court. The money having been paid over to the defendant, the plaintiff sued for a refund of it, as having been involuntarily paid. It was held that the amount must be taken to have been deposited *voluntarily and unconditionally*, and therefore no suit could lie for its recovery. MACLEOD C.J. observes :—

"If, then, the plaintiff, to suit his own convenience, got rid of the sale of the judgment-debtor's right, title and interest in the property by paying the decretal amount into Court, it is quite clear that he could not recover the amount as having been involuntarily paid."

In *Raghu Ram Pandey* v. *Deokali Pande*(1), a decree had been obtained by defendants 1 and 2 against defendant 3. In execution of that decree, a certain property was brought to sale and the plaintiff objected, stating that it belonged to him and not to the debtor, but his objection was disallowed. He then deposited the decretal amount and five per cent under Order XXI, rule 89, and got the sale set aside. The money was withdrawn by defendants 1 and 2, and the plaintiff filed the suit in question for a declaration that the property belonged to him and for a refund of the amount withdrawn. In spite of a finding that he was the owner of the property, his suit was dismissed on the ground that he was not entitled to get the money back. I quote the following passage from the judgment :—

"Once a payment is made under Order XXI, rule 89, it is clear that the person making the payment cannot be heard to say that the sale was not a valid sale and that the money deposited should not be paid to the decree-holder. The judgment-debtor

(1) (1927) I.L.R., 7 Pat., 30.

KUMMAKUTTY v. NEELAKANDAN NAMBUDRI.

or the person interested is under no compulsion to make the deposit under Order XXI, rule 89. Such a deposit is a voluntary deposit and the person making the deposit cannot in my opinion maintain a suit for a refund of the money deposited by him."

The same view was taken in *Kunja Behari Singha* v. *Bhupendra Kumar Dutt*(1). The case relied upon for the plaintiff, *Kanhaya Lal* v. *National Bank of India Ltd.*(2), does not help him. The defendant bank had obtained a decree against the Delhi Cotton Mills Company and attached certain mills. The plaintiff, claiming to be the owner of the mills, paid the decree amount under protest and, having freed his property from the attachment, brought an action claiming a return of the money so paid. The Judicial Committee held that the procedure provided in the Code, in regard to claims to attached property is merely permissive and the fact that such a procedure is open to him, if he chooses to adopt it, interferes in no way with his right to take any other lawful alternative. In that case, the money was paid before the sale and the payment was not made under Order XXI, rule 89. The decision has clearly no application.

If this be the correct view, it follows that the Court had no right to take the security bond in question. It acted clearly in excess of its powers. But it may be contended that, though its action was illegal, there is a higher rule which is called into play, namely,

> "One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors, . . ."

See *Rodger* v. *The Comptoir D'Escompte De Paris*(3).

But the facts to which I have referred take the case clean out of this principle. The claim of the plaintiff

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(1) (1907) 12 C.W.N., 151. (2) (1918) I.L.R., 40 Calc., 598 (P.C.).
(3) (1871) L.R., 3 P.C., 465 at 475.

is utterly inequitable and unjust. The District Munsif has carefully analysed the facts and stated them in detail. The Subordinate Judge, who has reversed his judgment, does not advert to them, and, confining his attention merely to the security bond, thinks that there are equities in favour of the plaintiff. The truth is, as I have shown, not only is there no equity in the plaintiff's claim, but all the equities appear to be the other way. The facts, I have fully set forth, and I do not propose to repeat them. It would suffice to point out again that, first, in 1911, Thuppan stated, when applying for an adjournment of the sale, that he would bring into Court the decree amount, and that, in 1921, ten years later, the plaintiff himself (Thuppan having in the meantime died) asserted in the reversioner's suit, that the decree debt had been fully paid up. These assertions show that Thuppan as well as the plaintiff were fully conscious of their obligation under Exhibit I. The present claim is not only unjust but inconsistent with their own declarations.

The suit is dismissed, but I direct the plaintiff to pay only the costs of this Second Appeal. Some blame attaches to the first defendant who voluntarily executed the security bond and that is the reason why I do not propose to give him costs in the Courts below.

K.R.