APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley, Kt., *Chief Justice*,
Mr. Justice Cornish and Mr. Justice Pandrang Row.

1935, April 12.

L. A. KRISHNA AYYAR (FIRST RESPONDENT AND PETITIONER), APPELLANT,

v.

ARUNACHALAM CHETTIAR (PETITIONER AND THIRD RESPONDENT), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XXI, rr. 89 and 90—Conditional deposit under r. 89—If valid—Proper deposit made under r. 89—Pending application under r. 90—Competency to proceed with the trial of—Effect of order on pending application under r. 90—Entertainment of application under r. 90 after proper deposit under r. 89—Competency of.

Neither the judgment-debtor nor a person interested in the property sold can attach any condition to his deposit under Order XXI, rule 89, of the Code of Civil Procedure, and the Court cannot accept the deposit subject to any condition or protest. Once the proper amount has been deposited in time by the person entitled to make the application the Court has no power to entertain or proceed with the trial of an application under Order XXI, rule 90, of the Code but has got to set aside the sale under Order XXI, rule 89, and the fact that an order was in fact made under Order XXI, rule 90, prior to the order under Order XXI, rule 89, would not make the earlier order a valid one.

Kummakutty v. *Neelakandan Nambudri*, (1930) I.L.R. 53 Mad. 943, and *Tuhi Ram* v *Izzat Ali*, (1908) I.L.R. 30 All. 192, followed.

Kotla Satyam v. *Thammana Perraju*, (1931) 34 L.W. 399, distinguished.

APPEALS converted into revision petitions to revise the orders of the Court of the Subordinate

* Appeal Against Orders Nos. 303 and 304 of 1933 converted into Civil Revision Petitions Nos. 535 and 536 of 1935 respectively.

Judge of Coimbatore, dated 9th December 1932 and made in Execution Application Nos. 196 of 1931 and 15 of 1931 respectively in Original Suit No. 117 of 1918.

B. Sitarama Rao (with him *S. V. Venugopalachari*) for respondent.—In this appeal there is no adverse interest between the judgment-debtor and decree-holder as contemplated by *Jainulabdin Sahib* v. *Krishna Chettiar*(1) so as to give a right of appeal. The judgment-debtor is interested in upholding the transaction since his decree would be *pro tanto* discharged and the decree-holder is also interested since he gets paid to that extent. No revision would lie since there is no question of want of jurisdiction.

[BEASLEY C.J.—If the appellant's contention is correct, viz., that the payment was made for a specific purpose and the Court applied it for a different purpose, then the order would be one passed without jurisdiction.]

T. M. Krishnaswami Ayyar (with him *P. R. Ramakrishna Ayyar*) for appellant.—The cases dealing with the right of appeal are collected under the heading "appeal" in the commentary to section 47 in Mulla's Civil Procedure Code.

The Full Bench, agreeing with the submission of Counsel for respondent that there was no right of appeal, converted the appeals into civil revision petitions.

The facts and the other questions of law arising in the appeal are fully dealt with in the judgment of his Lordship the CHIEF JUSTICE.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—The facts in these appeals are that the appellant, L. A. Krishna Ayyar, obtained a decree against one S. R. Subramania Ayyar and his mother on 20th January 1919, the suit being

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(1) (1921) 41 M.L.J. 120.

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upon two promissory notes. Previously he had got an attachment of S. R. Subramania Ayyar's immovable property on 18th October 1918. Whilst this attachment was in force, Subramania Ayyar executed a mortgage of his immovable properties on 7th November 1918 for Rs. 50,000 directing the mortgagee to pay Rs. 4,000 to the plaintiff-appellant and this sum was allowed as a credit when the decree in the suit was passed. On the date of the decree the decree-holder, the appellant here, applied for the arrest of Subramania Ayyar, but that petition was dismissed. He then filed a second execution petition for the sale of the properties attached before judgment. That petition was also dismissed, this time for the decree-holder's default, on 19th April 1922. He filed a third execution petition (Execution Petition No. 35 of 1924) for the sale of the properties. No fresh attachment was effected. S. R. Subramania Ayyar filed an objection petition saying that execution should not be allowed without fresh attachment. His objection was disallowed and the sale was held on 9th February 1935 and the appellant, the decree-holder, became the purchaser of the property in Court auction. S. R. Subramania Ayyar appealed to the High Court against the order disallowing his objection to the execution. He also applied in Execution Application No. 115 of 1925 under Order XXI, rule 90, Civil Procedure Code, to set aside the sale. A few days later, namely, on 4th March 1925, the assignee from the mortgagee, Arunachalam Chettiar, applied by Execution Application No. 181 of 1925 to set aside the sale under Order XXI, rule 89, Civil Procedure

Code, depositing Rs. 3,961-3-0 in Court. Meanwhile the High Court held that the attachment before judgment fell with the dismissal of the decree-holder's petition for default on 19th April 1922 and that the property sold was not under attachment, but dismissed the appeal leaving the matter to await the decision in Execution Application No. 115 of 1925. Then the assignee-mortgagee, Arunachalam Chettiar, filed Original Suit No. 22 of 1924 in the Subordinate Judge's Court of Coimbatore on the assigned mortgage and got a decree on 28th August 1925; and, while the two petitions, already referred to, to set aside the sale were pending, Arunachalam Chettiar filed Original Suit No. 2134 of 1925 in the District Munsif's Court, Coimbatore, for a declaration that he had priority over the rights acquired by the auction-purchaser and for stopping the execution proceedings and preventing the decree-holder from drawing the money, and on 27th June 1927 got a decree only in respect of the priority claimed, the claim for the injunction and other consequential prayers being disallowed. There was an appeal against that decree by the appellant here but that was dismissed. Meanwhile, on 19th July 1926, Execution Application No. 115 of 1925, the application under Order XXI, rule 90, Civil Procedure Code, was allowed and the sale was set aside; and on the same day Execution Application No. 181 of 1925, the application under Order XXI, rule 89, Civil Procedure Code, was ordered, the following order being made:

"This third party is entitled to deposit as he is interested in the property sold. Correct amount has been deposited in time. Sale set aside."

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As regards the third execution petition, Execution Petition No. 35 of 1924, the following order was made :

" Sale set aside as per Execution Application No. 115 of 1925 and Execution Application No. 181 of 1925. Sale held without proper proclamation is not valid. Petition dismissed. See separate order."

The decree-holder, the appellant, eventually filed Execution Application No. 15 of 1931 for the issue of a cheque for Rs. 3,961–3–0, the amount deposited in Court under Order XXI, rule 89, Civil Procedure Code ; but Arunachalam Chettiar, the holder of the decree in the mortgage suit and the depositor of the amount under Order XXI, rule 89, Civil Procedure Code, filed a similar petition for the payment back of the amount deposited by him alleging that the sale was set aside under Order XXI, rule 90, Civil Procedure Code, and that he was therefore entitled to get back the amount deposited by him. The learned Principal Subordinate Judge held that the appellant, the decree-holder-auction-purchaser, had no right to the money and that Arunachalam Chettiar had the right to withdraw the money deposited by him. Hence these appeals.

The case put forward in the lower Court and here on behalf of Arunachalam Chettiar, the respondent, was that he deposited the money in Court subject to a condition or under protest and that it was not meant to be there to be taken by the decree-holder unconditionally. In his affidavit in support of the petition he stated that he had got an interest in respect of the property sold in auction but that, as there had been no fresh attachment after the dismissal of the appellant's

execution petition and the auction sale was without any fresh attachment, it was not legally valid. He further stated :

"The said legal objection is always valid in my case and I can act upon it. Yet I have paid the amount now in connection with the said auction sale."

The learned Subordinate Judge has dismissed the appellant's execution petition because, when the respondent's petition under Order XXI, rule 89, Civil Procedure Code, was filed, the first judgment-debtor had already filed a petition under Order XXI, rule 90, Civil Procedure Code, and he adds :

"If that petition was ultimately allowed, there will be no scope for a petition or order under Order XXI, rule 89. That petition was ultimately allowed and the sale was set aside under Order XXI, rule 90. It appears that the orders on both the petitions for setting aside the sale were passed on the same day, i.e., 19th July 1926, and both the petitions were granted but it seems to me that, after the petition under Order XXI, rule 90, was allowed, there was no sale which should be set aside by the depositing of money and that the order in Execution Application No. 181 of 1925 was a surplusage and was unnecessary. Hence, it may be taken that the matters will stand as if there was no petition at all under Order XXI, rule 89, filed by Arunachalam Chettiar and no deposit made by him under that section."

He disallows the petition also upon the ground that the deposit made by Arunachalam Chettiar was not a voluntary deposit but an involuntary one under protest and says that there were indications that Arunachalam Chettiar paid the money not with a view to its being drawn by the decree-holder, and so the money must be considered to have been paid only under protest and that

"it cannot be said that there was any real setting aside of the sale under Order XXI, rule 89, Civil Procedure Code."

The first question to be considered is whether the lower Court was right in thinking (i) that the

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money was paid in under protest by Arunachalam Chettiar and (ii) that he was entitled on that account thereafter to get a refund of the money so deposited. With regard to (i) I do not understand Arunachalam Chettiar's affidavit to amount to more than a reservation of his rights to impeach the validity of the sale elsewhere, but I am prepared to deal with the case on the assumption that there was a deposit under protest. Under Order XXI, rule 89, the applicant may apply to have the sale set aside on his depositing in Court (*a*) for payment to the purchaser a sum equal to five per cent of the purchase-money and (*b*) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder. There is nothing in that rule which appears to permit any conditional deposit, and it is very fairly conceded by Mr. Sitarama Rao that the deposit must be unconditional. This question has been very clearly and fully dealt with in a very interesting judgment of VENKATASUBBA RAO J. in *Kummakutty* v. *Neelakandan Nambudri*(1). The head-note is as follows :

"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 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*(2) followed."

(1) (1930) I.L.R. 53 Mad. 943. (2) (1920) I.L.R. 45 Bom. 1094.

On page 947 VENKATASUBBA RAO J. says:

"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."

He further points out that, on such an application and on the deposit required by that rule being made within thirty days from the date of the sale, the Court has no option but to make an order setting it aside. That is by reason of Order XXI, rule 92. He is also of the opinion that, supposing such a person happens to be not a judgment-debtor but a third party, even then he is subject to the same restrictions. Reference is made in that judgment to *Narayan* v. *Amgauda*(1). There it was held that a person who applies and makes

(1) (1920) I.L.R. 45 Bom. 1094.

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the deposit under Order XXI, rule 89, cannot obtain a refund of the amount deposited on the plea of its having been involuntarily paid. The view taken there was that the amount must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally and therefore no suit would lie for its recovery. On page 1102, MACLEOD C.J. says :

"The auction-purchaser is entitled to the benefit of his purchase whatever it may amount to, and it is only under certain conditions that he can be deprived of that benefit, namely, that he gets five per cent for the loss of his bargain, and the decree-holder gets the benefit of his execution sale. If the Legislature had intended that sales could be set aside if payment was made into Court conditionally, then it would have said so."

He also says :

"It seems to me that, when it is expressly provided that the money should be paid for any particular purpose, i.e., under Order XXI, rule 89, such money could not be treated as assets held by a Court."

And SHAH J. says that, upon such an application and the payment of the deposit of the amount required by the rule, it is obligatory upon the Court to set aside the sale as provided by rule 92 (2). *Raghu Ram Pandey* v. *Deokali Pande*(1) decides that, where a property has been sold in execution of a money decree and a payment is made under Order XXI, rule 89, Civil Procedure Code, the person making such payment must accept the validity of the sale and cannot, therefore, maintain a suit for the setting aside of the sale and a refund of the money deposited by him. On page 33, KULWANT SAHAY J. says :

"He cannot make a payment under Order XXI, rule 89, and at the same time challenge the validity of the sale. A

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

payment under rule 89 must be an unconditional payment with the object of the money being paid to the decree-holder. 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 or the person interested is under no compulsion to make the deposit under Order XXI, rule 89."

It is contended on the other side that *Kotla Satyam* v. *Thammana Perraju*(1), a decision of REILLY and ANANTAKRISHNA AYYAR JJ., is against the appellant. There, a certain house was attached in execution as that of the judgment-debtor, and a third party who had purchased it from the judgment-debtor in a private sale prior to attachment brought, on his claim being disallowed, a claim suit, and, on the property having been sold during the pendency of that suit, he had the sale set aside by depositing under protest the amount required by Order XXI, rule 89, Civil Procedure Code, and subsequently succeeded in his claim suit and brought a suit against the decree-holder and the auction-purchaser, who was merely the decree-holder's benamidar, for recovery of the amount which was paid by him into Court and withdrawn by them. It was held that he was entitled to get back the sale-price as an involuntary payment made under coercion within the meaning of section 72 of the Contract Act. The plaintiff's application there stated that

> "money has been paid into Court under protest and the first defendant-counter-petitioner may take money for the present",

and the sale was accordingly stopped and the decree-holder drew out the money and in doing

(1) (1931) 34 L.W. 399.

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so must be assumed to have done so on those terms. ANANTAKRISHNA AYYAR J. says on page 407 :

"As I have already said, the petition filed by the present plaintiff when depositing the amount stated in so many words that it was deposited under protest and it also gave clear information to the present first defendant of the steps that the person depositing the money was proposing to take in respect of the matter."

A number of authorities are discussed in the judgments of REILLY and ANANTAKRISHNA AYYAR JJ., most of them relating to payments made to prevent sales or attachments. The Bench decided the case upon the view that, although the deposit was made and the application purported to be filed under Order XXI, rule 89, Civil Procedure Code, it was not really an application under that order and rule, and that the decree-holder chose to accept the money on the terms upon which it was deposited and did not choose to object to the application on the ground that it contained conditions which were not agreeable to him or open to the petitioner. They therefore held that it was not a voluntary payment and could be recovered. The deposit in that case was treated as being entirely outside Order XXI, rule 89, and the Bench under those circumstances did not consider whether a deposit made under Order XXI, rule 89, under protest could be recovered by the depositor. In the present case the application certainly purported to be one under Order XXI, rule 89, and the order made upon it by the Court was clearly an order made on such an application. It reads as follows :

"This third party is entitled to deposit as he is interested in the property sold. Correct amount has been deposited in time. Sale set aside."

That is shown by the reference to the correct amount as having been deposited and its having been deposited in time, namely, thirty days under article 166 of the Limitation Act which applies to such an application, and the statement that the petitioner is interested in the property sold. There is nothing in the order which indicates that the Court accepted the deposit as a conditional one even if the Court had power to do so. In my opinion, the application must clearly be taken as one under Order XXI, rule 89, and that distinguishes the present case from *Kotla Satyam* v. *Thammana Perraju*(1). *Shankerrao Keshavrao* v. *Vadhilal Mulchand*(2) is another case of a deposit made under Order XXI, rule 89. There, a suit was filed for the amount which the plaintiffs had deposited in order to set aside the sale. The payment by the plaintiffs was a payment made to save the property and get it back from the mortgagee-decree-holder who had wrongly allowed it to be sold in execution of the mortgage decree; but, following *Narayan* v. *Amgauda*(3), it was held that the amount paid must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally and that therefore no suit would lie for its recovery and that a person cannot be allowed to go back on his own act and claim the amount back from the decree-holder after he has secured the benefit of having the sale set aside. *Kanhaya Lal* v. *National Bank of India, Ld.*(4), a decision of the Privy Council, is of no assistance to the respondent. In that case, the plaintiff was the proprietor of the Delhi

(1) (1931) 34 L.W. 399.
(2) (1932) I.L.R. 57 Bom. 601.
(3) (1920) I.L.R. 45 Bom. 1094.
(4) (1913) I.L.R. 40 Calc. 598 (P.C.).

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Cotton Mills against which the defendant bank had an unsatisfied decree. The latter applied for attachment of the property and premises of the Delhi Cotton Mills Company, attached the property, knowing it to belong to the plaintiff, and dispossessed him. The plaintiff, in order to get rid of the attachment, was compelled to pay the balance due to the defendant under the decree against the Delhi Cotton Mills Company and did so under protest. It was held that the plaintiff was entitled to recover the money so paid as being an involuntary payment produced by coercion, namely, the wrongful interference of the defendants with his full and free enjoyment of his own property. It was held that the plaintiff was clearly entitled to rid himself of that unlawful interference with the lawful enjoyment of his property by any lawful means without thereby affecting his right to hold the defendants liable for that which they had thus caused him to do, although the paying under protest was not the only course open to him. At page 609 it is stated:

> "He might have taken legal proceedings, by which sooner or later he might have rid himself of the interference. But to do so would have involved his submitting to the wrong for all the period necessary for those proceedings to be effective, and that might have been a serious aggravation of the wrong."

That case, therefore, was a case of an owner of property in possession of it being dispossessed and making an involuntary payment to prevent dispossession. In *Valpy* v. *Manley*(1) a judgment had been obtained against a firm which subsequently became bankrupt, and a writ of *fi fa* issued upon that judgment. A warrant was

(1) (1845) 1 C.B. 594; 135 E.R. 673.

granted and the Sheriff's officer proceeded to the premises of the judgment-debtors. They, however, had previously on the same day executed a deed conveying all their property and effects to trustees in trust for the benefit of their creditors. The Sheriff's officer, therefore, did not make any actual seizure but said that he considered himself in possession. Later on, a fiat in bankruptcy issued against the judgment-debtors and a messenger entered and remained in possession. The next day an inventory of the property was made under the Sheriff's warrant and a cart-shed was broken open and a waggon taken out. The assignees of the bankrupts on learning that the Sheriff intended to sell paid through a clerk the amount claimed on the writ under protest. They were held entitled to recover the money so paid in an action for money had and received to their use on the ground that the payment was not voluntary but was made for the purpose of averting a threatened evil and the money was paid not in satisfaction of the writ but to induce the Sheriff's officer to refrain from putting into execution his threat to sell the property. That case also, in my opinion, is distinguishable by reason of the order in question here. The deposit is made on the footing that there has been a valid sale and is made in satisfaction of the decree. In my view, the reported cases where claimants made payments to avert sales of property and the payments were therefore payments made under coercion are of no real assistance in this case. The judgment-debtor or a person interested in the property cannot attach any condition to his deposit under Order XXI, rule 89, and the Court

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cannot accept the deposit subject to any condition or protest. Once the proper amount has been deposited in time by the person entitled to make the application, the Court has no option but at once to make the order setting aside the sale; and the fact that another application has been made by the judgment-debtor under rule 90 and an order setting aside the sale was made thereon does not make any difference, though the contention put before us was that it did because we were invited to assume that the order made on the application under rule 90 was made before the order under rule 89; but there is nothing to show which was prior in time, and certainly no inference that the former was can be drawn. On the contrary, in *Tuhi Ram* v. *Izzat Ali*(1), in the opinion of STANLEY C.J. and BURKITT J., as soon as the application was made and the money deposited in Court under the rule (the old rule which is similar to the present), it was the duty of the Collector to pass an order setting aside the sale, and he ought not, after the deposit was made, to have entertained the application put in to set aside the sale on the ground of material irregularity. I agree with that opinion, which I think is obviously right, because rule 89 involves no enquiry at all but rule 90 does, and that enquiry may result in the dismissal of the application, whereas the former rule gives no option to the Court but to set aside the sale. The respondent allowed the order to be made. He did not ask for his deposit back and it was an advantage to him to retain the order on his application because, in the event of an appeal against the order made on

(1) (1908) I.L.R. 30 All. 192.

the application under rule 90 being successful, he would still retain the benefit of his order against which there could be no appeal. In my view, the lower Court's order was, therefore, wrong.

But it was contended that no appeal lies against the lower Court's order as it is not an appealable one as it does not come within the terms of section 47 of the Code of Civil Procedure. In my view, that contention is sound, but the appellant asks to be allowed to convert the appeals into civil revision petitions and that, in my view, he ought to be allowed to do, because, in view of my opinion on the main question, the lower Court had no jurisdiction to entertain the respondent's application for the payment out of the money to him, in which view a civil revision petition would clearly lie. The appeals will accordingly be converted into civil revision petitions which will be allowed ; and on them the order will be made setting aside the order of the lower Court and giving a direction to the lower Court to order repayment of the money in question into Court, the respondent having taken it out, and to pay it out to the appellant. As this is a case of restitution the amount will be repaid with interest at six per cent. The appellant will get his costs in the lower Court in both the appeals and his costs here in Civil Miscellaneous Appeal No. 303 of 1933 and there will be no order as to costs here in Civil Miscellaneous Appeal No. 304 of 1933. The appellant will pay court-fees in respect of the civil revision petitions.

CORNISH J.—I agree.

PANDRANG ROW J.—I also agree.

G.R.