

KANNIAPPA
NAICKER
& Co.
v.
COMMISSIONER
OF
INCOME-TAX.

The individual shares of the partners must be specified in the instrument of partnership. They were not. That being so, the Income-tax Officer could refuse registration on that ground. The answer to this question, therefore, must be in the negative.

As regards costs, as the main contention has been upon question (a) and the assesseees have succeeded, in our opinion they are entitled to the costs which we fix at Rs. 250. The sum of Rs. 100 deposited by the assesseees is ordered to be refunded to them.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair.

MARUDAMUTHU KADURAR (PETITIONER), PETITIONER,

v.

ARUMUGASAMI KADURAR (MINOR) AND ANOTHER,
REPRESENTED BY THEIR MOTHER AND NEXT FRIEND SWAYAMBA
AMMAL, (RESPONDENTS), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXI, r. 89—
Execution sale—Application by judgment-debtor to set
aside—Amount to be deposited by him as condition of—
Purchaser of portion of property at sale—Amount deposited
into Court by—Judgment-debtor's right to use—Consent of
purchaser to use.*

In execution of a decree three items of property of the judgment-debtor were sold, the first lot being purchased by A, the

* Civil Revision Petition No. 1039 of 1935.

second by B and the third by the decree-holders themselves. Pending confirmation of the sale, the judgment-debtor privately sold the first lot to A and the second to B. A and B deposited in Court amounts which, together with an amount deposited by the judgment-debtor himself, were sufficient to cover the amount mentioned in the sale proclamation *plus* 5 per cent on the sale of the third lot *plus* the poundage in respect of that lot. A, B and the judgment-debtor applied under Order XXI, rule 89, Civil Procedure Code, for the setting aside of the sale. A and B being themselves purchasers of two items of the property were incompetent to apply under Order XXI, rule 89. The question was whether the judgment-debtor had deposited in Court the amount necessary for making the payments under clauses (a) and (b) of Order XXI, rule 89. The amount deposited by him was not by itself sufficient for the purpose but A and B had expressed their willingness that the amounts deposited by them might be used by the judgment-debtor. It was urged that taking those amounts also into consideration, the judgment-debtor must be held to have deposited in Court an amount sufficient to satisfy the requirements of Order XXI, rule 89.

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Held that the amounts deposited by A and B could not be taken into consideration and that the judgment-debtor had not therefore deposited the necessary amount.

After the deposit by A and B, the money deposited by them was in the custody of the Court till final orders were passed by it with respect to the sale and they could not, while the money was kept in the custody of the Court, operate upon it to enable the person wanting to set aside the sale to use it for the purpose of depositing in Court within the meaning of Order XXI, rule 89.

Civil Miscellaneous Appeal No. 82 of 1911 distinguished.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the District Court of Trichinopoly dated 13th August 1935 and made in Civil Miscellaneous Appeal No. 40 of 1935 (Execution Application No. 882 of 1934 in Original Suit No. 109 of 1927, Sub-Court, Trichinopoly).

MARUDAMUTHU *K. Rajah Ayyar* and *L. A. Gopalakrishna*
 v.
 ARUMUGASAMI. *Ayyar* for petitioner.

S. Parthasarathi and *V. K. Thiruvengkatachari*
 for respondents.

Cur. adv. vult.

JUDGMENT.

This civil revision petition arises out of an application made under Order XXI, rule 89, Civil Procedure Code, to set aside a Court sale. The application was made by three petitioners, of whom the petitioner here was the third petitioner before the Subordinate Judge. The other two petitioners were the purchasers of two lots of the property sold, namely, lots 1 and 3.

The facts are briefly these: In execution of the decree in Original Suit No. 109 of 1927 in which the petitioner here was the only defendant, four items of property were ordered to be sold. The first petitioner in the lower Court purchased the first lot for Rs. 1,000 which was deposited by him. Lot 2 was not sold. The second petitioner purchased the third lot for Rs. 800. He also deposited the money into Court. Lot 4 was purchased for Rs. 1,005 by the decree-holders who were minors represented by their next friend. Pending confirmation of the sale the third petitioner (that is, the judgment-debtor petitioner) privately sold lot 1, to the first petitioner for a sum of Rs. 1,200. He wanted that a sum of Rs. 957-13-0 out of this amount may be appropriated towards the decree amount, the balance being the poundage of Rs. 42-3-0. Lot 3 properties were sold by the judgment-debtor privately to the second petitioner for Rs. 1,000. He prayed that out of that sum

Rs. 764-1-0 may be appropriated towards the satisfaction of the decree, the balance of Rs. 35-15-0 representing poundage. The third petitioner, the petitioner here, had deposited in Court Rs. 369-8-0. Thus the total amount available is Rs. 957-13-0 *plus* 764-1-0 *plus* 369-8-6, in all Rs. 2,091-6-6. This amount will cover the amount mentioned in the sale proclamation, that is, Rs. 1,998-14-6 *plus* 5 per cent, on the sale price of lot 4 purchased by the decree-holders *plus* the poundage in respect of the sale of lot 4. In these circumstances the three petitioners ask the Court to set aside the sale stating that they have complied with the provisions of Order XXI, rule 89, Civil Procedure Code, the relevant portions of which are as follows :—

“(1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding any interest therein by virtue of a title acquired before such sale, 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.”

It will be observed that of the three petitioners, petitioners 1 and 2 are themselves purchasers of two items of the property and are hence incompetent to maintain an application under Order XXI, rule 89. But the judgment-debtor being one of the petitioners entitled to apply under Order XXI, rule 89, the question whether the sale can be set aside in the above circumstances has to be considered; and, as already stated, he is the only petitioner before this Court.

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ARUMUGASAMI. The learned Subordinate Judge set aside the Court sale, but his order was set aside by the learned District Judge.

The question of law presented by this case is a novel one and has not been the subject-matter of decision in any Court. It is argued by the petitioner that, inasmuch as the two purchasers have expressed their willingness that the money deposited by them in Court may be used by him as the properties have been privately sold to them, he has complied with the provisions of Order XXI, rule 89, Civil Procedure Code, by depositing in Court the necessary funds and the sale should therefore be set aside. He is supported in his application by the other two purchasers. It appears to me that the contention of the petitioner cannot be accepted. If the money deposited by the purchasers of lots 1 and 3 can be used by the petitioner, then no doubt the sale should be set aside. The question is, can it be said in the circumstances of the present case that the petitioner has deposited in Court the necessary sum? It is argued that since the purchasers of lots 1 and 3 have expressed their willingness that the money deposited by them may be used by the petitioner, that money has become his for depositing in Court and that he has therefore deposited into Court the necessary amount. In support of this contention an unreported decision of this Court in Civil Miscellaneous Appeal No. 82 of 1911 has been brought to my notice, but that case is distinguishable from the present one inasmuch as the amount in Court standing to the credit of the co-parceners which they allowed the fifth defendant, the petitioner, to use for setting aside the sale

was their own money, that is money lying to their credit, and therefore it may well be said that it became the money of the petitioner for him to deposit in Court within the meaning of Order XXI, rule 89, Civil Procedure Code, when they expressed their consent to that course. If in the present case the amount deposited by the first and second petitioners can, after the deposit, be said to be money which they can deal with as they liked, then the argument that taking that amount also into consideration the petitioner here has deposited in Court sufficient amount to make the payments may be accepted. It seems to me that after making the deposit the money deposited by the purchasers is in the custody of the Court till final orders are passed by it with respect to the sale. If the sale is confirmed the purchasers get the property and the money can no longer be claimed by them. If, on the other hand, it is set aside they will be refunded the money and it becomes theirs. But they cannot, while the money is kept in the custody of the Court, operate upon it to enable the person wanting to set aside the sale to use it for the purpose of depositing in Court within the meaning of Order XXI, rule 89. In the circumstances of the present case I am not satisfied that the petitioner has deposited in Court the amount necessary for making the payments under clauses (a) and (b) of Order XXI, rule 89, Civil Procedure Code. In my opinion the order of the lower Court is right and the civil revision petition is dismissed with costs.

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