

APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Wadsworth and Mr. Justice Krishnaswami Ayyangar.

AYYAPPA NAICKER (PETITIONER), PETITIONER,

v.

KASIPERUMAL NAYAKAR AND TWO OTHERS (RESPONDENTS), RESPONDENTS.*

1938,
December 13.

*Code of Civil Procedure (Act V of 1908), O. XXI, r. 90—
“ Person whose interests are affected by the sale ”—Meaning
of—Person obtaining attachment before judgment—If entitled
to set aside sale of the attached properties in execution
of a decree obtained by another person.*

A person who has obtained an attachment before judgment is a person whose interests are affected within the meaning of Order XXI, rule 90, of the Civil Procedure Code, when the property attached has been sold in execution of a decree obtained by another person.

Kathiresan Chettiar v. Ramasami Chettiar(1) overruled.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the Subordinate Judge of Tuticorin, dated 22nd August 1934 and made in Civil Miscellaneous Appeal No. 32 of 1933 preferred against the order of the Court of the District Munsif of Tuticorin in Execution Application No. 922 of 1933 in Small Cause Suit No. 552 of 1932, Sub-Court, Tuticorin.

The petition originally came on for hearing before VARADACHARIAR J. who made the following

ORDER OF REFERENCE TO A FULL BENCH :—

The point arising for decision in this civil revision petition is whether the petitioner had a *locus standi* to apply under

* Civil Revision Petition No. 1995 of 1934.

(1) (1914) 27 M.L.J. 302.

Order XXI, rule 90, Civil Procedure Code, to set aside the sale complained against. That this is a question of jurisdiction within the meaning of section 115, Civil Procedure Code, has been held in *Sundaram v. Mausam Mavuthar*(1) which related to Order XXI, rule 89.

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The relevant facts are that the petitioner attached certain properties before judgment and in due course obtained a decree; but before the date of that decree, the attached properties were sold in execution of a decree obtained by another creditor. As soon as the petitioner obtained his decree, he filed the present application under Order XXI, rule 90, to set aside the execution sale on certain grounds.

The Courts below have dismissed his petition, holding that he is not entitled to apply under Order XXI, rule 90. A decision of a Division Bench of this Court in *Venkatesha v. Vitla Bhakta*(2) was brought to the notice of the lower appellate Court and apparently of the first Court also. The learned Subordinate Judge has attempted to distinguish that case, but I am not satisfied that the distinction is beyond doubt. The lower Court assumes that in that case the decree had probably been obtained before the Court auction sale. The records of that case are reported to have been destroyed and I am not, therefore, able to verify whether this was so or not. Even assuming that the facts were as assumed by the lower appellate Court, I am very doubtful whether those facts furnished a sufficient ground for distinction. I can understand the view taken in *Kathiresan Chettiar v. Rimasami Chettiar*(3) that except where the attaching decreeholder has applied for rateable distribution he has no *locus standi*, merely on the ground of his attachment, to apply under Order XXI, rule 90. This view has, however, been departed from by a Division Bench in *Venkatesha v. Vitla Bhakta*(2) though it does not appear from the judgment whether the earlier case was brought to the notice of the learned Judges or not. There has been considerable diversity of opinion amongst the various High Courts as to the import of the expression "whose interests are affected by

(1) (1921) I.L.R. 44 Mad. 554 (F.B.).

(2) A.I.R. 1933 Mad. 455; (1933) 64 M.L.J. 605.

(3) (1914) 27 M.L.J. 302.

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the sale" in Order XXI, rule 90. The use of the plural "interests" has generally been relied on as supporting the contention that what is referred to by that expression is not merely an interest *in the property*, but any kind of pecuniary benefit that the applicant is likely to have derived if the sale had not taken place or is likely to derive if the sale is set aside. This apparently is the basis of the decision in *Venkatesha v. Villa Bhakta*(1).

In applying the rule to persons who had obtained an attachment before judgment, a distinction has been drawn between

(i) cases where the decree had been passed before the sale,

(ii) cases where the decree had been passed after the sale but before the application under Order XXI, rule 90, and

(iii) cases where no decree had been obtained even on the date of the application under Order XXI, rule 90 [cf. *Jogendra Nath Chatterjee v. Monmotha Nath Ghosh*(2), *Rameshwar v. Hari Prasad*(3); *Gopinath v. Kukari Protas*(4); *Baidya Nath v. Hemlata Dasi*(5); *Bulanda Bashini v. Pran Gobinda*(6); and *Gobinda Prasad v. Brindaban Chandra*(7)].

It is not easy to reconcile the several dicta to be found in these cases. Whatever may be said of cases where before the decree is obtained, the property attached before judgment has survived to co-parceners in a joint Hindu family, I do not see sufficient basis for the distinction suggested in a case like the present between a person who has obtained a decree before the sale complained against and one who obtains a decree only after the sale but before he files the application under Order XXI, rule 90.

The question is one that arises frequently and involves a point of procedure on which a uniform and certain rule is desirable. In view of the conflict in the authorities, it is better that the matter is considered by a Division Bench and, if they agree, it will even be desirable that the matter is decided by a Full Bench.

(1) A.I.R. 1933 Mad. 455; (1933) 64 M.L.J. 605.

(2) (1912) 17 C.W.N. 80.

(3) A.I.R. 1933 Pat. 445.

(4) A.I.R. 1934 Cal. 477.

(5) (1935) 40 C.W.N. 759.

(6) (1936) 40 C.W.N. 1334.

(7) A.I.R. 1937 Cal. 7; (1936) 40 C.W.N. 1338.

The petition came on for hearing in pursuance of the aforesaid order of reference before the Full Bench constituted as above.

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ON THE REFERENCE :—

K. V. Sesha Ayyangar for petitioner.—The crucial date for testing the qualification of an applicant under Order XXI, rule 90, Civil Procedure Code, is the date of the application and not that of the sale. Rights have to be adjudicated upon as on the date of filing a suit or an application. The use in Order XXI, rule 90, of the words “ whose interests are affected by the sale ” taken along with “ may apply ” support this contention. The word used is “ interests ” and not “ interest ”. This shows that the interest need not always be an interest in the property sold. It may be a pecuniary interest. It has been held, for instance, that a Hindu reversioner, who cannot be said to have any present interest in the property sold, can apply. Attachment before judgment confers sufficient interest to have the attached property used for satisfaction of the claim for which it is attached. Where the Civil Procedure Code intends to restrict the right to apply to persons having an interest in the property it has used appropriate language (*vide* Order XXI, rule 89). Comparison may also be made with the language in Order XXI, rule 72, where the words are “ person whose interests are affected by the sale ” and with the language of section 311 of the old Civil Procedure Code.

[Reference was made to the following cases : *Kathiresan Chettiar v. Ramasami Chettiar*(1), *Narayanan v. Pappayi*(2), *Venkatesha v. Vitla Bhakta*(3), *Sankaralinga Reddi v. Kandasami Tevan*(4), *Dhirendra Nath Roy v. Kamini Kumar Pal*(5), *Ravinandan Prasad v. Jagarnath Sahu*(6), *Sachai Gopinath v. Firm of Kukari Pratap Chandra Saha*(7) and *Rameshwar v. Hari Prasad*(8).]

A. Swaminatha Ayyar for respondent.—There is no basis for suggesting that the word “ interests ” has got a meaning

(1) (1914) 27 M.L.J. 302.

(2) (1927) 26 L.W. 164.

(3) A.I.R. 1933 Mad. 455; (1933) 64 M.L.J. 605.

(4) (1907) I.L.R. 30 Mad. 413.

(5) (1924) I.L.R. 51 Cal. 495.

(6) (1925) I.L.R. 47 All. 479

(7) (1933) 38 C.W.N. 172.

(8) A.I.R. 1933 Pat. 445.

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different from "interest" The only persons not holding an interest in the property who can apply are those satisfying the description "persons entitled to share in a rateable distribution of assets". This phrase will be redundant if the word "interests" is interpreted widely as including pecuniary interests. [Reference was made to *Jogendra Nath Chatterjee v. Monmotha Nath Ghosh*(1), *Baidya Nath v. Hemlata Dasi*(2), *Bulanda Bashini v. Pran Gobinda*(3) and *Gobinda Prosad v. Brindaban Chandra*(4).]

An attaching creditor is not a secured creditor. Attachment before judgment does not create any right in the property. So he is not entitled to apply under Order XXI, rule 90, of the Code. The case of *Sankaralinga Reddi v. Kandasami Tevan*(5) refers to movable property and the attachment there was not before judgment but in execution. To file an application under Order XXI, rule 90, a person must have an interest on the date of the sale and not on the date of the application. An auction-purchaser, for instance, cannot apply under that rule. It has been so held by the High Courts other than Madras and Allahabad. In this case, the petitioner who obtained an attachment before judgment had no interest in the property on the date of the sale and so he cannot apply under Order XXI, rule 90. [*Kristnasawmy Mudaliar v. Official Assignee of Madras*(6), *Manikkam Chettiar v. Income-tax Officer, Madura South*(7), *Scwdut Roy v. Sree Canto Maity*(8), *Gopalakrishnaayya v. Sanjeeva Reddi*(9), *Mahadeo Ram v. Raja Mohan Vikram Sah*(10), *Nihal Chand-Gopal Das v. Pritam Singh*(11) and *K. V. A. L. Chettiar Firm v. M. P. Maricar*(12) were referred to.]

Cur. adv. vult.

JUDGMENT.

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LEACH C.J.—This petition raises the question whether a person who has obtained an attachment

(1) (1912) 17 C.W.N. 80.

(2) (1935) 40 C.W.N. 759.

(3) (1936) 40 C.W.N. 1334.

(4) A.I.R. 1937 Cal. 7; (1936) 40 C.W.N. 1338.

(5) (1907) I.L.R. 30 Mad. 413.

(6) (1903) I.L.R. 26 Mad. 673.

(7) I.L.R. [1938 Mad. 744 (F.B.).

(8) (1906) I.L.R. 33 Cal. 639.

(9) (1919) 38 M.L.J. 228.

(10) (1933) I.L.R. 12 Pat. 665 (S.B.).

(11) (1932) I.L.R. 14 Lah 1.

(12) (1928) I.L.R. 6 Ran 621

before judgment is a person whose interests are affected within the meaning of Order XXI, rule 90, of the Code of Civil Procedure, when the property attached has been sold in execution of a decree obtained by another person. On 30th November 1932 the petitioner obtained an order for attachment before judgment in respect of certain immovable property belonging to the second and third respondents and on 3rd July 1933 a decree was passed in his favour. Some three weeks before the decree was passed the first respondent caused the attached property to be sold in execution of a decree which he had obtained against the second and third respondents. On 8th July 1933 the petitioner filed a petition in the Court which had ordered the sale (the Court of the District Munsif of Tuticorin) asking that the sale should be set aside on the ground that there had been material irregularity. The District Munsif held that the petitioner was not a person who came within the section and dismissed the application. The petitioner appealed to the Subordinate Judge of Tuticorin, who agreed with the District Munsif. The petitioner has now asked this Court to set aside the orders of the lower Courts under its revisional powers. It is not disputed that if the lower Courts erred in the interpretation of rule 90 this Court has power to interfere.

Rule 90 provides that where any property has been sold in execution of a decree the decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it. Section 311 of the Code of 1882 which is now rule 90 limited the right to apply to the decree-holder or any person whose immovable property

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had been sold. There has been much judicial discussion on the meaning of the words "whose interests are affected by the sale." Some Judges have expressed the opinion that these words must be taken to refer to a person having a proprietary or possessory title in the property, but the opinion which now prevails is that the words do not have this narrow implication and are intended to apply also to a person whose pecuniary interests are affected by the sale.

In *Kathiresan Chettiar v. Ramasami Chettiar*(1) a Division Bench of this Court composed of SADASIYA AYYAR and NAPIER JJ. held that a decree-holder who had not applied for execution, and, therefore, was not entitled to rateable distribution of the proceeds of the sale was not a person whose interests were affected by the sale within the meaning of the rule. They considered that the intention of the Legislature was to confine the word "interests" to an interest in the property sold. As I have indicated, this interpretation is not in accordance with later decisions. The meaning to be given to the words was fully discussed by SRINIVASA AYYANGAR J. in *Narayanan v. Pappayi*(2). In that case the Court directed that two items of property which were the subject-matter of a mortgage decree should be sold first and that only afterwards, if the sale proceeds proved insufficient, should another item of property which was covered by the same decree be sold. After the passing of the decree the fourth defendant in the suit purchased the item of property which was to be sold last. He died before the other two items were sold in execution of the decree. After they had been sold his legal representative applied for an order setting aside the sale on the ground of irregularity and fraud. The learned

(1) (1914) 27 M.L.J. 302.

(2) (1927) 26 L.W. 164.

Judge held that the legal representative of the fourth defendant was a person whose interests were affected by the sale. He refused to accept the contention that the expression "whose interests are affected by the sale" should be construed as though it meant that the petitioner must have some interest in the property itself and observed that, when the Legislature intended that the petitioner should have some interest in the property itself, it has used apt language. He pointed in this connection to the provisions of Order XXI, rule 89, which limits an application under that rule to the judgment-debtor or any person deriving title from him or any person holding an interest in the property. The learned Judge considered that the Legislature intended to confer the right to apply on any one who is directly and immediately affected by the sale and with this opinion I am in entire agreement.

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In *Venkatesha v. Villa Bhakta*(1) BEASLEY C.J. and BARDSWELL J. held that a decree-holder who has obtained an attachment before judgment is a person whose interests are affected by the sale. It was there conceded that a person whose pecuniary interests are affected comes within the rule and that the words do not mean proprietary interests only. The case, however, differed from the present one in that the applicant had obtained a decree before the Court sale.

The extent of the interest of a plaintiff in property attached before judgment was discussed by BENSON and WALLIS JJ. in *Sankaralinga Reddi v. Kandasami Tevan*(2). In that case the question was whether the plaintiffs had sufficient interest in the property to support an action against persons who had wrongfully removed crops from the land attached and it was held

(1) A.I.R. 1933 Mad. 455 (1933) 64 M.L.J. 605.

(2) (1907) I.L.R. 30 Mad. 413.

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that they had. It was true that the plaintiffs did not, by attaching the crops, acquire any charge on the attached property which would give them priority over other decree-holders applying for rateable distribution or against the general body of creditors proving in an insolvency of the judgment-debtor, but none the less, by virtue of the attachment the plaintiffs acquired a right to have the whole of the attached property applied in satisfaction of their debt if no other creditor came forward, and in any case to have a rateable proportion so applied. In this sense the attaching creditor had a charge on the attached property. The right of a plaintiff who attaches before judgment does not go beyond this and there is a long line of cases which shows that he is not a secured creditor in the ordinary sense, but it is clear that he has some interest in the property.

In *Dhirendra Nath Roy v. Kamini Kumar Pal*(1) a Division Bench of the Calcutta High Court also held that the expression "whose interests are affected by the sale" is not limited to persons whose proprietary or possessory title is affected by the sale and that an attaching creditor comes within the rule. In *Jogendra Nath Chatterjee v. Monmotha Nath Ghosh*(2) the Calcutta High Court held that a person who attached before judgment had no present interest in the property and therefore was not within rule 90, but in *Sachai Gopinath v. Firm of Kukari Pratap Chandra Saha*(3) another Division Bench of that Court held that a person who has attached before judgment is a person within the purview of rule 90. In the last-mentioned case a decree had been obtained by the plaintiff before he made his application and it was on this ground that the earlier case was distinguished.

(1) (1924) I.L.R. 51 Cal. 495.

(2) (1912) 17 C.W.N. 80.

(3) (1933) 38 C.W.N. 172.

As I have already indicated, in *Santharalinga Reddi v. Kandasami Tevan*(1) this Court held that a person who has attached property before judgment has sufficient interest in the property itself to maintain an action against a trespasser, but it is sufficient to bring him within rule 90 if his pecuniary interests are directly and immediately affected by any irregularity or fraud in connection with the sale proceedings. I hold that a plaintiff who has obtained an attachment before judgment is directly and immediately affected in such circumstances, and therefore is within the rule. The fact that he has not obtained a decree at the time he filed his application does not in my opinion make any difference. If he obtains a decree before making the application his position is, of course, strengthened, but the attachment before judgment is sufficient in itself to bring him within the category of persons whose interests are affected by the sale. In the present case, the petitioner had obtained his decree before he applied and he applied within time. It follows from what I have said that I consider that *Kathiresan Chettiar v. Ramasami Chettiar*(2) was wrongly decided and should be overruled.

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The decisions of the lower Courts being based on an erroneous view of the law their orders must be set aside with costs here and in the lower appellate Court. The District Munsif will now proceed to dispose of the application in accordance with law.

WADSWORTH J.—I agree.

KRISHNASWAMI AYYANGAR J.—I also agree.

V.V.C.

(1) (1907) I.L.R. 30 Mad. 413.

(2) (1914) 27 M.L.J. 302.