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upheld in its entirety without any condition attached to the decree.

We accordingly allow the appeal and dismiss the plaintiff respondent's suit with costs throughout.

*Appeal allowed.*

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July, 27.

Before Mr. Justice Lindsay, Mr. Justice Sulaiman and  
Mr. Justice Daniels.

FATIMA-UL-HASNA AND OTHERS (APPLICANTS) v. BALDEO  
SAHAI AND OTHERS (OPPOSITE PARTIES).\*

*Civil Procedure Code, order XXI, rule 89; order XLVI—Execution of decree—Sale—Application to set aside sale—Judgement-debtor competent to apply—Reference to High Court—"Reasonable doubt".*

A judgement-debtor whose property has been attached and sold has until the confirmation of the sale a right to make an application under order XXI, rule 89, of the Code of Civil Procedure to have the sale set aside but he cannot, by selling such property to a third party, enable the purchaser so to apply. *Pandurang Luxman v. Govind Dada* (1), *Musammal Dhanwanti Kuar v. Sheo Shankar* (2), *Sundaram v. Mausam Maruthar* (3), *Yad Ram v. Sundar Singh* (4) and *Bhawani Kuwar v. Mathura Prasad Singh* (5), referred to. *Ishar Das v. Asaf Ali Khan* (6), overruled.

Ordinarily, when there has been a clear pronouncement by a High Court which has not been subsequently doubted the subordinate courts are bound to follow it. But this is not necessarily so in the case of a ruling which has been doubted within the High Court itself and dissented from by other High Courts. In such a case a subordinate court may be justified in making a reference under order XLVI of the Code of Civil Procedure. *Bhanaji Raoji Khoji v. Joseph De Brito* (7), *Naru Koli v. China Bhosle* (8) and *Ajodhia Prasad v. Raghbir* (9), referred to.

\* Miscellaneous Case No. 303 of 1925.

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| (1) (1917) I.L.R., 40 Bom., 557. | (2) (1919) 4 P.L.J., 340.        |
| (3) (1921) I.L.R., 44 Mad., 554. | (4) (1923) I.L.R., 45 All., 425. |
| (5) (1912) I.L.R., 40 Cal., 89.  | (6) (1911) I.L.R., 34 All., 186. |
| (7) (1905) I.L.R., 30 Bom., 226. | (8) (1888) I.L.R., 13 Bom., 54.  |
| (9) (1912) 15 Oudh Cases, 330.   |                                  |

THIS was a reference made by the District Judge of Moradabad under order XLVI, rule 1, of the Code of Civil Procedure. The facts out of which it arose appear in the judgement of LINDSAY, J:—

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LINDSAY, J.:—In execution of a decree obtained against the minor heirs of one Abdus Sattar, deceased, certain immovable property of the judgement-debtors was attached and notified for sale. This property was sold by auction on the 20th of October, 1924. On the 23rd of March, 1924, the guardian of the minors had entered into a contract with Musammat Rifaqat-un-nissa for sale to her of the property which was under attachment. At that time the guardian (Musammat Fatima-ul-Hasna) had not obtained from the District Judge the sanction to the transfer which it was necessary for her, as the certificated guardian, to secure. The Judge's sanction was not got till the 25th of September, 1924. Acting on the sanction so obtained, she executed a sale-deed of the property in favour of Musammat Rifaqat-un-nissa on the 23rd of October, 1924, *i.e.*, three days after the court sale. On the 19th of November, 1924, the guardian of the minor judgement-debtors and Musammat Rifaqat-un-nissa presented a joint application to the execution court under order XXI, rule 89 (1), praying that the auction sale should be set aside. Tender of the sum required by the rule to be paid was made. It was represented that the property which has been sold was worth Rs. 7,000 while the price it had fetched at the auction was Rs. 1,200 only. It was prayed that if it should be held that Musammat Rifaqat-un-nissa, the purchaser, was incompetent to make an application under the rule in question, the application should be treated as made on behalf of the judgement-debtors and accepted accordingly. The Munsif to whom the application was made, following the judgement of a Bench of this

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Court, *Ishar Das v. Asaf Ali Khan* (1), rejected the application. He held that the judgement-debtors having transferred the property after the date of the court sale and before the date of the application, could not apply as they had lost all their interest in the property. He further held that Musammat Rifaqat-un-nisa as a subsequent purchaser under a private sale was not entitled to apply to have the court sale set aside.

The judgement-debtors appealed to the District Judge, who, instead of deciding the appeal, has made this reference asking for the opinion of this Court regarding the true construction of order XXI, rule 89.

On this reference—

Maulvi *Iqbal Ahmad*, for the applicants.

Babu *Piari Lal Banerji*, for the opposite parties.

The case was heard by a Bench of three Judges, who delivered separate judgements. The judgement of LINDSAY, J., after setting out the facts as above, thus continued:—

In his order of reference the District Judge points out that other High Courts have declined to accept the interpretation of this rule laid down in *Ishar Das's* case above referred to.

He cites in this connexion the following rulings—*Pandurang Laxman v. Govind Dada* (2). *Dhanwanti Kuar v. Sheo Shankar Lal* (3) and *Sundaram v. Mause Mavuthar* (4). He also refers to a Full Bench decision of this Court in which the correctness of the view taken in *Ishar Das's* case was questioned; *Yad Ram v. Sundar Singh* (5). In this latter case one of the Judges, PIGGOTT, J., while describing the construction of order XXI, rule 89, as a “ somewhat difficult question of law ” held that it was not open

(1) (1911) I.L.R., 34 All., 186.

(2) (1917) I.L.R., 40 Bom., 557.

(3) (1919) 4 Pat. L.J., 340.

(4) (1921) I.L.R., 44 Mad., 554.

(5) (1923) I.L.R., 45 All., 425.

to this Court to decide the question in proceedings taken in revision. He suggested, however, that the matter could be brought before this Court by means of a reference under order XLVI, rule 1, and a similar suggestion was made by WALSH, J., who was clearly of opinion that the view of the law taken in *Ishar Das's* case was not correct, and that the true interpretation of the rule was laid down in the Patna case cited above, *Dhanwanti v. Sheo Shankar* (1). The learned District Judge has taken the hint conveyed in the judgement just mentioned and has now referred the question for our decision.

Mr. *Piari Lal* has taken a preliminary objection that it is not possible for the Judge to entertain doubt as the rule has already been interpreted in a decision of this Court which he is bound to follow. In support of this argument two cases of the Bombay High Court have been referred to; *Bhanaji Raoji Khoji v. Joseph De Brito* (2), *Naru Koli v. Chima Bhosle* (3), and a case of the Oudh Court (4). The principle so laid down is so obviously correct as to require no further discussion. But this is not an ordinary case. Apart from the fact that the correctness of the judgement in *Ishar Das's* case has been challenged in other High Courts, there is the fact that it has been doubted in this Court in the Full Bench case referred to above and the further fact that an invitation has been thrown out in language which plainly suggests the willingness of this Court to have the question re-considered. In the circumstances, we are satisfied that the District Judge might well entertain a reasonable doubt and that he was competent to make this reference. The crux of the case is the interpretation in order XXI, rule 89 (1), of the words "person owning such property". Can these words be construed

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(1) (1919) 4 Pat. L.J., 940.

(2) (1905) I.L.R., 30 Bom., 226.

(3) (1888) I.L.R., 13 Bom., 54.

(4) (1912) 15 Oudh Cases, 380.

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to mean the judgement-debtor? If the words are to be taken in their literal sense and without qualification, I think they would not. We have it that by the time the occasion for an application under rule 89 (1) has arisen, the immovable property "has been sold" and it seems to me impossible to predicate of a person whose property has been sold that he is still the owner in the ordinary acceptance of that term. There has been a sale at which a person has become a purchaser and ordinarily this purchaser would be the owner. Once sold, the property cannot revert to the judgement-debtor unless the sale is set aside for one or other of the reasons mentioned in rules 89, 90 and 91 of order XXI. It is true that the auction-purchaser having bid and having deposited the purchase money does not at once acquire an absolute title as owner; he can only get this by the passing of an order under rule 92 (1) by which the sale is confirmed. But till this order is made, the auction-purchaser is at least the owner *sub modo*; he has acquired the right to the property subject only to the chances of the sale being set aside on any of the grounds upon which the court is entitled to set it aside.

This was the view expressed by their Lordships of the Privy Council in *Bhawani Kumar v. Mathura Prasad Singh* (1), although, under the old Code (section 316), which was applicable to the case, the title to the property sold did not vest in the purchaser until the date of the certificate of sale—that is, the date of the order confirming the sale. *A fortiori* the same view would be taken now that under section 65 of the present Code the title is deemed to have vested in the purchaser from the date of the sale and not from the time when the sale becomes absolute. But it seems plain that

(1) (1912) I.L.R., 40 Cal., 89.

rule 89 (1) does not contemplate the auction-purchaser as the "person owning the property", for it is not to be conceived that any auction-purchaser is going to apply to the court to set aside a sale made in his own favour on the terms that he shall deposit five per cent. of the purchase money for payment to himself and shall deposit in addition the entire amount of the decretal debt which may exceed, and frequently does exceed considerably, the amount of his bid. The only provision for an application by the auction-purchaser is to be found in rule 91, by which he can apply to set aside the sale on the ground that the judgement-debtor had no saleable interest in the property sold. If then rule 89 (1) does not treat the auction-purchaser as the owner and if the judgement-debtor cannot be treated as the owner for the reasons above given, the rule is defeated, for the only right to apply would then be in a person "holding an interest" in the property by virtue of a title acquired before the auction sale. The person who holds an interest in property is distinct from the owner. And yet the rule provides for an application by either.

It seems reasonably clear then that if rule 89 (1) is to be given its full effect, the language cannot be construed literally and the expression "person owning such property" cannot mean a person owning such property at the date of the application. The only interpretation which avoids the difficulty is the one by which the expression is construed to mean the person who owned the property at the date of the sale. And this conclusion is, I think, fortified by other considerations. In the Code of 1882, section 310A gave the corresponding right to apply to "any person whose immovable property has been sold"—words which obviously included the

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judgement-debtor. It is difficult to conceive of any good reason for supposing that it was intended to deprive the judgement-debtor of this valuable right of getting the sale set aside before it is confirmed. I agree with the observations made in this connexion by BATCHELOR, J., in *Pandurang Lawman Upadhe v. Govind Dada Upadhe* (1). Again, if regard be had to the policy of the rule, the interpretation above suggested is more acceptable than the literal interpretation. It cannot be doubted that the rule was enacted for the benefit of the judgement-debtor. It gives him a last chance of getting the sale set aside before confirmation upon the terms of satisfying the decretal debt and of paying compensation to the auction-purchaser for the loss of his bargain. If at the last moment he is able to make an arrangement by which he can liquidate the debt and compensate the auction-purchaser as well, why should he be debarred from applying under the rule?

It is notorious that a forced sale of immovable property often results in a price far below the real value and it is obviously much to the advantage of the judgement-debtor to allow him to get a better price if he can. He may not be able to retain the property after the sale is set aside, but by paying off the decretal debt he stands free of further liability and can protect any other property he may have. The decree-holder gets what he is seeking, namely, full satisfaction of his claim, while the auction-purchaser gets reasonable compensation for his disappointment. The rule interpreted and worked in this sense operates for the benefit of all concerned.

It is upon these considerations that other High Courts have been led to hold that in rule 89 (1) the person owning the property is the person who

(1) (1917) L.L.R., 40 Bom., 557 (560)

owns it at the date of the sale. *Vide* the Bombay case cited above; the case of *Musammât Dhanwanti Kuar v. Sheo Shankar Lal* (1) and *Sundaram v. Mousa Mavuthar* (2). I am of opinion that we should give effect to this view in preference to that taken by the Bench of this Court in *Ishar Das v. Asaf Ali Khan* (3).

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The construction adopted by our Court is too rigid, and fails, in my opinion, to allow full scope to the policy of the rule. It operates harshly against the interests of the judgement-debtor and that is a result to be avoided, if possible.

I would, therefore, answer this reference by saying that in order XXI, rule 89 (1) the words "person owning the property" mean the person owning the property at the date of the auction-sale; that in the particular case now before us the application under the rule in question in which the judgement-debtors joined should have been allowed; and that a person to whom a judgement-debtor purports to convey subsequent to the date of the auction-sale is not entitled to apply under the rule, being by the terms of the rule itself excluded on the ground that any title he may have acquired was not acquired before the auction-sale.

SULAIMAN, J.—I concur in the conclusion. The preliminary objection has no force. As to the merits there is undoubtedly a conflict of opinion and the Rules Committee might well have considered the advisability of amending order XXI, rule 89. A Bench of the Allahabad High Court, in the case of *Ishar Das v. Asaf Ali Khan* (3), held that "where a judgement-debtor, after the execution sale, has executed a registered deed of transfer in favour of

(1) (1919) 4 Pat. L.J., 340.

(2) (1921) I.L.R., 44 Mad., 554.

(3) (1911) I.L.R., 34 All., 186.

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a third party, neither the judgement-debtor nor such transferee is competent to apply under order XXI, rule 89." On the other hand, other High Courts, though holding that such transferee cannot apply, have held that the judgement-debtor is not disentitled from applying. It is unnecessary to refer to all the cases. Reference may be made only to *Pandurang Laxman Upadhe v. Govind Dada Upadhe* (1), *Sundaram v. Mausam Maruthar* (2) and *Musammatt Dhanwanti Kuer v. Sheo Shankar Lall* (3).

The auction sale of a judgement-debtor's interest does not necessarily before confirmation extinguish the interest of the judgement-debtor in the property. The ownership of the property does not *ipso facto* vest in the auction-purchaser before the confirmation. The property cannot automatically pass to the auction-purchaser as soon as the sale takes place, for he has fifteen days to deposit the whole purchase money. In default of payment the property is to be re-sold as the property of the judgement-debtor, and obviously not as the property of the defaulting auction-purchaser. In my judgement the judgement-debtor continues to own it till the sale is confirmed, but as soon as the sale is confirmed, the vesting of the interest in the auction-purchaser relates back under section 65 to the date of the sale. I am, therefore, clearly of opinion that the judgement-debtors did not cease to own the property merely because the property had been knocked down to an auction-purchaser but its sale had not yet been confirmed by the court.

As to the effect of the private transfer by the judgement-debtors after the auction sale, I am of opinion that in spite of it the judgement-debtors

(1) (1916) I.L.R., 40 Bom., 557.

(2) (1921) I.L.R., 44 Mad., 554.

(3) (1919) 4 Pat. L.J., 340.

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must be deemed to still own the property in these proceedings. It is true that a private sale during an attachment or even after an auction sale is not absolutely void for all purposes. Section 64 of the Code of Civil Procedure merely says that it shall be void as against all claims enforceable under the attachment. But in proceedings where a claim under the attachment is being enforced, it cannot be doubted that such a transfer is void. The present proceedings are between the decree-holder and the auction-purchaser on the one side and the judgement-debtors and their transferee on the other. In these proceedings the private transfer by the judgement-debtors must be deemed to be absolutely void, ineffectual and a nullity. In fact it is on that assumption that the decree-holder and the auction-purchaser would ask the court to confirm the sale. Can they then consistently plead this very transfer as a bar to the judgement-debtors' application? A transaction which is treated by them as absolutely void cannot with good grace be set up as a bar against the judgement-debtors. So far as these proceedings are concerned it must be assumed that no valid transfer has really taken place; it must, therefore, be assumed that the interest which the judgement-debtors possessed has not passed from them, and that they will be deemed to continue to be the owners till confirmation. If the sale is set aside and the attachment also withdrawn, the private transfer would become valid. If the sale is confirmed, the auction-purchaser's title will date back to the time of the sale.

DANIELS, J.—I concur in the conclusion that the judgement-debtor has a right to apply but the subsequent purchaser has not. It is clear that a purchaser from the judgement-debtor subsequent to an auction-sale cannot apply under order XXI, rule 89, of the

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Code of Civil Procedure. He is precluded by the terms of the rule as his interest was not acquired before the sale. The question whether the judgement-debtor who has parted with his remaining interest by a private treaty can do so is more difficult and there is much to be said, on the literal meaning of the rule, for the view taken in *Ishar Das v. Asaf Ali Khan* (1). Now, it is clear that for the purposes of the rule the judgement-debtor is treated as the owner notwithstanding the existence of the unconfirmed auction-sale. The words "owning such property" with reference to a time immediately after the auction-sale must apply either to the judgement-debtor or to the auction-purchaser. The latter cannot possibly have been intended. I, therefore, agree with SULAIMAN, J. that for the purpose of a proceeding under rule 89, the object of which is to get the sale set aside on the condition of compensating the purchaser and paying off the full amount due to the decree-holder, it cannot operate to divest the judgement-debtor of such ownership as remains to him after the auction-sale. I am conscious that it is paradoxical to hold that a judgement-debtor, who cannot in any event ultimately retain the property, is treated as still owning it for the purpose of the rule, but the fact that the rule has been construed in half a dozen different ways by different Judges sufficiently shows that it is impossible to find any construction to which no objection can be taken. The construction adopted above, which is substantially that of my brother SULAIMAN and that taken by BATCHELOR, J. in *Pandurang Laxman Upadhe v. Govind Dada Upadhe* (2), is least open to objection and best carries out the intention of the Legislature. I agree with Mr. Justice SULAIMAN that our judgements in this

(1) (1911) I.L.R., 34 All., 186.

(2) (1917) I.L.R., 40 Bom., 557.

case should be placed before the Rules Committee with a view to the amendment of the rule.

By THE COURT.—The questions formulated by the District Judge in this reference were :—

(1) Can a judgement-debtor make an application under order XXI, rule 89?

Our answer to this question is—Yes.

(2) Can a purchaser from a judgement-debtor subsequent to the date of the sale apply under this rule?

Our answer to this is—No.

Let these answers be returned to the District Judge together with copies of our orders.

*Reference answered.*

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## REVISIONAL CIVIL.

*Before Mr. Justice Sulaiman and Mr. Justice Daniels.*

AHMAD HUSAIN KHAN (DEFENDANT) v. HARDAYAL  
(PLAINTIFF).\*

1925  
July, 16.

*Civil Procedure Code, order IX, rule 13—Suit dismissed for default—Conditional order restoring suit on payment of costs.*

An order restoring a case dismissed for default on condition of the payment of a reasonable amount of costs to the opposite party within a time fixed by the order is not an illegal order, but, on the contrary, is an order contemplated by order IX, rule 13, of the Code of Civil Procedure.—*Jagarnath Sahi v. Kamta Prasad Upadhyaya* (1) and *Nand Lal v. Kishori* (2), referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Babu A. P. Bagchi, for the applicant.

Pandit Uma Shankar Bajpai, for the opposite party.

\* Civil Revision No. 50 of 1925.

(1) (1914) I.L.R., 36 All., 77.

(2) (1914) 12 A.L.J., 1270.