

# MYSORE HIGH COURT

M.H. Shivaji Rao

Vs

Niranjanaiah

Second Appeal No. 1066 of 1957

(S.R. Das Gupta, C.J. and H. Hombe Gowda, J.)

27.02.1961

## JUDGMENT

### S.R. Das Gupta C.J.

1. This is an appeal by the judgment-debtor in Ex. Case No.117/55 on the file of the Subordinate Judge, Mysore. In the said execution case the judgment-debtor's property was sold on 7-2-56. On 1-3-56 the judgment-debtor entered into an arrangement with the decree-holder by which he executed a mortgage for the amount due under the decree. Thereafter the judgment-debtor deposited ₹ 80/-being the five per cent of the sale price in Court and made an application under Order 21, Rule 89 of the Code of Civil Procedure for setting aside the sale. In the said application the decree-holder admitted that the amount of the decree had been satisfied in the manner indicated as above. The application was, however, opposed, by the auction-purchaser. His contention was that under Order 21, Rule 89 whole of the amount due to the decree-holder should be deposited in cash. In other words, his contention was that where the decree has been adjusted in the manner as indicated above the case does not come under Order 21, Rule 89.

2. The Subordinate Judge, following two decisions, i.e. *Venkataswami v. Chayapathi*<sup>1</sup>, and *Rabindra Nath v. Harendra Kumar*<sup>2</sup>, held that the amount due to the decree-holder need not be actually deposited but if the decree-holder's claim is otherwise settled, then the judgment-debtor is entitled to make an application by merely depositing five per cent of the purchase-money which was the solatium for the auction-purchaser. On this view of the matter, the Subordinate Judge allowed the application. On appeal, the lower appellate Court, relying on a decision of the Privy Council reported in *Nanhelal v. Umrao Singh*<sup>3</sup>, reversed the decision of the Subordinate Judge. Hence the present appeal.

3. Mr. Somasekhara Rau appearing for the judgment-debtor contended before us that the decision of the Privy Council on which the lower appellate Court's judgment was based is distinguishable from the present case. He contended that in the said case their Lordships of the Privy Council did not go into the question, which arises in this

<sup>1</sup>2 Mys LJ 31

<sup>3</sup> AIR 1931 PC 33

<sup>2</sup> AIR 1956 Cal 462

appeal, as no application was made therein under Order 21, Rule 89. What, according to him, their Lordships of the Judicial Committee held was that after the sale has taken place there cannot be an adjustment of the decree as contemplated in O.21, Rule 2 of the Code of Civil Procedure. Their Lordships, Mr. Somasekhara Rau urged, did not go into the question as to whether or not an application under Order 21, Rule 89 can be made in the circumstances of the present case.

4. In my opinion, the contention of Mr. Somasekhara Rau is sound and should be accepted. Order 21, Rule 89 provides as follows:

"89(1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an 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.  
....."

The question which arises before us is what is the meaning of the words "any amount which may have been received by the decree-holder". Do the said words imply that the decree-holder must receive the amount in cash only, or do they imply that he can receive also the equivalent of cash?

5. This question came up for consideration in a number of cases decided by the Madras and the Calcutta High Courts. In all those decisions the view taken was that the words "any amount which may have been received by the decree-holder" in Order 21, Rule 89(1)(b) of the Code of Civil Procedure do not mean that the decree-holder should have received the amount in cash only. The decree-holder according to the said decisions, can receive anything which to him is adequate equivalent' of the amount which is owing to him by the judgment-debtor under the decree or even waive the whole of the amount, in which case the judgment-debtor need pay nothing into Court in respect of the claim. The case of *Subbayya v. Venkata Subba Reddi*<sup>4</sup>, is a direct decision on the question which is now before us. In that case also the decree-holder had accepted a mortgage from the judgment-debtor in satisfaction of the amount due to him under the decree. The judgment-debtor deposited only 5 per cent as required under clause (1) (a) of Rule 89 of Order 21 but did not deposit the amount required under clause (1) (b) of the said rule. It was contended on behalf of the auction-purchaser that it was not sufficient compliance of the rule and that, therefore, the sale ought not to be set aside. Chief Justice Beasley, who decided the said case, did not accept that contention. His Lordship held, following two earlier decisions of the Madras High Court reported in *Anantha Lakshmi v. K. Sankaran Nair*<sup>5</sup>, and *Lakshminarasimha v. Lakshammam*<sup>6</sup>, that the judgment-debtor had complied with

<sup>4</sup> AIR 1935 Mad 1050

<sup>6</sup>1912 Mad WN 756

<sup>5</sup>24 Mad LJ 205

the conditions laid down in Order 21, Rule 89 of the Code of Civil Procedure, that it was not necessary that the decree-holder should have received the amount under clause (1)(b) in cash, and that it was enough if the decree-holder was satisfied with regard to the whole amount due to him under the decree and that the Court was bound to set aside the sale. Chief Justice Beasley

considered this question from various aspects. His Lordship pointed out that the auction-purchaser could not have any grievance if the decree-holder chooses to forge the whole of the amount owing to him under the decree. His Lordship further held that if there has been a receipt of cash which reduces the amount set out in the sale proclamation the auction-purchaser has no complaint to make. That being so, His Lordship held, there is no reason why the decree-holder cannot accept a mortgage in satisfaction of his claim and why in that event the judgment-debtor cannot make an application under Order 21, Rule 89 by only depositing 5 per cent of the purchase money.

6. The view taken in AIR 1935 Madras 1050 was accepted by a Full Bench of the Madras High Court in the case reported in *Muthu Venkatapathi v. Kuppu Reddy*<sup>7</sup>, In that case the judgment-debtor assigned to the decree-holder a mortgage which had been executed in his favor in part satisfaction of the amount due under the decree and the judgment-debtor paid into Court the difference between the amount stated in the sale proclamation and the value of the mortgage assigned to the decree-holder. Their Lordships held that this is sufficient compliance with Order 21, Rule. 89.

7. The Calcutta High Court also in a number of decisions bearing on this point has come to the same conclusion; see *Jotish Chandra v. Bireswar Haldar*<sup>8</sup>, *National Insurance Co. v. Ezekiel Aaron*<sup>9</sup>, and AIR 1956 Calcutta 462.

8. The learned Advocate for the respondent could not cite before us any decision except a decision of the Allahabad High Court reported in *Janki Pershad v. Lekhray*<sup>10</sup>, which has taken a contrary view on this point. The observations in ILR 55 All 697 : AIR 1933 Allahabad 510 as is pointed out by the Madras High Court in AIR 1935 Madras 1050 and AIR 1940 Madras 427 were mere obiter.

9. That being so, all the reported decisions on this question have consistently taken the view that it is not necessary in every case for the judgment-debtor to deposit the entire amount of the decree, and where the decree-holder has received anything, which to him is an adequate equivalent of the amount which is owing to him by the judgment debtor under the decree, an application can be made by the judgment-debtor under Order 21, Rule 89 by merely depositing 5 per cent of the purchase-money.

10. The Privy Council decision, as urged by the learned advocate for the appellant, does not touch the present question. In that case no application was made under Order 21, Rule 89 but the application made was for recording an adjustment of the decree under Order 21, Rule 2. This application was made after the sale had taken place and nearly 9 months after the said sale. What their Lordships had to consider in that case was whether, in the circumstances mentioned, the application under Order 21, Rule 2 was maintainable. Their Lordships held that when once a sale has been effected a

third party's interest intervenes, and there is nothing in this rule to suggest that it is to

<sup>7</sup> AIR 1940 Mad 427

<sup>9</sup> ILR (1937) 2 Cal 606

<sup>8</sup>39 Cal WN 829

<sup>10</sup> ILR 55 All 697 : AIR 1933 All 510

be disregarded. Order 21, Rule 2, according to their Lordships, which provides for certification of an adjustment come to out of Court, clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment-debtor and the decree-holder and when no other

interests have come into being. This is what their Lordships laid down in the said case. In that case their Lordships were not concerned with any application under Order 21, Rule 89 or with the present question, namely, whether or not it is necessary that the judgment-debtor must in every case deposit the entire decretal amount before he can make an application under the said rule and did not decide it. That being so, the Privy Council decision on which the lower appellate Court based its conclusion is distinguishable.

11. I am in entire agreement with the view taken by their Lordships of the Madras High Court and the Calcutta High Court on this point. In my opinion, it was not necessary in the present case that the judgment-debtor should have deposited the entire decretal amount in Court.

12. This appeal, therefore, succeeds, the order of the lower appellate Court is set aside and that of the trial Court is restored. The appellant will get his costs of this appeal from only the auction-purchaser.

**Hombe Gowda, J.**

13. I agree.

Appeal allowed.