Madras High Court
Sorimuthu Pillai And Ors. vs Muthukrishna Pillai on 11 November, 1932
Equivalent citations: (1933) 65 MLJ 253
Author: M Nair
JUDGMENT Madhavan Nair, J.

1. This Civil Miscellaneous Second Appeal arises out of a petition filed by the defendants in O.S. No. 12 of 1928 under Sections 47, 151 and Order 21, Rule 89 of the Code of Civil Procedure, in which they asked either that the Court should not confirm the auction sale held in execution of the decree against them or that the Court should set aside the sale under Order 21, Rule 89, Civil Procedure Code, for which they deposited 5 per cent, of the purchase money.

2. The property was sold in two lots; one lot was purchased by the decree-holders themselves who were respondents 1 and 2 to the petition, and the other lot was purchased by the 3rd respondent. The Lower Courts refused to confirm the sale so far as the first lot was concerned as the purchasers were decree-holders themselves, but with regard to the 3rd respondent to the petition, who is a stranger auction-purchaser, the Court dismissed both the prayers in the petition. It is against this order that the present civil miscellaneous second appeal and civil revision petition have been filed. The 3rd respondent to the petition - the stranger auction-purchaser - is the only respondent in this Court.

3. The facts necessary for understanding the contentions of the parties are these: Against the decree passed in the suit the petitioners preferred an appeal. During the pendency of the appeal, the decree-holders, i.e., respondents 1 and 2 to the petition, brought the properties of the petitioners to sale in execution of the decree and themselves purchased the first lot as already stated, while the second lot' was purchased by the 3rd respondent. The sale was held on the 3rd October, 1930. On the 16th October, 1930, the Appellate Court allowed the appeal and dismissed the suit. The present petition was filed by the petitioners on the 27th October, 1930, i.e., after the dismissal of the suit by the Appellate Court and before the confirmation of the sale.

4. On behalf of the appellants it is urged that since the decree has been set aside by the Appellate Court there is no jurisdiction for the Court to confirm the sale. In the event of the sale being confirmed the petitioners request the Court to set aside the sale and for that purpose they have deposited 5 per cent, of the purchase money. It will be observed that under Order 21, Rule 89, Civil Procedure Code, those who desire to have the sale set aside should in addition to the 5 per cent, make a deposit for payment to the decree-holder. This has not been done in this case because the petitioners contend that there is no necessity for making the deposit as the decree has been set aside on the date of the petition. The respondent contends that under the present Code the existence of a decree is not necessary for the confirmation of the sale and that the petition for setting aside the sale cannot be entertained unless the petitioners comply with the conditions of Order 21, Rule 89 by making all the necessary deposits mentioned therein, which admittedly they have not done. The respondent raises also a preliminary objection that no second appeal lies; but the appellant has filed also a civil revision petition. I shall deal with the preliminary-objection later.

5. The question to be decided with reference to the first prayer of the appellants in the petition is, whether the decree i under which the sale took place should still be subsisting at the time of the confirmation, for the sale to be confirmed. The argument on this point has mainly centred round the provisions of Section 65 and Order 21, Rule 94 of the present Code of Civil Procedure and of the corresponding provisions in the previous Codes. Section 65 of the present Code runs as follows:

Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

6. Order 21, Rule 94 of the Code is in these terms:

Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

7. These provisions have taken the place of Section 316 of the Code of 1882, which was as follows:

When a sale of immovable property has become absolute in manner aforesaid, the Court shall grant a certificate stating the property sold and the name of the person who, at the time of sale, is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before: provided that the decree under which the sale took place was still subsisting at that date.

8. It will be observed that the first part of Section 316 of the Act of 1882 is now represented by Order 21, Rule 94, Civil Procedure Code, with some slight alterations and its second part is represented by Section 65 with important alterations. There are two important differences between Section 65 of the present Code and the corresponding portion of Section 316 of the Code of 1882. One difference is that under the present Section 65 the property vests in the purchaser from the time when the property is sold and not from the time when the sale became absolute as under the old section. The other difference is that the statement in the old section that the property vests in the purchaser from the date of the certificate and not before was subject to a proviso "that the decree under which the sale took place was still subsisting at that date". This proviso is omitted in Section 65 of the present Code. The question is whether the dropping out of the proviso introduces any substantial change in law.

9. Mr. Ramaswami Aiyar argues that the omission of the proviso in Section 65 does not introduce any change in the law, that the existence of the decree has been always a necessary condition to give jurisdiction to the Court to confirm the sale, that without a decree there can be no justification for the confirmation of the sale, that the principle is a general rule of jurisprudence that has always been recognised in the Civil Procedure Codes, that, that being so, the Legislature thought that it was unnecessary to state it specifically and therefore dropped it out in the new Act of 1908. According to him, even before the proviso was enacted the rule contained in it was the law, that it was introduced

only to settle some doubts that had arisen in the Bombay Courts, that when it was discovered by the Legislature that that had been the law always it omitted the proviso in the new Code, so that it is not right to say that the law has been now altered by its omission. Having regard to the arguments of Mr. Swaminatha Aiyar which I shall presently refer to, Mr. Ramaswami Aiyar also contends that there is no connection between the proviso and the time when the property vests in the purchaser.

10. Mr. Swaminatha Aiyar's arguments may be summarised as follows: (a) Title to property vested in the purchaser from the date of the certificate under Section 316 of the Act of 1882; in order that title may start from that date it is a necessary preliminary that there should be a subsisting decree at that date and this was the reason why the Legislature introduced the proviso "that the decree under which the sale took place should be subsisting at that date". If the decree did not subsist at the date of the -certificate then the purchaser will not get any title to the property. According to the law contained in this section the existence of the decree at the date of the sale will not be enough to vest title to the property in the purchaser, for the title starts from the date of the certificate and not from the date of the sale. (b) Under the present Code the title to the property vests in the purchaser when the sale becomes absolute from the time when the property is sold and not from the date when the sale becomes absolute, and so, it will be sufficient to give title to the purchaser if there is a subsisting decree at the date of the sale. The existence of a decree at the date when the sale becomes absolute being thus unnecessary, it is argued that the proviso was dropped in the present Code and therefore the sale can be confirmed even though there is no subsisting decree at the date of the confirmation. According to this argument there is thus an intimate relation between the necessity for the existence of the decree and the time when the property vests in the purchaser. This argument is met by Mr. Ramaswami Aiyar - as already stated - by saying that even before the Act of 1882 the rule was that the title to the property vested in the purchaser from the time of the sale and notwithstanding that law the existence of the rule contained in the proviso was then recognised, (c) Another part of Mr. Swaminatha Aiyar's argument has reference to Order 21, Rule 92, Civil Procedure Code, which says that where no application has been made under Rules 89, 90 or 91, or where such application is made and disallowed, the Court shall make an order confirming the sale. It is argued that the language of the rule is imperative and that if after a sale, no application has been made to set it aside as in the present case, then the Court is bound to confirm the sale and cannot refuse to do so on the ground that the decree has been set aside and does not exist or on any other ground.

11. I shall first consider the history of the "proviso" and then examine whether there is any necessary connection between the rule contained in it and the time when the property becomes vested in the purchaser, and lastly deal with the argument based on Order 21, Rule 92, Civil Procedure Code.

12. In this connection we need not go earlier than the Act VIII of 1859. The first part of Section 256 of the Act of 1859 says that no sale of immovable property shall become absolute until the sale has been confirmed by the Court....

13. Section 259 states that after a sale of immovable property shall have become absolute in manner aforesaid, the Court shall grant a certificate to the person who may have been declared the purchaser at such sale, to the effect that he has purchased the right, title and interest of the defendant in the property sold, and such certificate shall be taken and deemed to be a valid transfer

of such right, title and interest.

14. Section 260 states that the certificate shall state the name of the person who at the time of sale is declared to be the actual purchaser....

15. The proviso appearing in Section 316 of the Act of 1882 did not find a place in any one of the above sections of the Act of 1859. Section 314 of the Act of 1877 corresponds with the first part of Section 256 of Act VIII of 1859. Section 316 of the Act corresponds with Section 259, and the first part of Section 260 of Act VIII of 1859. In the Act of 1877 also, we do not find the proviso appearing in Section 316 of the Act of 1882. This proviso was introduced for the first time by Section 49 of Act XII of 1879 which amended Section 316 of the Act of 1877. After amendment the section ran as follows:

When a sale of immovable property has become absolute in manner aforesaid, the Court shall grant a certificate stating the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before: provided that the decree under which the sale took place was still subsisting at that date.

16. This amended section appears in the same form and language without any change as Section 316 in the Act of 1882. To complete the history, the proviso was omitted and Section 316 was split up into Section 65 and Order 21, Rule 94 in the Act of 1908 as already mentioned.

17. Mr. Ramaswami Aiyar's argument already noticed is that though the proviso was first introduced by Act XII of 1879 the principle underlying it was recognised by the Courts of Law even before that date (under the Act of 1859) and that the amendment by introducing the proviso was only stating a principle that was already recognised and that when this was found to be so later, the proviso was dropped out as an unnecessary provision, that therefore no change in the law has taken place, and that even now, the existence of a decree is absolutely necessary for the confirmation of a sale. To support this contention in all its entirety the appellant will have to show not only that the principle of the proviso was recognised even before the amendment of the Act of 1877 but also that there was no necessary relation between the time when the title to property became vested in the purchaser and the rule contained in the proviso; or in other words, that even before the amendment when the principle of the proviso was used to be freely recognised and given effect to, the title to the property of the auction-purchaser used to relate to the date of the sale. The first part of the argument is sought to be supported by a decision of the Bombay High Court in Basappa bin Malappa Aki v. Dundaya bin Shivlingaya (1878) I.L.R. 2 Bom. 540 and the second part is made to rest on a decision of the Calcutta High Court in Bhyrub Chunder Bundopadhya v. Soudamini Dabee (1876) I.L.R. 2 Cal. 141 (F.B.). The decision in Basappa bin Malappa Aki v. Dundaya bin Shivlingaya (1878) I.L.R. was under the Act of 1877 before its amendment by the Act XII of 1879 which introduced the proviso to Section 316 of the Act of 1877. In that case "plaintiff's title to certain land in dispute was derived from the purchaser at a Court's sale, under a decree which was reversed in appeal subsequently to the sale, but before it had been confirmed."

18. It was held that "the Court, which had made the decree, ceased, from the moment of the reversal, to have jurisdiction to take any further steps to execute the decree," and that the confirmation of the sale would confer no title. In the course of the judgment the learned Judge pointed out that "a purchaser is bound to satisfy himself as to the jurisdiction of a Court to order a sale, and this obligation continues until the sale is completed " (page 541.) It is argued that in this decision even without any enactment of a proviso like the one in Section 316 the principle was recognised and given effect to under the Act of 1877 and that it was on account of this decision the Legislature enacted the proviso by the Amending Act XII of 1879. In this connection my attention was invited to the Report of the Select Committee that considered the Bill to amend the Civil Procedure Code, 1877. Therein the Committee stated:

We have also altered Section 316 so as to make it clear that the title to the property sold vests from the date of the certificate only when the decree under which the sale took place was still subsisting at that date. This will preclude the doubt which has, we understand, arisen in Bombay, where a certificate was granted to an auction-purchaser in ignorance of the fact that the decree under which the sale took place had been previously reversed on appeal.

19. Mr. Ramaswami Aiyar's contention that the principle underlying the proviso in question was recognised by Courts even before the amendment may be conceded on the strength of this decision; but the question is, what was the law that prevailed then regarding the time when the property sold vested in the auction purchaser. Mr. Ramaswami Aiyar would say that at that time also, the law was that when property was sold in auction the purchaser's title to it commenced from the date of the sale. To this argument Mr. Swaminatha Aiyar responds that there was no settled law on that point during the operation of the Acts of 1859 and 1877 and so when the Legislature decided to recognise the existence of the principle of the 'proviso' by introducing the amendment, it at the same time stated clearly the law relating to the time when the title of the auction-purchaser would commence, with the result that we find in Section 316 the law was stated to be this, that the title to the "property sold shall vest in the purchaser from the date of such certificate and not before, provided that the decree under which the sale took place was still subsisting at that time," thus establishing an intimate relation between the time when the property vests and the condition laid down in the proviso. The question is which view is right. In support of his contention Mr. Ramaswami Aiyar relied on the Full Bench decision in Bhyrub Chunder Bundopadhya v. Soudamini Dabee (1876) I.L.R. 2 Cal. 141 (F.B.). The facts of the case are thus stated in the headnote:

The defendant became a purchaser at an execution-sale of a share of certain property, of which the plaintiff held another share partly as Zemindar and partly as putnidar; the sale took place in September, 1872, but the defendant did not obtain possession until confirmation of the sale in May, 1873. Between the date of the sale and the confirmation, a considerable sum became due for Government revenue on the whole property and to prevent its being sold the plaintiff paid the whole of the revenue due. In a suit to recover the proportion due in respect of the share purchased by the defendant, it was held, that, on confirmation of the sale, the share purchased by the defendant must be considered to have vested in her from the date of the sale; and, therefore, she was liable for the amount of Government revenue in respect of her share which became due between the date of the sale and its confirmation.

20. It may appear at first sight that this decision supports Mr. Ramaswami Aiyar's view, but the true scope and significance of the decision is thus explained in Mr. Broughton's Commentaries on the Civil Procedure Code of 1877 (see page 453):

The case was referred to a Full Bench because the decisions were conflicting on the point whether the title of the auction-purchaser under a decree relates back to the date of the sale see Kalee Dass Neogee v. Hur Nath Roy Chowdhry (1864) S.W.R. 279 or merely takes effect from the date of confirmation see Beepin Beharee Biswas v. Judoonath Hazrah (1874) 21 S.W.R. 367 and it will be observed that this was not decided except for the purpose of the particular suit.

(The italics are mine.)

21. This Commentary puts the matter beyond any doubt. On the question under consideration there was no settled law under the Act of 1859 and the decision cannot be said to lay down a proposition of law applicable to all the cases. The same must be considered to be the position under the Act of 1877 also, for, as I have shown, the relevant provisions under both the Acts are similar and in neither of the Acts do we find any such specific statement of law regarding the time when the title to the property vests in the auction-purchaser as we find in Section 316 of the Act of 1877 after the amendment in 1879 - which was repeated as Section 316 of the Act of 1882 - and in the present Act of 1908. By Section 49 of the Amending Act of 1879 it was enacted that the title of the auction-purchaser to the property would start from the date of the certificate and in order that it may be so, formal recognition was given to the principle that there must be a decree in existence at the time of the certificate; and then the proviso came to be enacted as a necessary condition upon which would depend the commencement of the title of the auction-purchaser; and when the law on the latter point was altered, there was no need for the existence of the proviso and so it was dropped out from the new Code. This I think is the true history of the proviso in question, and read in this light I cannot agree with the contention of Mr. Ramaswami Aiyar that the omission of it in the present Code does not indicate any change in the law. On the other hand, from what I have said it follows that the argument of the respondent that on account of the omission of the proviso it is no longer necessary for the confirmation of the sale that the decree should be subsisting at the time of the confirmation should be accepted.

22. The next argument of the respondent's learned Counsel is that having regard to the language of Order 21, Rule 92, Civil Procedure Code, the reversal of the decree after sale but before confirmation cannot be relied on as a ground by the appellant for asking the Court not to confirm the decree. Order 21, Rule 92 provides that where no application is made under Rules 89, 90 or 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

23. The language of this rule is imperative, and when no application under Rules 89, 90 or 91 has been made, as in the present case, after sale, it is the duty of the Court to confirm it. Under this rule, the act of confirmation of sale should follow automatically after sale has taken place when no such application as is referred to in Rule 92 was made or when such application was made and disallowed. The present case admittedly does not fall under the exceptions mentioned in this rule.

The reversal of the decree is not mentioned in the rule as one of the grounds for refusing to confirm the sale. This interpretation of Order 21, Rule 92 is supported by the decision of the Privy Council in Seth Nanhelal v. Umrao Singh (1930) L.R. 58 I.A. 50 : 60 M.L.J. 423 (P.C.). In that case it was held:

Once a sale has been duly effected, it is not competent to the decree-holder and the judgment-debtor to get rid of it by merely asserting that the decree has been adjusted or satisfied out of Court.

24. In holding so, their Lordships of the Privy Council relied solely on Order 21, Rule 92 and the interpretation of the language thereof. In the course of their judgment the following observations occur:

When once a sale has been effected, a third-party interest intervenes, and there is nothing in this rule to suggest that it is to be disregarded. The only means by which the judgment-debtor can get rid of a sale, which has been duly carried out, are those embodied in Rule 89. That this is so is, in their Lordships' opinion, clear under the wording of Rule 92, which provides that in such a case (i.e., where the sale has been duly carried out), if no application is made under Rule 89 'the Court shall make an order confirming the sale and thereupon the sale shall become absolute' " (p. 429).

25. It may be observed that their Lordships made no reference to cases under Rule 90 or 91 referred to in Rule 92 as these had no application to the case before them. To the same effect is the decision of the Full Bench of the Nagpur Court reported in Shankar v. Jawaharlal (1928) 111 I.C. 895. The learned Judges in that case held that the private satisfaction of a decree certified in Court after sale of immovable property has been held and before the confirmation is ordered, does not extinguish the decree and prevent the Court from confirming the sale where a third person has purchased the property bona fide at the auction sale. The judgment of that case discusses the question in all its detail. One of the grounds of the judgment is based on Order 21, Rule 92. The learned Judge Kinkhede, A.J.C., states that the provisions of Rule 92 are imperative and the Court cannot refuse to confirm the sale unless the requirements of Rules 89 and 90 are strictly complied with" (p. 897).

26. In the course of the judgment the same observation is repeated in a somewhat different language thus:

The provisions of Sub-rule (1) of Rule 92 of Order 21, Civil Procedure Code, also are peremptory. They cast an imperative duty on the executing Court to make an order confirming the sale unless the conditions specified in Rules 89, 90 or 91 were fulfilled. Sub-rule (2) lays down the conditions under which alone the Court is permitted to make an order setting aside the sale....(p. 898).

27. Later on the learned Judge observed as follows:

If the Legislature had desired to refuse confirmation and veto the purchaser's rights on any grounds other than those mentioned in Rules 89, 90 or 91 of the Order, there was nothing to prevent it from providing for such a contingency in the Code. If it had intended to leave him to the mercy of the decree-holder and judgment-debtor by enabling them to defeat his rights and even to oust the Court's jurisdiction, by a private pact of their own, formed behind the purchaser's back, the Code

would have expressly provided for the exercise of such a right. In my opinion the very absence of any such provision in the Code for vetoing or negativing the purchaser's rights under the Court-sale itself constitutes the strongest proof of the absence, of any such intention (p. 899).

28. Mr. Ramaswami Aiyar tries to distinguish the case on the ground that it relates to a case of the private satisfaction of the debt by adjustment outside the Court. But having regard to the imperative language of the provision contained in Order 21, Rule 92, the distinction is meaningless; and the reversal of the decree and the adjustment of it outside the Court stand so far as the language of Rule 90 is concerned on the same footing; because, barring the cases mentioned in that rule the Court cannot recognise, once a sale is held, any other ground for refusing to confirm it. This case is interesting because it deals also with the argument of Mr. Ramaswami Aiyar that I have already dealt with, vis., that by the "dropping out of the proviso" in the present Code no change in the law has been made by the Legislature and that even under the present Code the subsistence of a decree at the time of the confirmation of the sale is a necessary condition for the sale being confirmed. Regarding this argument the learned Judge Kinkhede, A.J.C., observed as follows:

If the intention of the Legislature had been to make the acquisition of title by the auction-purchaser, contingent upon the decree being a subsisting decree at the date of the confirmation, there was no point in deleting the words to that effect from Section 316 of the old Civil Procedure Code when Section 65 of the new Code was in its stead enacted. All that appears to be necessary under (he Code from the point of view of third party purchasers is that to give them a good title at the date when the sale is held, the decree must be a subsisting decree. If that decree ceased to exist at the date of the sale there is no debt to recover and, therefore, the Court loses its jurisdiction to sell the judgment-debtor's property, and consequently every sale held under such circumstances must be treated as a nullity.

29. To show that confirmation of a sale can be refused on grounds other than those mentioned in Rule 92, and therefore impliedly it can be refused if there was no subsisting decree at that time, and that therefore the argument based on the language of Order 21, Rule 92 should not be accepted, the learned Counsel for the appellant has drawn my attention to cases under Section 47, Civil Procedure Code, mentioned in Mulla's Civil Procedure Code, at p. 160, under the heading "A judgment-debtor may seek to set aside a sale on grounds other than those mentioned above," the grounds 'mentioned above' being (1) on deposit under Order 21, Rule 89, (2) for material irregularity under Order 21, Rule 90, and (3) for fraud under Order 21, Rule 90. The significance of most of these cases can be explained with reference to their special facts; but I shall deal with four cases as the learned Counsel specially emphasised their importance in support of his contention. These cases are Sahdeo Pandey v. Ghasiram Gyawal (1893) I.L.R. 21 Cal. 19, Rajagopala Aiyar v. Ramanujachariar (1923) I.L.R. 47 Mad. 228 : 46 M.L.J. 104 (F.B.), Raghava Chariar v. Murugesa Mudali (1923) I.L.R. 46 Mad. 853 : 44 M.L.J. 680 and Ariatullah v. Sashi Bhusan Hazrah (1919) 55 I.C. 547. Sahdeo Pandey v. Ghasiram Gyawal (1893) I.L.R. 21 Cal. 19 and Rajagopala Aiyar v. Ramanujachariar (1923) I.L.R. 47 Mad. 288 : 46 M.L.J. 104 (F.B.) may be dealt with together. The facts show that in these two cases the sale was held without giving notice to the judgment-debtor as required under the Code. It was held that such a sale was a nullity and therefore should be set aside. These are instances of cases where the Court held that in law there was no sale at all. To such a class of cases Order 21, Rule 92

will not apply, cases to which that rule relates being only cases of valid sale "where no application is made under Rules 89, 90 or 91 or where such application is made and disallowed." In Raghava Chariar v. Murugesa Mudali (1923) I.L.R. 46 Mad. 583 : 44 M.L.J. 680 it was held that the Court has inherent power to refuse to confirm the sale on the ground that it was misled in fixing the reserve price. This also may be treated as a case, having regard to the fact that the Court was misled into passing an order for sale, where there has been no valid sale. In Ariatullah v. Sashi Bhusan Hazrah (1919) 55 I.C. 547 it was held that "a sale held in execution of a decree for an amount in respect of which there was no decree existing at the time is illegal, and the Court would be justified in refusing to confirm it." This was also a case where there was no valid sale as there was no decree justifying the sale at the time when it was held. To cases of this kind Order 21, Rule 92 will not apply. This is clearly pointed out by the learned Judges in their order. They state:

We do not think that that is contemplated by Order 21, Rule 92. Order 21, Rules 89, 90, 91 and 92 pre-suppose a valid decree under which the sale is held, and the first three rules provide for setting aside the sales, and Rule 92 says that if there be no application for setting aside the sale, or such an application is made and disallowed, the sale shall be confirmed. Rule 92 does not affect the power of the Court to refuse to confirm a sale, or make it compulsory to confirm the sale when the Court finds that the sale is held under a decree which did not authorise the sale.

30. None of these cases can therefore help the appellants. Having regard to the decision of the Privy Council in Seth Nanhelal v. Umrao Singh (1930) L.R. 58 I.A. 50 : 60 M.L.J. 423 (P.C.) I must hold that under Order 21, Rule 92, Civil Procedure Code, where no application is made under Rules 89, 90 or 91 to set aside a valid sale, the Court is bound to confirm the sale and cannot refuse to do so on the ground that there was no subsisting decree at the time of the confirmation or on any other grounds; for the language of the rule is imperative.

31. For the above reasons the first prayer in the appellants' petition asking the Court to refuse to confirm the sale on the ground that the decree was reversed in appeal had to be disallowed. In this connection I may draw attention to the opinion expressed in Mulla's Civil Procedure Code which supports this view. At p. 218 of the 9th Edition of the book the learned author expresses the following opinion referring to Section 316 of the Code of 1882:

On referring to Section 316 of the Code of 1882 (p. 213) it will be observed that it contained a proviso the effect whereof was stated to be that a sale could not be confirmed if, at the time of application for confirmation, the decree under which the sale was effected had ceased to be a subsisting decree. That proviso has not been reproduced in the present section. Under the present section therefore a sale held in execution of a decree may be confirmed, in any event where the purchaser is a third party, though the decree has been reversed before confirmation of the sale. See Order 21, Rule 92 and note the words ' the Court shall make an order confirming the sale'.

32. In an earlier page, at p. 214, referring to the omission of the proviso to Section 316 when dealing with Section 65 of the present Code it is stated:

that it is therefore no longer necessary that the decree should be subsisting at the time of the confirmation of sale.

33. The opinion of Sir Dinshah Mulla is therefore against the contention of the learned Counsel for the appellant. It is but fair to say here that Mr. Nandlal in his commentaries on the Code of Civil Procedure takes a different view. He says that the omission of the proviso does not introduce any change in the law.

34. I shall now deal with the alternative prayer for setting aside the sale contained in the appellants' petition. The appellants ask the sale to be set aside on the contingency of the Court confirming it. There are various objections in granting this alternative prayer. It has been held in Raghu Ram Pandey v. Deokali Pande (1927) I.L.R. 7 Pat. 30 that a person who impeaches the validity of the sale cannot file an application under Order 21, Rule 89, Civil Procedure Code. In that judgment it is pointed out that when the payment is made under Rule 89, the person making the payment must accept the validity of the sale. He cannot make a payment under Order 21, Rule 89, and at the same time challenge the validity of the sale. A payment under Rule 89 must be an unconditional payment....

35. This case has been followed in this Court in Kummakutty v. Neelakandan Nambudri (1930) 59 M.L.J. 893. There is a still more serious objection to the grant of the appellants' alternative prayer. The appellants have deposited only 5 per cent, of the purchase money for payment to the purchaser. Under Order 21, Rule 89, Civil Procedure Code, if the appellants wish to set aside the sale they should deposit not only 5 per cent, of the purchase money but also should make a deposit of the sum mentioned in Clause (b) for payment to the decree-holder. This has admittedly not been done by them in this case. They refuse to make this deposit because they say that the decree has been set aside and that therefore the decree-holder is not entitled to get any amount. But that consideration cannot in any way affect their obligation to deposit the amount under the Rule. This really shows the inconsistency of the alternative prayers contained in the appellants' petition. For, in an application under Order 21, Rule 89 the petitioners cannot be heard to say that the sale which they seek to set aside is invalid and unless they are permitted to do this, they cannot be absolved from the statutory duty of depositing the amount mentioned in Sub-clause (b) of Clause (1). Those who impeach the sale, as already pointed out, cannot apply under Order 21, Rule 89. It has been held in Karunakara Menon v. Krishna Menon (1915) I.L.R. 39 Mad. 429 : 28 M.L.J. 262 that a judgment-debtor who wishes to take advantage of the provision under Order 21, Rule 89 must strictly comply with the same, by paying all the amounts as directed by the Rule....

36. The two cases relied on by the learned Counsel for the appellants, Vedala Lakshminarasimha Charyulu v. Pacha Lakshmiamma 1912 M.W.N. 756 and Anantha Lakshmi Ammal v. Sankaran Nair (1913) 24 M.L.J. 205, which show that it is not necessary to make all the payments mentioned in Sub-clauses (a) and (b) to Clause (1) of Order 21, Rule 89 have been distinguished in this case. The learned Judges state that Anantha Lakshmi Animal v. Sankaran Nair (1913) 24 M.L.J. 205 only decides that where a decree-holder had agreed to give up a portion of the decree amount, he was not entitled to insist upon the deposit or payment of the full amount mentioned in the proclamation of sale. About the case in Vedala Lakshminarasimha Charyulu v. Pacha Lakshmiamma (1912) M.W.N.

756 they point out that "in that case an agreement by the decree-holder to set off a portion of the decree amount was held to amount to payment". It is clear that these two cases do not show that the payment required under Order 21, Rule 89 need not be made. The present case does not fall within the scope of either of these decisions. The decision in Subbayyan v. Thoppai Muthayyan (1921) 42 M.L.J. 71 accepts the strict view of Order 21, Rule 89 held in Karunakara Menon v. Krishna Menon (1915) I.L.R. 39 Mad.429 : 28 M.L.J. 262. The same view of Order 21, Rule 89 is entertained by the Bombay High Court also. In Manaji Kuverji v. Aramita (1921) I.L.R. 46 Bom. 171 it was laid down:

The provisions of Order 21, Rule 89 being a concession allowed to judgment-debtor must be strictly complied with in order to enable the judgment-debtor to obtain the advantage of the concession.

37. This decision was followed in Dattatreya v. Jagannath A.I.R. 1929 Bom. 215. In this connection my attention was drawn by Mr. Swaminatha Aiyar to the decisions in Tirumal Rao v. Syed Dastaghiri Miyah (1898) I.L.R. 22 Mad. 286 and Chundi Charan Mandal v. Banke Behary Lai Mandal (1899) I.L.R. 26 Cal. 449 (F.B.) also. These also support the view contended for by the respondent. As the appellants have not deposited all the amounts required under Order 21, Rule 89, Civil Procedure Code, the-alternative prayer asked for in their petition cannot be granted. In the result, both the prayers of the appellants have to be refused.

38. I shall now deal with the preliminary objection raised by the respondent that no second appeal lies. The objection is not of much importance as the appellants have filed a Civil Revision. Petition also, and if the Lower Court's order is wrong this Court may well interfere with it under Section 115, Civil Procedure Code, as the question involved is without doubt a question of jurisdiction, namely, whether the Court has jurisdiction to confirm a sale when the decree on which the sale is based has been reversed in appeal subsequent to the sale and before its confirmation. But the respondent presses the preliminary objection for another reason, and it is this, namely, that if I hold that there is no second appeal and therefore deal with the case as a Civil Revision Petition, then my order will be final and not be subject to any further appeal; but if I deal with the case as a second appeal then the order passed by me will be subject to a Letters Patent Appeal provided I give permission to file an appeal. This technical advantage which he hopes to get is of course dependent upon the assumption that the appellants' case is going to be dismissed. If the appellants succeed then the preliminary objection will certainly re-act against the respondent. However, as the question has been raised I will deal with it.

39. If the appellants' petition to the Lower Court is to be considered as one under Order 21, Rule 89, then it is clear that there is only one appeal under the Code against the order that may be passed upon it and against the appellate order only a revision under Section 115, Civil Procedure Code, can be filed and not a second appeal. But the appellants have filed their application under Section 47, Civil Procedure Code, also. It is argued by the respondent that the contest being between the judgment-debtors and the auction purchaser, having regard to the Full Bench decision in Veyindramuthu Pillai v. Maya Nadan (1919) I.L.R. 43 Mad. 107 : 38 M.L.J. 32 (F.B.), which holds that a stranger auction-purchaser is a representative of the judgment-debtor it must be held that the question does not arise between "parties to the suit" and that therefore one of the conditions for the application of Section 47, Civil Procedure Code, lacking, the petition does not lie under that section.

At first sight this objection seems to be insurmountable, but having regard to the explanation put upon the Full Bench decision by a Bench of this Court subsequently this objection has to be overruled. The scope of the Full Bench decision has been discussed in detail by Krishnan, J., in Jainulabdin v. Krishna Chettiar (1921) 41 M.L.J. 120, where the learned Judge pointed out that the Full Bench after holding that the stranger auction-purchaser is a representative of the judgment-debtor went further and held on the authority of the Privy Council decision in Prosunno Kumar Sanyal v. Kali Das Sanyal (1892) L.R. 19 I.A. 166 : I.L.R. 19 Cal. 683 (P.C.) that irrespective of any question of the representative character of the auction-purchaser-applicant, Section 47, Civil Procedure Code, should be applied to his case where the question raised is one relating to execution, and is one in which the decree-holder and the judgment-debtor are adversely interested.

40. The learned Judge ends his discussion of the question with this observation:

The Full Bench, as I understand them, hold that the condition in Section 47, Civil Procedure Code, that the question should be one 'arising between the parties' is satisfied by the question being one of a nature in which the parties to the suit are adversely interested, though the person actually raising it in any particular case against one party may not be the representative of the other party. In fact they gave an extended meaning to these words.

Ayling, J.

41. Concurred with the opinion of Krishnan, J., stating that he was not prepared to dissent from his view though he was inclined to think that the Full Bench judgment extended the applicability of Section 47, Civil Procedure Code, to a degree hardly suggested by the wording of the section. In this case there can be no doubt that the question for decision is one of a nature in which the auction-purchaser and the judgment-debtors are adversely interested and it therefore follows that the petitioners' application would fall under Section 47, Civil Procedure Code; and if so, an appeal against the first Court's order will lie to the appellate Court and against that Court's order a second appeal will lie to this Court, the order passed on an application under Section 47 being in the nature of a decree. As against this contention of the appellants based on the interpretation of the Full Bench judgment as given in Jainulabdin v. Krishna Chettiar (1921) 41 M.L.J. 120, Mr. Swaminatha Aiyar has called my attention to the decision in Yagnasami Aiyar v. Chidambaranatha Mudaliar (1921) 13 L.W. 15, where it was held by Abdur Rahim, J., who was a party to the Full Bench decision, and Odgers, J., subsequent to the Full Bench decision in Veyindramuthu Pillai v. Maya Nadan (1919) I.L.R. 23 mad. 107 : 38 M.L.J. 32 (F.B.), that a question arising for decision between the judgment-debtor and auction-purchaser does not fall under Section 47, and the decision thereon is not appealable. The judgment is a short one and the Full Bench decision is not discussed in it, nor does it refer to the later decision of this Court in Veyindramuthu Pillai v. Maya Nadan (1919) I.L.R. referred to by Krishnan, J., in his judgment. For these reasons I am inclined to accept the decision in Jainulabdin v. Krishna Chettiar (1921) 41 M.L. in preference to the decision in Yagnasami Aiyar v. Chidambaranatha Mudaliar (1921) 13 L.W. 13 L.W. 15. Mr. Swaminatha Aiyar draws my attention to a decision of mine where I upheld the preliminary objection and dismissed the civil miscellaneous appeal on the strength of the Full Bench decision in Veyindramuthu Pillai v. Maya Nadan (1919) I.L.R. 43 Mad. 107 : 38 M.L.J. 32 (F.B.). But no attempt was made before me to distinguish the Full

Bench decision, nor was my attention invited to the decision in Jainulabdin v. Krishna Chettiar (1921) 41 M.L.J. 120. The appellants' learned Counsel in that case accepted the preliminary objection and I therefore dismissed the second appeal. For the above reasons I would hold that in the present case a civil miscellaneous second appeal would lie.

42. In the result both the civil miscellaneous second appeal and the civil revision petition are dismissed, but the respondent will get his costs only in the civil miscellaneous second appeal.