

**(1922) 01 BOM CK 0002****Bombay High Court****Case No:** Second Appeal No. 392 of 1921

Balvant Rangnath

APPELLANT

Vs

Bala Malu

RESPONDENT

**Date of Decision:** Jan. 11, 1922**Acts Referred:**

- Civil Procedure Code, 1882 - Section 315
- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 93

**Citation:** (1922) 24 BOMLR 308 : 67 Ind. Cas. 360**Hon'ble Judges:** Norman Macleod, J; Coyajee, J**Bench:** Division Bench**Final Decision:** Dismissed

### Judgement

Norman Macleod, C.J.

The plaintiff brought this suit to recover possession of the suit land from the first three defendants, or, in the alternative, to recover Rs. 417-9-0 from the fourth defendant. The fourth defendant had obtained a mortgage decree on the 15th August 1913 in Suit No. 696 of 1910 against defendants Nos. 5 and 6, Sakharam and Tukaram. In the execution of that decree, the suit land was sold by auction on the 3rd March 1917. The plaintiff purchased it for Rs. 401 and his sale was confirmed in the 23rd May 1917. He says that he got possession of the land unobstructed, but the defendants allege that only symbolical possession was obtained and the plaintiff was never in actual possession or Vahivat of the land. On the 28th August 1917, defendants Nos. 1 and 2 asserted their right to be in possession of the land, whereupon the plaintiff filed Suit No. 28 of 1917 in the Mamlatdar's Court which he lost. So he had to bring this suit.

2. In the trial Court it was found that defendants Nos. 1 to 3 had been in possession as owners for more than twelve years and therefore the plaintiff could not succeed as against them. The learned Judge passed a decree for Rs. 407-6-0 and costs

against the fourth defendant relying on the decision in *Rustomji Ardeshir v. Vinayak Gangadhar* ILR (1910) 35 Bom 29; 13 Bom. L.R. 723.

3. In appeal this decision was reversed by the District Judge who considered that the rule laid down in *Rustomji Ardeshir v. Vinayak Gangadhar* had no application to a sale in pursuance of a mortgage decree under Order XXXIV, that there was no allegation of fraud, and that therefore there was no basis for the claim to recover the purchase money.

4. Now under Order XXI, Rule 91, an auction-purchaser at a Court sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold, and the period of limitation for such application is thirty days. If the order is made to set aside the sale, then the purchaser under Rule 93 is entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid. The corresponding section in the Code of 1882 to Order XXI, Rule 93, was Section 315 which directed:-

When a sale of Immovable property is set aside u/s 310(a), 312 or 313, or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase money (with or without interest as the Court may direct) from any person to whom the purchase money has been paid.

5. It will, therefore, be noticed that a considerable change has been made in the law by the Code of 1908, for the statutory right to file a suit for recovery of the purchase money has been taken away. If it is found that the judgment-debtor had no saleable interest when the property was sold, the purchase money cannot be recovered until or unless the sale is set aside. That is the construction placed on Order XXI, Rules 91 and 93 by the decision of the Allahabad High Court in *Nannu, Lal v. Bhagwan Das*. ILR (1916) All. 114 The learned Judges remarked at page 119:-

It is only necessary to point out that there is a marked difference in the terms of the present CPC and the CPC of 1882. Section 315 of the latter Act provided that the purchaser might get back the purchase money when a sale had been set aside under Sections 310 (a) 312 or 313, or when it was found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser was for that reason deprived of it. We have already pointed out that, under the provisions of the present Code, it is only when the sale has been set aside that the purchase money can be returned... "As regards sales under a decree of a Court, there is no warranty of title either by the decree-holder or by the Court." In the case of (1878) L.R. 5 I.A. 116 (Privy Council) their Lordships remarked :—"Now it is, of course, perfectly clear that when the property has been sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that

of the judgment-debtor, he has no remedy against either the sheriff or the judgment-creditor."

6. The same point was dealt with in *Parvathi Ammal v. Govindasami Pillai* ILR (1915) Mad. 803. In that case the Court-sale was set aside on account of irregularities in its conduct perpetrated by the decree-holder. The purchaser thereupon filed a suit for a return of the poundage fees not returned to him and interest on the purchase money paid by him. It was held that a suit was maintainable for the recovery of the same. The argument for the appellant was that the plaintiff should have sought redress in execution and that a separate suit did not lie. Their Lordships said:-

The present Code contains no provision regarding the right of the purchaser to obtain a refund of his purchase money without applying to set aside the sale when it is subsequently found that the judgment-debtor had no saleable interest in the property. It may be, as suggested by Mr. Ramachandra Ayyar for the respondent that unless the purchaser seeks the aid of the Court to set aside the sale, he has no remedy against the decree-holder. It was laid down by the judicial Committee in *Darab Ally Khan v. Abdool Azeez* that there was no warranty of title in Court-sales. See also *Sundara Gopalan v. Venkatavarada Ayyangar* ILR (1893) Mad. 228. The right of action to obtain a refund consequent on the want of saleable interest in the judgment-debtor is not a right inhering in a purchaser, but is the creature of a statute, and the right thus conferred can only be exercised within the limitations prescribed. Consequently without getting the sale set aside through Court, the purchaser has no right of action.

7. The case relied upon by the appellant, *Rustomji Ardeshir v. Vinayak Gangadhar* ILR (1910) 36 Bom. 29 was a case under the Code of 1882 being Second Appeal No. 472 of 1909. His Lordship the Chief Justice said:-

We think, however, that the right of the plaintiff to maintain a suit is made clear by the provisions of the CPC in the manner indicated in *Sundara Gopalan v. Venkatavarada Ayyangar*<sup>(3)</sup>. Under the CPC an implied warranty of some saleable interest, when the right, title and interest of a judgment-debtor is put up for sale, is implied, and the purchaser's right based thereon to a return under certain conditions of the purchase money which has been received by the judgment-creditor is recognized.

8. I doubt very much whether there was any necessity to base the right given by the Legislature under the old Code of 1882 to a purchaser to file a suit to recover his purchase money on a warranty. But for the purpose of this case we are bound by the provisions of the Code of 1908, and it seems to me we should follow the cases of *Nannu Lal v. Bhagwan Das* and *Parvathi Ammal v. Govindasami Pillai* which decide that an auction purchaser, at a Court sale, should he get nothing from his purchase, must get the sale set aside under Rule 91 before he can obtain the right to ask for a refund of the purchase money. He can undoubtedly maintain a suit against the

judgment-debtor on any ground which is open to him in law such as fraud or misrepresentation; but such a claim would depend on different evidence, and would be entirely of a different character to the present suit. No fraud or misrepresentation was alleged in the plaint, and the only ground on which the plaintiff sought relief was that after he purchased the property he discovered that other persons were entitled to it. Therefore the decision of the District Judge is right and the appeal must be dismissed with costs.

Coyajee, J.

9. I agree.