# Virjibun Dass Moolji Vs Bissesswar Lal Hargobind and Others

**Court:** Calcutta High Court

**Date of Decision:** May 12, 1920

**Citation:** 60 Ind. Cas. 406

**Hon'ble Judges:** Asutosh Mookerjee, Acting C.J.; Ernest Fletcher, J

**Bench:** Division Bench

## Judgement

Asutosh Mookerjee, Acting C.J.

1. This appeal raises an important question of the namely, who there Order XXI, Rule 89 of the Code of civil Procedure, 1908, applies to Bales in

execution of mortgage-decrees on the Original Side of this Court.

2. Mr. Justice Greaves has stated in the order now under appeal that if the matter were res integra, he would be inclined to answer the question in

the affirmative. But in view of the long established practice of the Court and the decision of Mr, Justice Woodroffe in Surendra Kristo Ran v.

Gooroo Prasad Ghose 59 Ind. Cas. 432 : 24 C.W.N. 538 he felt constrained to answer the question in the negative, and to dismiss the application

of the mortgagor.

3. The question raises two issues: First, Whether Order XXI, Rule 89 applies to sales held in execution of mortgage-decree and, secondly, if it

does so apply, whether the rule is applicable on the Original Side of this Court.

4. As regards the first point, Mr. chakravarty has contended that Rule 89 is applicable only where Immovable property has been sold in execution

of a decree after attachment and, in support of that view, he has invited our attention to various rules embodied in Order XXI. We are of opinion

that this contention is wholly unfounded. Rule 11 of Order XXI contemplates, as is clear from Sub-rule (2) Clause (j), that property may be sold in

execution of a decree either after attachment or without attachment.

5. In the case of execution of a decree for money, the Immovable property intended to be brought to sale must be attached. This is in the interest

of the decree holder who requires a prohibitory order in his favour, as otherwise the judgment-debtor might, during the pendency of the execution,

transfer the property to a stranger and thus defeat the claim of the execution creditor. On the other hand, in the case of execution of a decree on a

mortgage where the decree itself directs the sale of the mortgaged property, an attachment is manifestly unnecessary and the Code does not

contemplate that in such a case the execution-creditor should proceed to attach the property the sale whereof is directed by the decree it is Rule

89 is expressed in perfectly general terms and lays down tint 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 squired before such sale, may apply to have the sale set aside on his

depositing-in Court certain prescribed sums. The rule is not limited by its terms to cases where Immovable property has been sold after attachment

in execution of a decree; and, we are of opinion that it should not be so restricted.

6. The history of this matter is well known. When Section 310A was introduced into the Code of 1882, a question arose. Whether that section

was applicable to sales held in execution of a mortgage-decree under the rules framed pursuant to Section 104 of the Transfer of Property Act,

There was a divergence of judicial opinion on the subject (his Court answered the question in the negative, while all other High Courts answered it

in the affirmative Kedar Nath Raut v. Kali churn Ram 25 C 703 : 2 C.W.N. 353 : 13 Ind. Dec. (N.S.) 460, Raja Ram Singhii v. Chunni Lal 19 A.

205 : A.W.N. (1897) 47 : 9 Ind. Dec. (N.S.)135 Krishnaii v. Mahadev 25 B. 104 : 2 Bom. L.R. 635 Malikar unadu Setti v. Lingamwti Pantulu

25 M. 244 (F.B.) 12 M.L.J. 279 In order to remove the doubt thus created, the Legislature in 1908 remodelled Section 310 A and also repealed

the sections of the Transfer of Property Act which were inserted with modifications in the new Code of Civil Procedure. We feel no doubt that

Order XXI, Rule 89 applies to sales in execution of mortgage-decrees.

7. As regards the second point, namely, whether the rule is applicable to such sales on the Original Side of this Court, we observe that Order

XLIX, Rule 3, specifics the Rules which do not apply to any Chartered High Court in the exorcise of its ordinary or extraordinary Original civil

Jurisdiction. Order XXI, Rule 89, is not one of the rules go excluded. Prima facie, then, Order XXI, Rule 89, is applicable to sales in execution of

mortgage decrees on the Original Side of this Court. This view is supported by the provisions of Clause 37 of the Letters Patent which authorizes

the High Court to frame rules, and directs that the High Court shall be guided in making such rules and orders, as far as possible, by the provisions

of the Code of Civil Procedure. Consequently, if the view is put forward that Order XXI, Rule 80, does not apply to the Original Side of this

Court, notwithstanding its omission from Rule 3 of Order XLIX, it must be established that there is some specific provision in the rules framed by

this Court which justifies Such an inference.

8. Our attention has been drawn to only one such Rule which is to be found in Chapter XXVII of the Rules framed by this Court. Bale 53 provides

that, ""No bidding shall be opened except with the consent of the purchaser, or unless it be shown that there has been fraud or mis-conduct in the

management of the sale, or that the purchaser by reason of being in a fiduciary position was disqualified from purchasing"". We are of opinion that

this rule is of no assistance to the respondent the rule clearly contemplates the re-opening of a bid so as to allow a higher bid to be offered. It has

no application to a case where the bid has been accepted and the sale has been completed by the payment of the purchase-money and thereafter

an application is made by a person competent to apply under Rule 89 to have the sale set aside upon payment of the prescribed amount. There is,

in our opinion, no escape from the conclusion that Order XXI, Rule 89, applies to mortgage sales on the Original Side of this Court.

9. As regards the decision of Mr. Justice Woodroffe in Hurin.ra Kristo Bay v. Gooroo Prasad Ghose 59 Ind. Cas. 432 : 24 C.W.N. 536 it is

plain that the question was not necessary for decision for the purposes of that case, became, even assuming that Rule 8) was applicable, the

applicant had not complied with the requirements of the Code. We are further of opinion that that decision attaches undue importance to the

previous practice of the Court. There had been a fundamental alteration effected in the law and steps had been taken by the Legislature to negative

the decision of the Full Bench in Kedar Nath Baut v. Kali churn Ram 25 C 703 : 2 C.W.N. 353 : 13 Ind. Dec. (N.S.)460 We feel no doubt that

the practice which at present prevails on the Original Side of this Court is contrary to law, and upon a correct construction of the civil Procedure

Code, Order XXI, Rule 89, must be held applicable t to mortgage sales.

10. We have stated that Mr. Justice Greaves was himself in fined to adopt this view. but he probably felt constrained by the dictum in the case of

Chaitram Rambilas v. Bridhichonl kesrichand 30 Ind. Cas. 631 : 42 C. 1140 : C.L.J. 548 : 19 C.W.N. 820 to treat himself as bound by a decision

which, in his opinion, was not correct. That dictum however was not intended to be carried to this length No doubt when a decision of a single

Judge of the Original Side of this Court is produced before another Judge, he is bound to treat it with respect, and ordinarily to follow it if it is

applicable to the circumstances of the case before him. but this does not imply that he cannot examine the matter and that it is not competent to him

to take a contrary view, if he is convinced that the decision is erroneous. The answer to the question, what regard is to be had to an earlier decision

of a Court of coordinate jurisdiction, must depend upon a variety of circumstances. One important factor is the length of time during which it has

stood unchallenged. Another factor, possibly of greater importance, is whether the decision gives adequate reasons for the conclusion embodied

therein. but the position is indefensible on principal, that, although a Judge may feel absolutely convinced that the decision produced before him is

erroneous in law, he is still bound to decide against his own opinion. To take such a view is to hold that the Judge may be reduced to an automaton

by the production of an earlier judgment. Reference may, in this connection, be usefully made to the course followed in Such circumstances in

England.

11. In Finlay v. Darling (1897) 1 Ch. 719 : 66 L.J. Ch. 384 : 76 L.T. 416 : 45 W.R. 445 Mr. Justice Rimer observed as follows: " The only other

case that has occasioned me any difficulty is that, before Kekewick, J, of Bendy, In re, Wallis v. Bendy (1895) 1 Ch. 109 : 64 L.J. Ch. 170 : 13

R. 95 : 71 L.T. 750 : 43 W.R. 345 That is a decision of a Judge of first instance like myself. Ordinarily, in these cases I should always follow the

decision of a Judge of coordinate jurisdiction unless on principle I differed from it. To the same, effect are the observations of Lord Alverstone,

Order J., in London County Council v. Schewzik (1905) 2 B. 695 : 74 L.J.K.B. 959 : L.T. 550 : 54 W.R. 168 : 69 J.P. 409 : 3 L.G.R. 1159 : 21

T.L.K. 731 that """the Court of Appeal have recently recognized that it is desirable in the public interest, and in order that people may know with

certainty what their position is, that Courts of ordinate jurisdiction should follow their deciplene, unless there are strong grounds which enable the

Court to say that the previous decisions ought not to be followed,"" The same view had been taken in 1860 in the case of Neu castle-Under Lyne

and Turnpike Bonds v. North Stoffordshire Railway Co. (1860) 5 H. & N. 160 : 120 R.R. 524 : 29 L.J.M.C. 150 : 8 W.R. 21 6 : 1 L.T. 332 :

157 E.R.1140 where Pollock, C.B., observed as follows: ""The rule is this : that wherever there is a decision of a Court of concurrent jurisdiction,

the other Courts will adopt that as the basis of their decision, provided it an be appealed from. If it as not be appealed from, they will exercise their

own judgment"". Baron Martin added, ""that is where they think the judgment of the other Court was clearly wrong not where it is a doubtful

matter"".

12. A similar opinion was expressed by Sir George Jessel, M.R. in Chorne and Roulett, In re (1880) 93 Ch. 774 : 49 L.J. Ch. 310 : 42 L.T. 650 :

28 W.R. in the following terms : When I first had the honour of sitting here 1 used to think myself bound by any decision of a Vice-Chancellor that

was twenty years old; but the Court of Appeal in one instance held that I was not so bound, I then reconsidered my position and thought I was not

bound by any decision of a Court of co-ordinate authority. Accordingly, I have since frequently declined to follow Such authority."" in a later case,

Gatheicole v. Smith (1881) 44 L.T. 439 : 50 L.J. Ch. 671 : 17 Ch. 1. 29 Sir George Jewel made a similar statement That the Courts of Queen''s

Bench, Common Pleas, and Exchequer followed each other''s decisions was a matter of courtesy. The Vice Chancellors did not consider

themselves bound by each other''s decisions. I have differed frequently from Courts of co-ordinate jurisdiction There are, however, dicta of other

learned Judges who apparently lay down a more stringent rule for instance, in Merry v. Nickalls (1872) 7 Ch. App. 733 : 20 W.R. 929 : 27 L.T.

12 Lord Justice James observed : ""The whole theory of our system is, that, the decision of a proper Court is binding on an inferior Court and on a

Court of coordinate jurisdiction, in so far as it is a statement of the law which the Court is bound to accept."" To the same effect is the observation

of Brett, M.R. in Palmer v. Johnson (1884) 13 Q.B.D. 351 : 53 L.J.Q.B. 348 : 51 L.T.21 : 33 W.R. 6, and Mr. Justice Joyce in two cases felt

disinclined to depart from the decision of concurrent authorities, although he considered them to be doubtful. See Lyon v. London city and

Midland Bank (1903) 2 K.B. 135 : 72 L.J.K.B. 465 : 88 L.T. 392 : 51 W.R. 400 : 19 T.L.R. 334 and Ratenmorth, In re, Baiensworth v. Tindale

(1905) 2 Ch. 1 : 74 L.J. Ch. 353 : 92 L.T. 490 : 21 T.L.R. 357

13. We are of opinion that the rule which should be followed in this Court is that a Judge on the Original Side is ordinarily bound to consider with

respect the decision of another Judge on the Original Side produced before him, but that if he is convinced that the decision is erroneous, he is not

under an obligation to follow it against his own judgment.

14. The result is that this appeals allowed and the order (Mr. Justice Greaves is set aside the application under Rule 89, Order XXI is granted. The

appellant-judgment-debtor is entitled to the costs of this appeal and of the hearing before Mr. Justice Greaves.

Fusion, J.

15. I agree.