

**Varkey Mathai and ors. Vs. Oommen Oommen and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/718501](http://sooperkanoon.com/718501)

**Court :** Kerala

**Decided On :** Nov-08-1961

**Reported in :** AIR1963Ker148

**Judge :** Madhavan Nair, J.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 34 - Order 21, Rule 93;  
[Contract Act, 1872](#) - Sections 65

**Appeal No. :** Second Appeal No. 495 of 1957

**Appellant :** Varkey Mathai and ors.

**Respondent :** Oommen Oommen and ors.

**Advocate for Def. :** K.K. Mathew and; George Vadakkal, Advs. for Respondents  
Nos. 1 and 2

**Advocate for Pet/Ap. :** K.C. John, Adv.

**Judgement :**

**Madhavan Nair, J.**

1. The Appellant herein is the plaintiff in a suit for refund of price paid for a void Court sale in his favour.

2. The suit property belonged to Narayana Panicker, who mortgaged it with possession to Kurien Isaac and subsequently hypothecated the equity of redemption to the 1st defendant. The 1st defendant sued on the hypothecation, as O. S. No. 308 of 1109 on the file of the Munsif, Thiru-vella, obtained decree thereon, took out execution, and purchased the suit property in Court auction on Dhanu 4, 1113, (Vide the sale certificate Ext. C) and also got symbolical delivery of the property. Subsequently he sold his rights as per Ext. D to Issac Sosarnma, who, by that time, had succeeded to the mortgage on the property.

Subsequent to the aforesaid court-sale, the equity of redemption was again sold in execution of O. S. No. an of 1109 on the file of the same Court on Meenom, 12, 1121 and the sale was confirmed on Medom 30, 1121. (Vide the sale certificate Ext. F). The decree-holder therein was the 2nd defendant Bank, of which the 1st defendant was then the liquidator under a voluntary liquidation. The latter court-sale was for Rs. 400/- and the purchaser therein was the 3rd defendant in the present suit. From the 3rd defendant the plaintiff got assignment of the rights under the court-sale as per Ext. A dated Thulam 26, 1122, taken benami in the name of P. W. 1 and subsequently released in his name as per Ext. B dated Thulam 28, 1122. Having thus secured the equity of redemption, the plaintiff issued a notice to Isaac Sosamma demanding redemption; and it is from her reply dated Karkidakam 12, 1124, that he came to know of the earlier court-sale in favour of the 1st defendant. He therefore instituted the present suit for refund of the sale amount of Rs. 400/- as also Rs. 15/- that he had to spend for taking assignments in his favour, with interest thereon from Thulam 26, 1122, as the court-sale failed for want of a saleable interest in the judgment-debtor. The cause of action was however stated to be the fraud played by the 1st defendant, who had already purchased the property in court-sale in execution of a decree in his favour, in proclaiming the same for sale again in O. S. No. 211 of 1109.

The 1st defendant disowned liability and stated that he did not advert to the identity of the property that was being proclaimed by the Bank with that sold in execution of the decree in his favour when he signed the proclamation that was brought to him for signature as the liquidator of the Bank. On behalf of the and defendant Bank also it is the 1st defendant who filed the written statement,

reiterating the same contentions as were mentioned in his own.

The Munsif found that there was no fraud in the court-sale in favour of the 3rd defendant, and therefore, dismissed the suit. The Subordinate Judge concurred therewith. Hence this second appeal.

3. The only question that arises for consideration in this second appeal is the right of an auction purchaser to sue for refund of the sale amount when the execution sale has proved to be a nullity, on account of the judgment-debtor having no saleable interest at the time of the sale.

4. This question has been the subject of decision by several High Courts in India.

In. State v. Padmanabhan Pillai Kwnjan Pillai, AIR 1956 Trav-Co 216 a Bench of the Travancore-Cochin High Court followed the dictum in Raja Rishee Case Law v. Manik Molla, AIR 1926 Cal 971 :

'the auction purchaser may recover the purchase-price which he has paid if he can bring himself within the equitable principles which justify a suit for money had and received upon the ground that it is unconscionable that the defendant should retain the money as against the plaintiff.'

5. in Mehar Chand v. Milkhi Rain, AIR 1932 Lah 401 (FB) it is held:

'..... a decree-holder does represent when applying for the attachment and sale of property that the judgment-debtor has some saleable interest therein. If afterwards it turns out that the judgment-debtor has no such interest, then it is only right to assume that the decree-holder was guilty of misrepresentation. Misrepresentation is defined in Section 18, Contract Act, to mean and include inter alia :

'causing however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.'

In any case there can be no doubt that, putting the most favourable construction on the conduct of the decree-holder, both he and the auction-purchaser must be deemed to have been influenced in getting the property sold and in purchasing it respectively under a mistake as to a matter of fact which was essential to the

transaction of sale. It is obvious that, if the decree-holder knew that the judgment-debtor had no saleable interest in the property or at least that he did not believe in its existence, he would not ordinarily have got it sold and the auction-purchaser would not have bid for it except under such belief. If on the other hand, the decree-holder knew or had reason to believe that the judgment-debtor had no saleable interest in the property and still proceeded with its sale, then he would be guilty of fraud or at least of misrepresentation.

Therefore, in every case where the property of a third person, in which the judgment-debtor had no saleable interest, has been sold at the instance of the decree-holder both the parties, i. e., the auction-purchaser and the decree-holder must at least be deemed to be labouring under a mistake on an essential fact and therefore the suit would lie to recover the purchase price on the auction-purchaser being deprived of the property by the rightful owner as for recovery of money had and received on total failure of consideration. The right to maintain such auction has been given to the purchaser on equitable grounds; he must therefore bring his case within the rules of equity and his right to recover would be subject to any equitable defence that the decree-holder might be able to advance on the ground of laches, knowledge of true state of affairs, fraud, etc., on the part of the purchaser.

From the foregoing it would appear that the object of the Legislature in enacting Rule 93 Order XXI, C. P. C. was not to deprive the auction-purchaser of any rights that he otherwise had but was merely to provide him with an unconditional right, which could be enforced summarily, of getting back the purchase money, if the sale is set aside under Rule 92; in other cases, his right to have recourse to the ordinary remedy of instituting a suit for refund and to bring his case within the ambit of the rule of equity was not intended to be affected.'

6. In *Madia Koundan v. Kottara Koundan*, AIR 1936 Mad 50 (FB) it is held:

'It is clear that this Clause (Section 315 of the Civil Procedure Code, 1882 which corresponds to Order XXI Rule 93 of the Civil Procedure Code 1908) recognises the right of the auction-purchaser to obtain a refund of his purchase money if there is no saleable interest though there is no warranty of title. What is meant is that

though in a Court-sale there is not such a warranty as to the extent of title as we find in a private transaction between a vendor and a purchaser, still the Code adopts the view that there is a limited kind of warranty, viz., that the judgment-debtor possesses some little interest however small it may be. If the judgment-debtor's interest turns out to be nothing, the Court practically makes a promise that the decree-holder will have a refund of his purchase money. This is the theory underlying Section 315. Civil P. C. (1882). If once such a right in the purchaser is recognised, on the principle that every right should be capable of being enforced by a suit, a regular suit lies to obtain a refund of the purchase money, but the Legislature proceeded to give a remedy in execution also under Section 315. Accordingly under the Code of 1882 Courts have held that in a case where the judgment-debtor has a saleable interest, the auction-purchaser can obtain a refund of his purchase money under Section 315 or by a regular suit. Where it is sought to be obtained by a suit, it is improper to describe it as a suit under Section 315 Civil Procedure Code. As already observed the right to obtain a refund being recognised by the Code, the remedy by way of suit exists not because the Code gave it but because every right can be enforced by a suit. When the present Civil Procedure Code was passed, the Legislature limited the right of the auction-purchaser to obtain a refund in execution to cases where the sale was set aside by the executing Court under Order XXI; Rule 92 i. e., where an application is made under Rules 89, 90 or 91. But in cases where the executing Court does not set aside the sale, but the sale turns out to be futile by the finding in another litigation that the judgment-debtor has no saleable interest, this provision viz., Order XXI Rule 93 cannot apply.

The question that now arises is whether the auction-purchaser can recover the purchase money at least by a regular suit. It follows from the observations already made that such a suit exists unless it is taken away by an express provision of law. The object of the Code is to provide a speedier remedy in execution under certain special circumstances. The right of suit under other circumstances remains under the general law.'

The dictum in AIR 1936 Mad 50 has been followed in Subbarayudu v. Lakshmayya, AIR 1954 Mad 139, Ouseph Ouseph v. Devasia Chacko, AIR 1953

Trav-Co 619 and Pedda Malliah v. Adi-gopala Brahmayya, AIR 1960 Andh Pra 89.

7. Kameshwar Singh v. Banshidhai Marwari, AIR 1937 Pat 532 held:

'The remedy provided under Order XXI, Rule 91, is available to an auction-purchaser only if he makes his application within thirty days of the sale. There may be cases, however (this case is one of that type) in which an auction-purchaser becomes aware of the judgment-debtor's want of title in the property sold to him after the thirty days have expired and it is inconceivable that in such cases he should be left without a remedy. That being so, it has been held in some cases that where property to which the judgment-debtor has no saleable interest has been purchased in execution of a decree and the circumstances are such that in accordance with the equitable rules obtaining in that behalf it would be against reason and conscience that the person to whom; the purchase price has been paid should retain the purchase money as against the auction-purchaser, the auction-purchaser is entitled to recover such money from the decree-holder as money had and received to his use.'

8. in Solaiman Kaaim v. Ahammathu Filial Atiarku'nju, 1947 Trav-LR, 132 (FB) Krishnaswami Aiyar, C. J. held :

'Where a thing sold is non-existent, the transaction of sale is necessarily otiose and bad, whether it be a court-sale or whether it be a private sale. It may be that in some cases the non-existence of the subject-matter of sale, namely a disposable interest of the judgment-debtor in the property sold, may be discovered within a few days of the sale and in other cases it may not be discovered until a long time after the execution of the decree has been completely finished and closed ..... Where there was no saleable interest of the judgment debtor and it is discovered before ..... the sale is confirmed, the Court auction-purchaser in that case is only relieved from the obligations of having made a successful bid at the auction for the purchase of a non-existent property. The sale having failed the court in the exercise of its jurisdiction recalls the invalid sale and returns the purchase price to the court auction-purchaser. in a case where the invalidity of the sale appears or becomes known only later, the sale gets confirmed and the sale certificate is issued. The sale certificate in a court auction sale answers to the description of a

sale deed in a transaction inter parties by private treaty ..... The contract of transfer is concluded by the sale certificate and if there happened to be a total failure of consideration thereafter the right of the court-auction-purchaser to recover his purchase money in an independent suit is not at all affected because it could not be raised in the execution side of the court's jurisdiction'.

Krishna Pillai, J., concurred and observed:

'It appears to me that Order XXI, Rule 93 gives recognition to the principle that where the judgment-debtor had no title which could be sold, the sale ought to be set aside and the purchase money refunded to the auction-purchaser. it is merely a summary process by which relief is granted where application is made within the time Unlit of thirty days prescribed for cancellation of court-sales. it presupposes the contingency that the applicant discovered the absence of the title within thirty days and leaves untouched those cases where the truth is discovered only later, or as it sometimes happens established in an independent action by a third party long afterwards. Any other view would tend to defeat the very purpose for which the power of sale is conferred on courts and the principles underlying judicial sales ia general ..... My conclusion therefore, is that if at a court-sale a non-existing property is sold and purchased and the purchaser gets nothing out of the bargain, the purchaser can seek compensation by a separate suit from any other who has been directly benefited by it'.

Habeeb Muhammed, J., also observed in the same case :

'In proclaiming the property to sale, the decree-holder has made a misrepresentation, however innocent it be, that the property belongs to the judgment-debtor, or that the judgment-debtor had a saleable interest in it ..... As a result of the misrepresentations made by the decree-holder the auction-purchaser makes the mistake of purchasing the property in the belief that it belongs to the judgment-debtor. The purchase money paid by the purchaser, is received by the decree-holder. As there is a total failure of consideration for the sale, it is certainly unjust to allow the decree-holder to retain the money. In such cases, an action for recovery of the money is clearly one for money had and received.'

9. A contrary view was however taken in *Amar Nath v. Firm Chotelal Durgaprasad*, AIR 1938 All 593 (FB) where it was held that, apart from Order XXI, Rule 93 Civil Procedure Code, an

'auction-purchaser has no right to recover the purchase price by suit from the decree-holder in case it subsequently turns out that what he has purchased does not belong to the judgment-debtor'.

I do agree with the view taken by the Lahore, Madras, Patna, Travancore and Travancore-Cochin High Courts and follow the same in preference to that taken by the Allahabad High Court in AIR 1938 All 593.

10. Though there is no warranty Of title in a court-sale, where the rule of caveat emptor applies mostly, there is a representation well implied in the proceedings in execution that what is proceeded against is the property of the judgment-debtor in the case. It may be that the judgment-debtor has not the same interest in the property as is proclaimed he has. But if he has any interest in the property, be it a life interest, a mortgage interest, a leasehold interest or other limited interest, still it may be said to be the property of the judgment-debtor to the extent of that interest. In such cases the execution sales cannot be nullities. But if the judgment-debtor has no saleable interest in the property, it is not property of the judgment-debtor; the sale is nullity; and the purchaser would be entitled to refund of the price he paid as on a total failure of consideration. He has a cheaper and easier remedy in the executing Court if he can avail it before the sale is confirmed; otherwise he has to institute a suit for return of the price paid. As the property sold under Ext. F had already been sold away in a prior court-sale under Ext. C, the judgment-debtor had no saleable interest to pass under the later court-sale, which therefore, failed totally. The plaintiff is therefore entitled to a return of the money he paid for that void sale. It then follows that the decree of the Courts below cannot be sustained and has to be reversed.

11. As the suit is for money had and received as on a total failure of consideration, unless fraud is proved in the receipt thereof, which has not been in this case, the claim can only be for a refund of the money paid to and received by the defendant. In the instant case the amount paid for the court-purchase was admittedly Rs.



400/-. The plaintiff has also claimed interest on the above sum and another sum of Rs. 15/- being the costs he met in taking assignments in his favour. These latter claims cannot stand. It has been held in State v. Krishna Pillai, 1958 Ker LT 961 : 1958 Ker LJ IT34 that where there is no agreement or a provision of law for payment of interest, and no custom or usage is proved in that behalf, interest prior to the suit cannot normally be allowed. Interest after date of suit falls under Section 34 Civil Procedure Code and is in the discretion of the Court. Costs met by the plaintiff in taking assignment of the auction-purchaser's rights in his favour cannot in any view be imposed on the defendant.

12. It then follows that the plaintiff may have a decree for Rs. 400/- with interest at 5 per cent from the date of suit, not exceeding one-half the principal amount till date of this decree, and there-after at 5% per annum on the principal amount till payment, to be realised from the defendants A and 2, Judgment accordingly.

13. The appellant will have his costs throughout.

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