

MANU/BH/0067/1970

Equivalent Citation: AIR1970Pat368

**IN THE HIGH COURT OF PATNA
FULL BENCH**

Civil Revn. Nos. 307 and 308 of 1968

Decided On: 09.01.1970

Appellants:**Onkar Nath Jalan**
Vs.

Respondent:**Ramanand Prasad and Ors.**

Hon'ble Judges/Coram:

Misra , C.J., S.N.P. Singh and G.N. Prasad , JJ.

Counsel:

For Appellant/Petitioner/Plaintiff: N.P. Agarwala, Adv.

For Respondents/Defendant: Prem Lall and Gupteshwar Prasad, Adv.

JUDGMENT

Misra, C.J.

1. These two applications arise out of two execution cases. Civil Revision No. 307 of 1968 arises out of Execution Case No. 146 of 1966, which gave rise to Miscellaneous Appeal No. 13/2 of 1967/1968 and Civil Revision No. 308 of 1968 arises out of Execution Case No. 147 of 1966, which gave rise to Miscellaneous Appeal No. 14/3 of 1966/1968. The petitioner was an applicant for setting aside the sale held in these two execution cases covering an area of one katha two dhurs of land with a house standing on it, being survey plot Nos. 242 to 246, in the town of Motihari. This house was owned by Bishwanath Prasad Tibriwal, opposite party No. 3. The petitioner instituted a money suit against him, numbered as 37 of 1966 in the Court of Subordinate Judge, Motihari, for realisation of dues to the extent of Rs. 16,000/- on handnote. Opposite party No. 1, Ramanand Prasad. is the auction-purchaser in these two cases. Opposite party No. 2 is Badri Prasad Tibriwal, decree-holder in the two execution cases and cousin of the defendant in the petitioner's money suit and judgment-debtor in the two execution cases. In Execution case No. 146 of 1966, the amount of decree was Rs. 618-16 P. and in Execution Case No. 147 of 1966, the amount was only Rs. 188.87 P. The property was, however, sold for Rs. 3050/- in each of the two cases. The date of sale was 13th of December, 1966. It may be stated that opposite party No. 3 has only the property in dispute and no other property. On the 17th of March, 1966, the petitioner instituted a money suit and obtained attachment before judgment of the disputed property on the 23rd of March, 1966. The amount of outstanding debts payable by the judgment-debtor was Rs. 40,000/- and on the 19th of July, 1967, the petitioner's son purchased this property in Execution case No. 83 of 1966 for Rs. 40,000/-.

2. On the 4th of January, 1967, the petitioner applied, before the expiry of the period of thirty days from the date of sale, under Order 21, Rule 89, Code of Civil Procedure, for depositing in the executing Court the amount of decretal dues together with the requisite 5 per cent of compensation payable to the auction-purchaser. This was,

however, opposed by the decree-holder. The learned Munsif, on a consideration of the objection raised on behalf of the decree-holder, however, came to the conclusion that the petitioner had a right to deposit the amount under Order 21, Rule 89, inasmuch as he was the person who was interested in the property which was auction-sold and as such, under the amendment of Order 21, Rule 89, made by the Patna High Court, the petitioner had every right to deposit the amount. This order was passed on the 10th of January, 1967, and money was actually deposited within time on the 16th of January, 1967, when the Court reopened, the Court being closed from the 12th of January to 15th of January. From that decision an appeal was preferred in the Court of the learned District Judge, Motihari, by the auction-purchaser on the 7th February, 1967. The learned Additional District Judge, who heard the appeal, however, with reference to certain authorities of this Court, set aside the judgment of the learned Munsif and hold that the petitioner had no locus standi to deposit the amount. Hence the two civil revision applications to this Court, which were referred by the Division Bench for consideration of the matter by a larger Bench because there were conflicting decisions on this point, the matter having been referred to that Bench by a learned Single Judge. The learned Judges referred to the following decisions:

2 Pat LJ 676 : AIR 1917 Pat 159 Nand Kishore Jha v. Paroo Mian -- a case under the unamended rule; 4 Pat LJ 340 : AIR 1919 Pat 501, Musammat Dhan-wanti Kuer v. Shen Shankar Lall; MANU/BH/0047/1935 : AIR 1936 Pat 119, Nasiniddji- Haidef v. Hakim "Muhammad Tahir; MANU/BH/0138/1940 : AIR 1941 Pat 204, Mundrika Singh v. Nand Lal Singh MR1947 Pat 293, Deopati Kuer v. Mahabir Prasad Singh; MANU/BH/0046/1947 : AIR 1948 Pat 66, Kamiruddin Khan v. Sachidananda Jena; (MANU/BH/0013/1959 : 1958 BLJR 728 : AIR 1959 Pat 50 Radharaman Choudhary v. Gulab Thakur.

It has been held in some of these decisions that the word 'interest' occurring in Order 21, Rule 89, means title and unless the person seeking to deposit the amount under Order 21, Rule 89, is himself the judgment-debtor, or seeks to deposit the amount as a person who has got title to the property, he cannot be held competent to make the deposit. In other decisions however, of this Court, it has been held that a person having some kind of interest which is likely to be affected if the auction-sale is not set aside, must be held to be a person competent to make the deposit. The provisions of Order 21, Rule 89, its amendment by the Patna High Court: and its amendment by the other High Courts along the same line and the decisions interpreting the unamended provision as also the effect of the amendment and the scope thereof, have to be examined in order to decide whether a person attaching before judgment a property which has been subsequently auction-sold in execution of a decree, can be held to be one having locus standi to make the deposit as contemplated under Order 21, Rule 89, Code of Civil Procedure. Order 21, Rule 89, in so far as it is relevant, runs thus:--

"Where immovable property has been sold in execution of 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. ..."

This rule, however, has been amended on account of certain ambiguity in it by almost all the High Courts but with slightly different words. So far as the Patna High Court is concerned, the words "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale" have been substituted by the following words:

"a judgment-debtor or any person deriving title through the judgment-debtor, or any person holding an interest in the property at the date of the application under this rule."

The decisions of this Court in 2 Pat LJ 676 :AIR 1917 Pat 159; 4 Pat LJ 840 :AIR 1919 Eat 501; MANU/BH/0047/1935 : AIR 1936 Pat 119 and MANU/BH/0138/1940 AIR 1941 Pat 204 were pronounced prior to the amendment of this rule. These decisions, therefore, will have only, an indirect value for giving interpretation of the rule as amended by the Patna High Court. The first judgment after the amendment, however, is the decision in MANU/BH/0119/1946 : AIR 1947 Pat 293, laying down the proposition that even the vendee under a sale deed duly executed by the vendor but not registered prior to the auction-sale cannot be regarded as a person having locus standi to deposit the amount of auction-sale to set aside the sale. This is a judgment of Manohar Lall, J. sitting with Imam, J. Whereas Ramaswami, C. J. and Choudhary, J., in (MANU/BH/0013/1959 : 1958 BLJR 728 : AIR 1959 Pat 50), held that the interest referred to in Order 21, Rule 89, did not mean a completed interest but also included an inchoate interest or an interest which one sought to establish in a Court of Law. In that context, it has got to be determined whether a person who has obtained attachment before judgment in respect of a property, while his suit against the holder of the property is still pending, can be regarded as a person having sufficient interest to make the deposit under Order 21, Rule 89, if the property has been auction-sold. The question has to be approached from these angles.

3. In Nand Kishore Jha's case 2 Pat LJ 676 : AIR 1917 Pat 159 it was held by Sharfuddin and Roe, JJ. that a person who is out of possession of certain immovable property but is litigating to establish his title thereto, is not entitled to make a deposit in Court to set aside the sale of such property held in execution of a decree. Following a decision of the Bombay High Court in Desai Himat Singhji Joravarsinghi v. Bhavabhai Kayahai; ILR(1880) Bom 643, it was held that the party who was not in possession but expected to gain possession as a result of opening litigation, could not be held to be entitled to make payment on behalf of the person lawfully payable. A party in possession was interested in maintaining that possession and a party not in possession and subsequently attaching having no title, had no interest at all. Hence, a party not in possession at least of a part of the property could not be regarded as one entitled to make the deposit. That, however, was a decision based on the un-amended provision of Order 21, Rule 89. In 4 Pat LJ 340 :AIR 1910 Pat 50, however, the point for consideration was whether a judgment-debtor who, subsequent to the sale of his immovable property in execution, has sold his property privately may apply to have the auction-sale set aside under Order 21, Rule 89. It was held that he could so apply on the ground that he had sufficient interest left in him to make the application for depositing the amount on the date that the sale was held. The subsequent act in disposing of fee property was held to be immaterial for determining the right to make the deposit, as it was beyond the scope of Rule 89 to enquire into any transaction subsequent to the sale and to find out the motive for such a transaction. This ruling also does not throw much light upon the point under consideration in the instant case.

4. In the case of Nasiruddin Haider, MANU/BH/0047/1935 : AIR 1936 Pat 119 the person seeking to make the deposit under Order 21, Rule 89, was one who obtained a decree for specific performance of contract for sale from the judgment-debtor in respect of the property, the subject-matter of the execution sale. It was held that since the decree for specific performance of contract was not executed by the applicant when the application was made to deposit the amount, he could not be held

to have been entitled to make the deposit. This too was a case prior to the amendment of Order 21, Rule 89.

5. In the case of Mundrika Singh, MANU/BH/0138/1940 : AIR 1941 Pat 204 the point for consideration was where attached property has been sold by auction and a third person within thirty days makes an application under Order 21, Rule 89, on the strength of a contract for sale executed in his favour by the judgment-debtor before auction-sale, whether such a person could be allowed to make the deposit, It was held that he had the necessary locus standi to make the application because he had sufficient interest in the property by virtue of a contract for sale in his favour. The real conflict of decision has arisen on account of the pronouncement in two Division Bench decisions of this Court, one being MANU/BH/0119/1946 : AIR 1947 Pat 293, and the other being (MANU/BH/0013/1959 : 1958 BLJR 728 : AIR 1959 Pat 50) Deopati Kuer's case, MANU/BH/0119/1946 : AIR 1947 Pat 293 was one the decision of which depended upon the construction to be put on the word 'interest' as used in Order 21, Rule 89, under the Patna amendment. The applicant in that case was a purchaser from the judgment-debtor but whose sale deed, although duly executed, was not registered on the date the application was filed. In that case Manohar Lall, J., on a review of the case-law on the point, held that on the date of the application under Order 21, Rule 89, the appellant in the High Court had no title to the property inasmuch as title could pass to the vendee under Section 54 of the Transfer of Property Act only on registration of the document. Since the vendor refused to register the document, which came to be registered later on, the applicant could not be deemed to have a valid title on the date of the application for making the deposit. Reference was made to Gopal Bux Rai v. Shyam Behari Singh, MANU/BH/0088/1940 : AIR 1940 Pat 565, judgment of Harries, C. J. and Dhavle, J., for the proposition that the property does not actually vest in the purchaser at the time of the sale, but once the sale is confirmed it is deemed to have vested in him as and on from that date. Since the confirmation of sale in that case was not made, an order prohibiting sale and also prohibiting confirmation of sale which had already taken place could not confer a valid title. On that analogy, it was held in Deopati Kuer's case, MANU/BH/0119/1946 : AIR 1947 Pat 293, also that the registration of the document was an integral part of the transaction of the sale and without its registration the purchaser acquired no title. Hence, he could not make the deposit under Order 21, Rule 89, for setting aside the sale. In Radharaman Choudhary's case (MANU/BH/0013/1959 : 1958 BLJR 728 : AIR 1959 Pat 50), however, the facts were that the applicant laid claim to the property, which was auction-sold, as a third person having interest in the property under Order 21, Rule 58, Code of Civil Procedure, but his application was dismissed. Before, however, he could institute a suit under Order 21, Rule 63, Code of Civil Procedure, to establish his right to the property, it was sold in execution of a money decree. The applicant applied before the executing Court for making the deposit. It was held that he was a person who had sufficient interest in the property auction-sold and if the sale could be avoided and if the petitioner succeeded in his title suit, the property would become his. Hence, he had sufficient interest in the property to be held competent to make the deposit of the requisite amount so that the sale might be set aside. This case takes cognizance even of an inchoate interest as 'an interest' contemplated under Order 21, Rule 89, even after its amendment, unlike the decision Deopati Kuer's case, MANU/BH/0119/1946 : AIR 1947 Pat 293 in which it was held that only the person having complete title could be held to be qualified to make the necessary deposit under Order 21, Rule 89.

It appears, however, that the decision of the Division Bench in Radharaman Choudhary's case (MANU/BH/0013/1959 : 1958 BLJR 728 : AIR 1959 Pat 50) is

sounder than the decision in Deopati Kuer's case. I have already stated that the change in the language of Order 21, Rule 89, as introduced by the amendment of this rule by the various High Courts, has tended towards greater liberalisation of the power of a third person to make the deposit for setting aside the sale. A person owning such property being the judgment-debtor, in any case, has a right to make the de-posit, but before the amendment of this rule by this Court it was the person 'holding an interest therein by virtue of a title acquired before such sale,' and the 'interest' Was more or less, therefore, of the nature of a title which might exclude an inchoate interest. After the amendment, however, the language is that the deposit will be made by the judgment-debtor or any person deriving title through the judgment-debtor, which 'again refers to a purchaser, but towards the end the language is "or any person holding an interest in the property . . ." This is not 'interest' in the nature of a title as was worded by the draftsmen of the Code as such. The amendment has simply referred to the person 'holding an interest' and not an interest in the nature of a title, so - that much greater flexibility has now been introduced under this rule than the case was before.

It may be mentioned here that there is good reason for making the rule very liberal as has been done in the Patna High Court as also in the High Courts of Madras and Andhra Pradesh where the language is identical with the language of the Patna High Court. The idea behind this change is that normally only such a person can be reasonably held to be inclined to make the deposit of the decretal dues as will think that his interest in the property will be defeated if the auction-sale is allowed to stand. It may seldom be that a gratuitous deposit will be made by a man of prudence. A nice distinction between a person who can be held to have title and a person who cannot be so held which is a subject matter of so many controversies in the law Courts prior to the amendment of this rule, was, on principle, of no significance and considerable time of Court was wasted upon this theoretical matter. That view, however, was consistent with the language of the rule which referred to title of the nature of interest acquired prior to the' application for making the deposit. A title, therefore, was construed to be a completed title without which the person making the deposit would have no right to do so, although it might well be that a person having only a prospective title could well be prejudiced to a great extent if the sale could be allowed to stand, Hence, the word 'title' has now been completely deleted from the wording of this rule and it has been held that a person who, prima facie, can be taken to have an interest, which is defeasible if the sale is confirmed, must be taken to have sufficient interest and, in that view of the matter, the Division Bench in Radharaman Choudhary's case has held that 'interest' in this context also means an inchoate interest and not merely a completed interest as has been held by Manohar Lall, J. in Deopati Kuer's case,

6. So far as the nature of the interest of a person who had attached a property before judgment, and which property has been auction-sold, is concerned, the point for consideration is whether such inchoate interest is sufficiently tangible interest so as to bring such a right within the ambit of the word 'interest' used in the amended provision of this rule. Upon this question, there is a direct decision of the Madras High Court in Kattikoolathil Mammu v. Vinayaka Kamath, MANU/TN/0263/1951 : AIR 1951 Mad 816. That was exactly a case of a creditor attaching the auction-sold property prior to the auction-sale and prior to a decree being passed in his favour. The learned Judge held that it was so because if the sale would be allowed to stand, the attaching creditor, in many cases, might have no property to proceed against for satisfaction of his decretal dues when decree would be passed in his favour. Such an interest, therefore, was sufficiently material to bring this word within the ambit of

Order 21, Rule 89, as amended by the rule of that Court. In that case Govinda Menon, J., had to deal with the argument that attachment does not create interest in the property, for which reliance was placed on Krishnamma Naicken v. Sivasumi Chettiar, MANU/TN/0405/1942 : AIR 1943 Mad 709 and other decisions of that Court. But nevertheless, it was held that the change in the wording of the rule as amended by the Madras High Court, which is almost identical with the changed wording of the amended provision of this Court substituting the words "holding an interest therein by virtue of a title acquired before such sale" to "holding an interest in the property" resulted in giving the person seeking to make the deposit a more beneficent and wider right than was contemplated before, lays down the law correctly.

In Ayyappa Naicker v. Kasiperumal Nayakkar MANU/TN/0036/1938 : AIR 1939 Mad 250 (FB), on which considerable reliance was placed by learned Counsel for the opposite party, the Full Bench of the Madras High Court also had occasion to consider in the context of Order 21, Rule 90, the meaning of the expression "a person whose interests are affected by the sale" and it was held that a person obtaining attachment before judgment must be held to be a person whose interests are affected by the sale. It is, no doubt, true that in some of the judgments an endeavour has been made to draw a line of distinction between the wording of Order 21, Rule 89, and Order 21, Rule 90, and also of a person obtaining attachment after judgment and a person who has obtained attachment before judgment. The observation made in the above judgment at page 253 is as follows:

"I hold that a plaintiff who has obtained an attachment before judgment is directly and immediately affected in such circumstances, and therefore, is within the rule. The fact, that he has not obtained a decree at the time he Sled his application does not in my opinion make any difference. If he obtains a decree before making the application his position is, of course, strengthened, but the attachment before judgment is sufficient in itself to bring him within the category of per-sons whose interests are affected by the sale."

Referring to a number of decisions of the Calcutta High Court, particularly (MANU/WB/0038/1924 : ILR 51 Cal 495 : AIR 1924 Cal 786) 'Dhirendranath Roy v Kamini Kumar Pal, their Lordships concluded that the expression in Order 21, Rule 90 "whose interests are affected by the sale" is not limited to persons whose proprietary or possessory title is affected by the sale and that an attaching creditor comes within that rule.

No doubt, in Jogendra Nath Chatterjee v. Manmatha Nath Ghose¹⁷ Cal WN 80, the Calcutta High Court held that a person effecting attachment before judgment cannot be said to have any present interest in the property and, therefore, was not entitled to apply under Rule 90, but their Lordships of the Madras High Court did not consider this as sound view and preferred to follow the decision of the Calcutta High Court in Gopinath v. Kukari Protab Chandra (MANU/WB/0318/1933 : 38 Cal WN 172 :AIR 1934 Cal 477) in which it has been held that a person who has attached a property before judgment is a person within the purview of) Rule 90. In Sankaralinga Reddi v. Kanda-sami Thevan ILR(1907) Mad 413 also it was held that a person who had attached a property before judgment had sufficient interest in the property itself to maintain an action against a trespasser, but under Order 21, Rule 90, if his pecuniary interests are directly and immediately affected by any irregularity or fraud in connection with the sale proceedings, he has got a right to make an application for setting aside the sale. His Lordship, Leach, C. J., who delivered the main judgment .

and with whom other learned Judges agreed, also referred in that connection to the language of Order 21, Rule 89, and observed as follows:

"The learned Judge considered that the Legislature intended to confer the right to apply on anyone who is directly and immediately affected by the sale and with this opinion I am in entire agreement."

This decision, therefore, is also in favour of the contention urged on behalf of the petitioner. Reference was, however, made to certain other decisions of the Madras High Court, Official Receiver of Ramnad at Madura v. Veerappa Chettiar AIR 1943 Mad 199 and MANU/TN/0405/1942 : AIR 1943 Mad 709. AIR 1943 Mad 199 was also a case under Order 21, Rule 90. It was a case of an application being filed by the interim receiver. His right to make an application for setting aside the sale under Order 21, Rule 90 was negated on the ground that while the sale was held on the 21st of November, 1938, he was appointed receiver only on the 16th December, 1948, after the sale was held. Hence, his right to apply for setting aside the sale could not be antedated to give him locus standi so as to prejudice the rights of others which had come into existence long before his appointment. Accordingly, that decision has got no bearing upon this question. AIR 1943 Madras 709 was a case in which an attempt was made by a person who purchased a property for Rs. 2500 at an auction-sale with instruction to pay the purchase price towards the decree to make the deposit. The purchaser paid only Rs. 500 but did not pay the balance and the other properties of the judgment-debtor were sold to another purchaser. The previous purchaser claimed under Order 21, Rule 89, to have the sale of the other properties set aside. In those circumstances, it was held that the applicant had no locus standi because, apparently, he had no interest in the property. In that case it was held that creditors who merely obtained decree could not be regarded as persons whose interests were affected by the sale so as to be competent to apply under Order 21, Rule 90, Code of Civil Procedure, for setting aside the sale. That case, therefore, also has no bearing on, the point under consideration before us.

7. In the case of T. S. Sailappan v. Subbiah Pillai', MANU/TN/0060/1963 : AIR 1963 Mad 156 (FB), which is another Full Bench decision of the Madras High Court, an interim receiver who was directed by the Court to take possession of an insolvent debtor's property was held to be competent to apply under Order 21, Rule 90, Code of Civil Procedure, for setting aside the sale and in that context the decision in AIR 1943 Mad 199 was also overruled. It is true that in that case there is an observation that the scope of Order 21, Rule 90, is wider than Order 21, Rule 89, but, assuming that it is so, without scrutinizing the position further, it may be said that this decision has no bearing on the point for consideration under the present reference. Attention has also been drawn to the case of Chhotibai Daulatram Marwadi v. Mansukh-lal Jasraj, (MANU/MH/0074/1940 : ILR (1941) Bom 34 :AIR 1941 Bom 1). That too has no bearing on the present question because that only lays down -- "An Order for attachment is merely an injunction restraining the defendant from disposing of certain land, which , operates in personam and not in rem, and which does not create any right or interest in the land". Stress is laid upon the words 'does not create any right or interest in the land'. But that was a decision where the nature of attachment had to be considered in a general manner and not in the context of Order 21, Rule 89, Code of Civil Procedure. MANU/WB/0318/1933 : AIR 1934 Cal 477 is a case in which it has been held that a person attaching property before judgment has ordinarily some interest in the property though not necessarily a right or title, and his interests are thus affected by sale in execution of another decree. He is, therefore, entitled to apply under Order 21, Rule 90. Reference is made in that connection to the

case of MANU/WB/0038/1924 : AIR 1924 Cal 786. AIR 1958 Cal 543, Basant Kuma Roy v. Charu Chandra Pal is a case in which the question for consideration was whether a shareholder of a company is a person who can apply under Order 21, Rule 90, for setting aside an auction-sale of a property belonging to the Company. It was held that although he could have a share in the profits of the company, he could not be regarded as a person having an interest in the company's property as such. This decision, therefore, has no relevance so far as the facts of the present case are concerned.

MANU/WB/0136/1956 : AIR 1956 Cal 462, Rabindra Nath Banerjee v. Harendra Kumar Chakravarty, too was a case in which it was held that Order 21, Rule 89, includes not merely completed and perfected title but a title in process of maturity, as has been held in MANU/BH/0138/1940 : AIR 1941 Pat 204. This decision, therefore, is also against the contention of the opposite party. The decision of the Calcutta High Court in (1913) 17 Cal WN 80, which lays down that a plaintiff who has attached an immovable property before judgment has no present interest in such property and is not entitled to apply under Order 21, Rule 90, to set aside the sale of the property in execution of a decree, is a decision which has been noticed by the Full Bench of the Madras High Court in MANU/TN/0036/1938 : AIR 1939 Mad 250, which I have discussed above, and has not been followed. Besides, this decision came into existence prior to the amendment of the rule. In my opinion, it is difficult to make any distinction between the right of a person who has attached property after decree and a plaintiff who has attached the property of the defendant prior to the passing of the decree. So far as making the application for setting aside the sale either under Order 21, Rule 89, or Order 21, Rule 90, is concerned, I accept the view of the Madras Full Bench laying down that there is no difference for the purpose of Order 21, Rule 89 or 90, between a person who has obtained an attachment before judgment and one who has attached the property after the judgment so far; as his right to be set aside the sale is concerned.

As a matter of fact, Order 38, Rule 11, itself provides that even when there is attachment before judgment, the same attachment continues even after judgment is delivered so that it operates as an attachment after judgment in execution of the decree, In substance, therefore, there can be no distinction so far as the operative force of the two kinds of attachment is concerned. This aspect of the matter also was not considered by Mookerjee and Beachcroft, JJ., in the above Calcutta case and, in my opinion, the Madras High Court has rightly held that there is no difference' in principle between the two situations, referring also to a decision of the Privy Council. Reference has also been made to 1925 AC 619, Macaura v. Northern Assurance Co., Ltd.; MANU/SC/0009/1950 : AIR 1951 SC 41, Charanjit Lal Chowdhary v. Union of India and MANU/SC/0072/1954 : AIR 1955 SC 74, Mrs. Bacha F. Guzdar v. Commissioner of Income Tax, Bombay. These decisions, however, have no relevance.

8. In the result, therefore, it must be held that the decision of this Court in 1958 BLJR 728 = (MANU/BH/0013/1959 : AIR 1959 Pat 50) has laid down the law correctly so far as the scope of the word 'interest' in Order 21, Rule 89, Code of Civil Procedure,' is concerned, and the observation to the contrary in MANU/BH/0119/1946 : AIR 1947 Pat 293 cannot be sustained as correct. Having answered the point thus, it must be held that the two applications filed to this Court must succeed. The order of the Additional District Judge is set aside and that of the learned Munsif is restored. A small question, however, has been raised as to whether the learned Munsif was right in setting aside the sale without issuing notice to the auction-purchaser. That is an irregularity, however, "which must be rectified and, when the case goes on remand to

the learned Munsif, he must issue notice to the auction-purchaser, who did not appear before him because no notice was issued to him and he must deal with the matter in the light of the observation made by this Court to the effect that the petitioner was competent to make the application for setting aside the sale on depositing the amount of decretal dues as also the amount of compensation required, to be paid to the auction-purchaser. The petitioner is entitled to his costs throughout. Hearing fee in this Court is assessed at Rupees 110.

9. I may, however, state before parting with the case that the most comprehensive wording and one which is not only consonant with the underlying policy of the amendments but has besides it, the advantage of avoiding unnecessary investigation of the nature of interest is that of the High Court of Lahore prior to partition and that of the Nagpur High Court and should be adopted in our High Court as well. The amendment stands thus:

"any person claiming any interest in the property sold at the time of the sale or at the time of making the application under this rule or acting for or in the interest of such a person".

The decree-holder is interested in getting his dues. The auction-purchase while bidding knows the provision of Order 21, Rule 89, and receives the compensation and thereby can have no grudge as to why the amount of purchase money is deposited and sale set aside. No one suffers by the procedure adopted in the above amendment and it may be reaffirmed that no prudent man is likely to waste his good money in depositing it for the benefit of the judgment-debtor merely in a gratuitous manner.

S.N.P. Singh, J.

10. I agree. The main point for determination in these two cases is whether a person who has attached a property before judgment has an interest in that property. If the answer to this question be in the negative, he cannot apply under Order 21, Rule 89 of the Code of Civil Procedure (as amended by this Court) to have a sale set aside. In the case of 1958 BL[R 728 = (MANU/BH/0013/1959 : AIR 1959 Pat 50) a Division Bench of this Court following the two decisions of the Madras High Court held that the word "interest" in Order 21, Rule 89 has got a very wide import and should be construed very liberally so that any inchoate right which a party may have over a property may be sufficient "interest" to enable him to apply under Order 21, Rule 89. The view taken in that case appears to be sound on principle. An attachment before judgment certainly does not create a charge or lien in the property in 'favour of the attaching creditor but he has an inchoate right of saving the property from being sold so that his interest might not suffer if he ultimately succeeds in his suit.

11. I agree.

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