A KANCHERLA LAKSHMINARAYANA

v.

MATTAPARTHI SYAMALA AND ORS.

(Civil Appeal No. 2001 of 2008)

MARCH 14, 2008

B

[S.B. SINHA AND V.S. SIRPURKAR, JJ.]

Code of Civil Procedure, 1908 – Order 21, Rule 58, proviso clause (a) – Execution – Auction :

C *Time factor – Sale was not confirmed – Objection to auction and for setting aside of auction sale – Maintainability of – Held: Maintainable – Mere holding of auction would not bar the objections thereto – The word 'sold' in Clause (a) of proviso to Rule 58 to be understood as complete sale* D *including confirmation of auction.*

Locus factor – Objection by alleged purchaser on the basis of agreement of sale – Held: Purchaser cannot be utter outsider having no locus standi to take the objections as he filed suit on the basis of an agreement of sale which was not E *denied by the seller.*

Second respondent executed an agreement of sale of suit property and received part consideration amount. However, he failed to execute the sale deed inspite of F **several requests. Appellant filed a suit for specific performance of sale agreement. Subsequently first respondent who was wife of second respondent filed a maintenance case against her husband and obtained therein injunction order restraining second respondent** G **from alienating the properties. This suit was decreed. The first respondent filed Execution Petition for recovery of arrears of maintenance but second respondent did not pay the arrears amount and instead filed IA to set aside the decree. This application was dismissed.**

H

The first respondent again filed execution petition for execution of the decree. A public auction was ordered and the same was conducted in which the third respondent purchased the suit property. A

The appellant filed a petition before the Executing Court under the provisions of Order 21 r.58 CPC raising objections to the said auction and to declare that the sale is subject to appellant's claim in suit for specific performance filed by him which was pending. This application was dismissed by the subordinate Court which was upheld by High Court on the ground that once the sale takes place during the execution, then objection raised would be of no consequence and the application would be untenable. Hence the present appeal. B C

Allowing the appeal, the Court D

HELD: 1. The High Court and the Trial Court were in utter error in relying on proviso to Clause (a) to Rule 58 of Order 21 CPC. Mere holding of the auction does not bar the objections thereto. Since the sale was not confirmed, that made substantial difference. The word "sold" in Clause (a) of the proviso to Rule 58 Order 21 CPC has to be read meaning thereby a complete sale including the confirmation of the auction. That not having taken place, it cannot be said that the objection by the appellant was ill-founded or untenable as has been held by the High Court and the Trial Court. [Paras 10, 16] [240-F; 234-B-C] E F

M/s. Magunta Mining Co. v. M. Kondaramireddy & Anr. AIR (1983) A.P. 335 – affirmed.

Vannarakkal Kallalathil Sreedharan v. Chandramaath Balakrishnan & Anr. (1990) 3 SCC 291; *Rango Ramachandra Kulkarni v. Gurlingappa Chinnappa Muthal* AIR 1941 Bom. 198; *Yeshvant Shanker Dunakhe v. Pyaraji Nurji Tamboli* AIR 1943 Bom 145; *Kochuponchi Varughese v. Ouseph Lonan* AIR 1952 TC 467; *Kewal Singh v. Umesh Mishra* AIR 1983 G H

A **Patna 303 – referred to.**

2. It cannot be said that the present appellant has no locus standi to raise an objection to the sale for the simple reason that he had filed a suit on the basis of an Agreement of Sale. The factum of the Agreement of Sale was not B **denied by the second respondent. Therefore, whether the Agreement of Sale was a good Agreement of Sale entitling the appellant for specific performance on the basis of that agreement is essentially a question to be decided subsequently in the suit (though the suit is earlier to the** C **suit filed by the first respondent). Under such circumstances there was a cloud on the property and a person like appellant who had the obligation qua the property in the shape of an Agreement of Sale could not be held to be an utter outsider having no locus standi to** D **take the objections. [Para 14] [238-F-H; 239-A]**

Most. Puphup Dei Kuar v. Ramcharitar Barhi **AIR (1924) Pat. 76;** *Janki Mohan & Anr. v. Dr. S. Samaddar & Ors.* **AIR (1962) Patna 403;** *Sasthi Charan Biswan Banik & Ors. v. Gopal Chandra Saha & Ors.* **AIR (1937) Cal 390;** *Mt.Puhupdei* E *Kuar v. Ramcharitar Barhi & Ors.* **AIR (1924) Patna 76;** *C. Jagannadhan v. Padayya* **AIR (1931) Mad 782;** *Purna Chandra Basak v. Daulat Ali Mollah* **AIR 1973 Cal. 432;** *Desh Bandu Gupta v. N.L. Anand & Rajinder Singh* **(1994) 1 SCC 131 – referred to.**

F

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2001 of 2008.

From the final Judgment and Order dated 16.03.2007 of the High Court of Judicature at Madras in C.M.A. No. 3245 of G 2004.

P.S. Narasimha, V. Pattabhiram, L. Roshmani, Mandakini Sharma and S.S. Dharma Teja for the Appellant.

K.V. Viswanathan, A. Ramesh, K. Rajeev, R. Chandrachud, H G. Madhav, T.N. Rao and K. Sarada Devi for the Respondents.

The Judgment of the Court was delivered by A

V.S. SIRPURKAR, J. 1. Leave granted.

2. The dismissal judgment of the Madras High Court in Civil Miscellaneous Appeal under Order 43 Rule 1 of the Code of Civil Procedure, filed by the appellant herein, is in challenge B before us. This appeal was filed against the order dated 9.9.2004 passed by Subordinate Judge, Yanam in Execution Application No.9 of 2003 in Execution Petition No.15 of 2002. The said Execution Application was filed under Order XXI Rule 58 whereby the appellant sought to make a prayer for raising C the attachment on the suit property or in the alternative to declare the sale being subject to the claim in Original Suit being OS No.31 of 2000. The following facts will highlight the controversy.

3. Second Respondent herein, namely, Mattaparthi Satyam owned 14 acres of land. He put up the said land for sale and the D present appellant having offered highest market value of Rs.29,000/- per acre, executed an Agreement of Sale for 14 acres in favour of the appellant on 20th March, 1993 after having received a sum of Rs.1 lakh from the appellant. The appellant thereafter paid Rs.2 lakhs on 27.3.1993 and Rs.20,000/- on E 16.4.1993 which payments were endorsed on the reverse side of the Agreement by the Second Respondent. However, the Second Respondent failed to execute the registered Sale Deed inspite of several requests and, therefore, the present appellant filed Original Suit No.605 of 1996 before the Subordinate Judge, F Pondicherry for specific performance of the Sale Agreement which suit was later on transferred to Sub Court, Yanam and was renumbered as Original Suit No.31 of 2000. The said suit is still pending.

4. In the year 2000, the first respondent, who is none else G but the wife of the second respondent filed a maintenance case being OP No.34 of 2000 before the Family Court, Yanam. She filed one IA No.582 of 2000 seeking an injunction restraining the second respondent from alienating the schedule properties and this application was granted on 17.2.2000. This petition H

A was also transferred to the Sub Court Yanam and was re-numbered as OS No.63 of 2000. Thereafter this suit was decreed on 22.1.2002. Execution Petition No.10 of 2002 came to be filed on the basis of the decree passed in OS No.63 of 2000 for recovery of arrears of maintenance payable by the B second respondent to the first respondent. The second respondent did not pay the arrears of maintenance but instead filed IA No.4 of 2003 in OS No.63 of 2000 before Sub Court, Yanam to set aside the above decree dated 22.1.2002. However, even this application was dismissed on merits on C 27.2.2003. The first respondent thereafter filed E.P. No.15 of 2002 before Sub Court, Yanam for execution of the decree dated 22.1.2002 passed in OS No.63 of 2000. A public auction was ordered in that Execution Application and the same was conducted on 2.7.2003 in which public auction the third D respondent herein purchased the said suit property. The present appellant, therefore, filed a petition in E.P. No.15 of 2002 in OS No.63 of 2000 under the provisions of Order XXI Rule 58, raising objections to the said auction and to declare that the sale is subject to the appellant's claim in OS No.31 of 2000 which was pending on the file of Sub Court, Yanam. This application was E numbered as Execution Application No.9 of 2003. The said application came to be dismissed by the Subordinate Court. The appellant herein filed an appeal against the said order of dismissal dated 9.9.2004. However, by its order dated 16.3.2007, the High Court of Madras dismissed CMA 3254 of F 2004 holding that the application was not maintainable. The logic of the Madras High Court as well as the Trial Court seems to be that once the sale takes place during the execution, then the objection raised would be of no consequence and the application will be untenable. The High Court has thus G considered the question of the stage at which the objection could be raised and has dealt with that such objection would not be tenable on the backdrop of the language of Clause (a) of proviso to Order XXI Rule 58. The stress is thus on the stage at which the objection could be raised (or the time when the objection is H raised). These concurrent orders are now in challenge before

us.

5. Shri Narasimha, learned counsel appearing on behalf of the appellant took us through the orders and contended that the view expressed by both the courts below to the effect that the Execution Application is not tenable is patently incorrect. As against this Shri Vishwanathan, learned counsel appearing on behalf of the first respondent and Shri Chandrachud, learned counsel appearing on behalf of the third respondent supported the order contending that in the wake of the completed auction under Order XXI Rule 58, the High Court and the Trial Court were justified in holding that the appellant's claim was not tenable at all. It is, therefore, to be seen as to whether the appellant's claim is tenable at all.

6. Learned counsel for the appellant took us through both the orders and firstly pointed out that the suit by the appellant being OS No.605/96 before Sub Court, Pondicherry which was later on transferred to Sub Court, Yanam and re-numbered as OS No.31 of 2000 was prior in point of time. From that suit it is clear that the first respondent was the wife of the second respondent. Though she fully knew about the pendency of the aforementioned suit, not only filed another suit but brought a decree. According to the appellant it is obvious that the said decree was a collusive one. As if this was not sufficient, she also attached the very same property which was the subject matter of OS No.31 of 2000 and got it sold in a public auction on 2.7.2003. It was pointed out that the sale was not confirmed. Learned counsel, therefore, pointed out that the appellant not only had a substantial obligation regarding the property but was rightly entitled to object to the auction sale. Thus, the learned counsel urges that even after the sale the objection to the attachment and the sale could be raised and more particularly because the present appellant would be necessarily a person having locus standing due to obligation regarding the property. According to the learned counsel these two factors, namely, the time of taking the objection and the locus of the objector have to be considered and while the courts below considered only the

A "time factor" or the "stage factor", the court did not consider the "locus factor".

7. As against this a contention was raised by the learned counsel Shri Vishwanathan that the wife, respondent no.1 herein, had filed OP No.34 of 2000 in Family Court in her individual B right as a wife. She had also secured the order of injunction restraining the second respondent from alienating the schedule properties as she was interested in the property being preserved so that she could recover her maintenance out of that property and there was nothing wrong in it. It is pointed out that the C injunction was granted and though there was a publication about the same, the appellant never raised any objection to it. The said OP which was renumbered as OS 63 of 2000 came to be ultimately decreed and there was nothing wrong on the part of the first respondent in filing the Execution Petition No.10 of 2000 D for recovery of arrears of maintenance and when the second respondent did not comply with the orders, she was driven to file Execution Petition No.15 of 2002 for the sale of the schedule property by public auction to recover the arrears of maintenance. He further claimed that the second respondent had never brought E to her knowledge about OS No.31 of 2000. Learned counsel, therefore, claimed that there was no collusion between the first and the second respondent and her rights of maintenance are independent of any said suit which had arisen 18 years ago when her marriage was solemnized with the second respondent. F Our attention was drawn even to the counter filed by the second respondent before the Trial Court where the second respondent had denied the Agreement. It was alleged by him that the Agreement set up by the appellant was only by way of security as the appellant had advanced a sum of Rs.1 lakh to be paid to G Mattaparthi Syamala and others on behalf of the second respondent. It was pointed out that the second respondent had flatly denied any such Agreement to Sell. Learned counsel, therefore, urged that the courts below were right in holding the application, filed by the appellant, to be not tenable particularly in view of the completed auction under Order XXI Rule 58.

H

8. Even the learned counsel appearing on behalf of third respondent urged that he was a bona fide purchaser of the auction held on 2.7.2003 and he was the highest bidder and that he did not know about OS No.31 of 2000 filed by the appellant. It was his contention that in fact the appellant, in collusion with the second respondent, had filed an objection to the Execution. He pointed out that the third respondent had deposited the entire bid amount into the court and only the confirmation of sale had remained to be done.

9. Shri Narasimha, learned counsel appearing on behalf of the appellant invited our attention to the language of Order XXI Rule 58 CPC which is as under:

> "**58. Adjudication of claims to, or objections to attachment of property**. – (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained:
>
> Provided that no such claim or objection shall be entertained –
>
> (a) where, before the claim is preferred or objection is made, the property attached has already been sold; or
>
> (b) where the court considers that the claim or objection was designedly or unnecessarily delayed.
>
> (2) xxxxxx
>
> (3) xxxxxx
>
> (4) xxxxxx
>
> (5) xxxxxx"

It is pointed by the learned counsel from the language of the clause (a) of proviso to Rule 58(1) that where any objections

A are taken to the attachment on the ground that such property is not liable to attachment, the court has to proceed to adjudicate upon the claim or objections in accordance with the Rule. Learned counsel further argues that there is a rider to this Rule in the shape of a proviso and it is suggested that such claim or B objection need not be entertained where firstly the property attached has already been "sold". Learned counsel points out that merely because of the auction of the suit property, it cannot be said that the said property is sold, thereby leaving no right in or opportunity with the objector to object to the attachment. C Learned counsel invited our attention to the judgment of the Andhra Pradesh High Court in **M/s.Magunta Mining Co. v. M. Kondaramireddy & Another [AIR (1983) A.P. 335]** where the similar situation had arisen on the basis of an application made by the appellant under Order XXI Rule 58 CPC. The objector was none else but the son of the Judgment-Debtor whose D property was auctioned. The objection was that since there was a prior lease in respect of the said property and since in pursuance of that lease the objector-appellant had been in possession of the same and, therefore, the attachment was not valid and has to be vacated. An objection was also raised that E the properties which were attached were already sold and, therefore, the objection to the attachment and the appeal had become infructuous. The Court, therefore, dealt with the effect of the court sale conducted by the lower court. It was an admitted position that before the said order of High Court reached the F sale was already completed in respect of all the items where the Decree-holder himself purchased the properties. It is also seen from the facts that there the sale was not confirmed. The Division Bench, speaking through Hon'ble Jagannadha Rao, J. (as His Lordship then was) observed in para 15:

G "Whenever a claim is preferred under O. 21 R. 58 CPC against attachment of immovable properties, the fact that the properties are sold or the sale confirmed will not deprive the court of its jurisdiction to adjudicate on the claim. The inquiry into the claim can be proceeded with by the trial H court or the appellate court (under the amended Code)

and in the event of the claim being allowed, the sale and the confirmation of sale shall to that extent be treated as a nullity and of no effect, as the judgment-debtor had no title which could pay to the court auction-purchaser." A

Relying heavily on this case the learned counsel pointed out that there is no contrary decision of this Court on this issue and, therefore, this decision has to be held as good law. In support of the argument that the appellant had the locus standi, the learned counsel pointed out that it is only during the pendency of the suit by the appellant which was based on the prior Agreement of Sale in respect of the suit property that the subsequent suit for maintenance was filed by the wife and the decree obtained and, therefore, obviously the judgment-debtor, the second respondent could not have passed a clean title during the auction sale and it would have to be held that he could not pass better rights that he himself had. Learned counsel urged that the rights which were passed on to the auction purchaser in the court sale were subject to the Agreement of Sale. In support of this proposition the learned counsel relied on the reported decision in **Vannarakkal Kallalathil Sreedharan v. Chandramaath Balakrishnan & Anr. [(1990) 3 SCC 291]** where the situation was more or the less same. This Court in para 9 observed: B C D E

"....The agreement for sale indeed creates an obligation attached to the ownership of property and since the attaching creditor is entitled to attach only the right, title and interest of the judgment-debtor, the attachment cannot be free from the obligations incurred under the contract for sale..." F

This Court had held the decisions by Bombay High Court in **Rango Ramachandra Kulkarni v. Gurlingappa Chinnappa Muthal [AIR 1941 Bom. 198]** and **Yeshvant Shanker Dunakhe v. Pyaraji Nurji Tamboli [AIR 1943 Bom 145]** and the High Court of Travancore-Cochin in **Kochuponchi Varughese v. Ouseph Lonan [AIR 1952 TC 467]**, to the same effect to be the good law. G H

10. On the basis of these two judgments, the learned counsel urged that the objection application in the Execution Petition could not have been, therefore, thrown away by the Trial Court and the High Court as not being maintainable. Considering the law laid down in **Magunta Mining's case** (supra) it must be said that mere holding of the auction does not bar the objections thereto. It is our considered opinion that in this case the sale was not confirmed and that made substantial difference. The word "sold" in Clause (a) of the proviso to Rule 58 has to be read meaning thereby a complete sale including the confirmation of the auction. That not having taken place, it cannot be said that the objection by the appellant was ill-founded or untenable as has been held by the High Court and the Trial Court.

11. However, a contrary view has been taken by the Patna High Court in a reported decision in **Kewal Singh v. Umesh Mishra [AIR 1983 Patna 303]** where the Division Bench of the Patna High Court held that the term "sold" used in proviso (a) means the stage when the property is auctioned by the court and the bid is accepted by the court. The term does not refer to the stage of confirmation of the sale when it is made absolute under Rule 92. The learned Judge who was considering the interpretation of the proviso, after clearing some factual grounds, discussed the issue in para 7 of the judgment. In coming to the conclusion that the word "sold" would include the sale under Rule 58, even when it is not made absolute under Rule 92, the learned Judge has taken into account the term "sold", "sale set aside" and "sale confirmed and made absolute". The learned Judge held that these three terms referred to three stages in relation to the court sale. While Rule 58 provides for the objection made before the property is "sold", Rule 64 and onwards provide for the proclamation of sale. The learned Judge then took note of two headings, one with respect to the sale of movable property and the other Rule 82 with respect to the sale of immovable property. The learned Judge then proceeded to take note of Rules 89, 90 and 91. It was noted by the learned Judge that the implication of the term "the sale having been made absolute" has been specifically provided in Section 65 of the Code which

provided that where the immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have been vested in the purchaser from the time when the property is sold and not from the time when the sale become absolute. The learned Judge then observed as under:

> "Thus, this rule is a pointer to the significance that though the sale is complete when it is ultimately made absolute but title to the purchaser vests from the date of the sale. It may be noticed, at this place, that there are uses of the two terms "property sold" and "sale becomes absolute" in this S. 65 and the two terms used in the same section clearly suggests the two stages as to the sale having been held and the sale subsequently made absolute. But what I have to determine, in the present case is to find out the meaning of the term 'the property already sold' in the proviso to R. 58 mentioned above. That term speaks of the 'sale held' and not 'sale having been made absolute' and as the distinction may be marked the former term used in S. 58 implies that that refers to the stage when the "sale was held" and not the stage which would come subsequently when the "sale is made absolute". I am supported of this view by two Bench decisions of this Court and a Bench decision of the Calcutta High Court..."

The learned Judge then made reference to the decision in **Most. Puphup Dei Kuar v. Ramcharitar Barhi [AIR 1924 Pat. 76]** and proceeded to hold ultimately that:

> "I am of the view that the term 'property has been already sold' used in the proviso to Cl. (1) of R.58 refers to the stage when the sale had taken place and does not refer to the stage when the sale becomes absolute."

Learned counsel for the respondent very heavily relied on this judgment and pointed out that the decision in **M/s.Magunta Mining Co's case** (supra) the court had not considered the impact of Section 65 CPC. It will, therefore, be our task to decide

A the correctness or otherwise of both the judgments.

12. Reverting back to the judgment of Andhra Pradesh High Court in **M/s.Magunta Mining Co's case**, it will be seen that in para 14 of its judgment, the learned Judge considered the impact of Order XXI Rule 59. The learned Judge held:

B

"The provisions of O. 21 Ru.59 CPC show that where before a claim is preferred or objection made, and the property attached had already been advertised for sale, the court may, if the property is immovable, make an order, C that pending the adjudication of the claim or objection the property shall not be sold, or that pending such adjudication, the property may be sold but the sale shall not be confirmed and any such order may be made subject to such terms and conditions as to security or otherwise as the court thinks fit. This provision therefore provides that pending D adjudication of a claim in respect of immovable property the court may proceed with the sale but stay the confirmation. Obviously this has been made with a view to expedite the sale proceedings so that in the event of the claim being rejected, the further proceedings can go on E expeditiously. But it is clear that as long as the sale is not confirmed the status quo ante can be restored in case the claim is allowed. It has been held that once the claim petition is allowed the sale will be treated as void because the interest of the judgment-debtor that was sold did not F in fact belong to him and the Court auction-purchaser would not get any title to the property as the judgment-debtor had no interest therein and because the claimant continues to retain his interest in those properties vide *Bibi Umatul Rasul v. Lakho Kuer* [AIR (1941] Patna 405]. To the same G effect is the decision in *Madholal v. Gajrabi* [AIR (1951) Nag. 194]."

"The term of O.21 R.63 are imperative and they declare that any order passed by the executing Court is subject to the result of such a suit. In Phul Kumari v. Ghanshyam H

Misra, (1907) ILR 35 Cal 202: (35 Ind App 22 (PC) their Lordships of the Privy Council pointed out that the object of a suit under S.283, Civil P.C. of 1882 which corresponds to O. 21 R. 63 of the present Code is in effect to set aside a summary decision. When the claimant succeeds in getting a decree in his favour declaring his title to the property attached and that the property is not liable for attachment and sale in execution of a particular decree the executing court's power to sell the property in that execution proceedings must cease. The claimant's success in a suit under O. 21 R. 63 ousts the jurisdiction of the executing court. If that is the result, the sale must be pronounced to be a nullity and consequently not capable of being confirmed under O. 21, R. 92, Civil P.C."

These observations will show that the Andhra Pradesh High Court not only considered the language of Rule 59 and the impact thereof as clearly displayed but also went on to consider the fact of the prior obligation regarding the objector in the property and the fact that even if the sale is effected under Rule 58, it cannot obliterate the claims of the objectors which were created prior to the sale. This very situation with regard to impact of the prior interest in the shape of Agreement of Sale was taken into consideration in the subsequent judgment of **Vannarakkal Kallalthil Sreedharan** (cited supra) wherein the judgments of the Bombay High Court and the Travancore-Cochin High Courts were approved. Thus in considering the "time factor" of challenging the sale, the judgment also considers the "locus standi factor" on account of any prior interest of the objector in the suit property. This situation is very conspicuously absent in the judgment of the Patna High Court which has merely chosen to go by the language of Section 65 CPC. We must hasten to add that even if under Section 65 CPC, the title "after the sale has been made absolute under Rule 92" relates back to the date of sale, it would still be subject to the earlier rights of the objector and his interest in the suit property. Therefore, in our opinion Section 65 would not, by itself, provide any guidance regarding the interpretation of the term "sold" in the said proviso.

A Once it is held, as has been confirmed by this Court in ***Vannarakkal Kallalathil Sreedharan's case*** that the attachment cannot be free from the obligations under the contract of sale, then the necessary sequatur must follow that even after the factum of sale the objection would still lie before B the sale is made absolute. In our opinion, therefore, the law laid down by the Andhra Pradesh High Court in ***M/s.Magunta Mining Co's case*** is preferable to the law laid down by the Patna High Court in ***Kewal Singh's case***.

13. We have examined the relied on judgments of the C Patna High Court reported in **Janki Mohan & Anr. V. Dr. S. Samaddar & Ors. [AIR 1962 Patna 403]** where the High Court relied on the judgments of the Calcutta High Court in **Sasthi Charan Biswan Banik & Ors. V. Gopal Chandra Saha & Ors. [AIR 1937 Cal 390]** as also judgment of Patna High Court D in **Mt.Puhupdei Kuar v. Ramcharitar Barhi & Ors. [AIR 1924 Patna 76]**. However, since we have taken a view that the judgment of the Andhra Pradesh High Court is correct, those judgments would have to be held as not laying down a good law. A contrary view has been taken by Madras High Court in **C. E Jagannadhan v. Padayya [AIR 1931 Mad 782]** which supports the view of Andhra Pradesh Judgment. We approve of that view.

14. Again, it cannot be said that the present appellant has no locus standi to raise an objection to the sale for the simple F reason that he had filed a suit on the basis of an Agreement of Sale. The factum of the Agreement of Sale was not denied by the second respondent. Therefore, whether the Agreement of Sale was a good Agreement of Sale entitling the appellant for specific performance on the basis of that agreement is G essentially a question to be decided subsequently in the suit (though the suit is earlier to the suit filed by the first respondent). Under such circumstances there was a cloud on the property and a person like appellant who had the obligation qua the property in the shape of an Agreement of Sale could not be H held to be an utter outsider having no locus standi to take the

objections. This is the import of the aforementioned decision in **Vannarakkal Kallalthil Sreedharan's case.** To the same effect is the judgment in **Purna Chandra Basak v. Daulat Ali Mollah [AIR 1973 Cal. 432]** where the learned Single Judge of that Court has held:

> "An attaching creditor can only attach the right, title and interest of his debtor at the date of the attachment and on principle, his attachment cannot confer upon him any higher right than the judgment-debtor had at the date of the attachment. If a person, having a contract of sale in his favour, has such pre-existing right the attachment could not be binding upon him. If the promise get a conveyance, after the attachment, in pursuance of his contract, he takes a good tile inspite of the attachment. "

The observations would only highlight the importance of the Agreement of Sale which is prior in time of the attachment as also the unconfirmed sale.

15. Learned counsel also points out the observations of this Court in **Desh Bandu Gupta v. N.L. Anand & Rajinder Singh [(1994) 1 SCC 131]** in paragraph 5 which are to the following effect:

> "The auction-purchaser gets a right only on confirmation of sale and *till then his right is nebulous and has only right to consideration for confirmation of sale*. If the sale is set aside, part from the auction-purchaser, the decree holder is affected since the realisation of his decree debt is put off and he would be obligated to initiate execution proceedings afresh to recover the decree debt."
>
> (Emphasis supplied)

From this the learned counsel contended that since in this case the sale had remained to be confirmed, there was no question of holding the appellant to be an utter outsider or throwing his application as untenable.

16. It was urged before the High Court that the provisions of Order XXI Rule 58 read with the provisions of Order 22 Rule 101 spells out the duty of the court to adjudicate all the questions relating to the rights of the parties and that the Executing Court had failed to consider the provisions in the proper perspective and it should have decided as to whether the decree between the first and second respondents is a collusive decree merely meant to defeat the right of the appellant herein. The aforementioned proviso to Rule 58 and more particularly Clause (a) thereof was the only provision relied upon by the High Court which is clear from the observations made in internal page 10 of the judgment of the High Court in the following words:

> "Clause 5 of Order 21 Rule 58 CPC deals with a situation where the claim or objection under the proviso to sub-rule (1) is refused to be entertained by the court, the party against whom such order is made may dispute, but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive. The highest bidder in the auction sale has been declared as the purchaser and that therefore, the proviso to Order 21 Rule 58 CPC is attracted."

We have already shown that this is not the situation in law. The High Court further went on to suggest that a merely Agreement holder could not prevent the right of the auction-purchaser to get the sale confirmed. This statement is also patently incorrect statement in law. We have, therefore, no hesitation in holding that the High Court and the Trial Court were in utter error in relying on proviso to Clause (a) to Rule 58 of Order XXI CPC. The appeal has, therefore, to succeed. The Executing Court thus shall be obliged to decide the objections raised by the appellant.

17. In the above circumstances the appeal is allowed. However, in the facts and circumstances of the case, there will be no order as to costs.

D.G. Appeal allowed.