2026:KER:20267

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SATHISH NINAN

&

THE HONOURABLE MR.JUSTICE P. KRISHNA KUMAR

WEDSDAY, THE 11TH DAY OF MARCH 2026 / 20TH PHALGUNA, 1947

FAO NO. 51 OF 2020

AGAINST THE ORDER DATED 13.02.2020 IN E.A.NO.168/2019 IN E.P.NO.20/2016 IN OS NO.7 OF 2014 OF SUB COURT, THODUPUZHA

APPELLANT/PETITIONER:

KOSHY ABRAHAM,
AGED 67 YEARS
S/O. ABRAHAM, RESIDING AT KOCHUTHUNDIYIL HOUSE, KANJIKUZHY KARA, KANJIKUZHY VILLAGE, THODUPUZHA TALUK, IDUKKI DISTRICT, PIN-685606.

BY ADV SRI.M.NARENDRA KUMAR

RESPONDENTS/COUNTER PETITIONER/DECREE HOLDER AND ADDITIONAL JUDGMENT DEBTOR 1 TO 4:

1 **SHAJI,**
AGED 45 YEARS
S/O. THOMAS, RESIDING AT KADAKKANATTU HOUSE, VANNAPPURAM KARA P O, VANNAPPURAM VILLAGE, THODUPUZHA TALUK, IDUKKI DISTRICT, PIN-685607.

2 **MERCY APPACHAN @ LYAPPACHAN JACOB.**
W/O. LATE APPACHAN @ LYAPPACHAN JACOB, RESIDING AT VATTAKKATTU HOUSE, KALIYAR KARA, KALIYAR P.O, VANNAPPURAM VILLAGE, THODUPUZHA TALUK, IDUKKI DISTRICT, PIN-685607.

3 **ANU (DELETED)**
D/O. LATE APPACHAN @ LYAPPACHAN JACOB, RESIDING AT VATTAKKATTU HOUSE, KALIYAR KARA, KALIYAR P.O,

VANNAPPURAM VILLAGE, THODUPUZHA TALUK, IDUKKI DISTRICT, PIN-685607.

(THE THIRD RESPONDENT IS DELETED FROM THE PARTY ARRAY AT THE RISK OF THE APPELLANT VIDE ORDER DATED 13/07/2023 IN IA 1/2023.

4 ANJU
D/O. LATE APPACHAN @ LYAPPACHAN JACOB, RESIDING AT VATTAKKATTU HOUSE, KALIYAR KARA, KALIYAR P.O, VANNAPPURAM VILLAGE, THODUPUZHA TALUK, IDUKKI DISTRICT, PIN-685607. C/O. BIBIN MARTIN, MADAPPILKUNNEL HOUSE, KALLOORKAD P.O, MUVATTUPUZHA.

BY ADVS.
SHRI.P.B.KRISHNAN (SR.)
SRI.P.B.SUBRAMANYAN
SRI.SABU GEORGE
SMT.B.ANUSREE
SRI.MANU VYASAN PETER
SMT.MEERA P.

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR HEARING ON 02.03.2026, THE COURT ON 11.03.2026 DELIVERED THE FOLLOWING:

2026:KER:20267

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SATHISH NINAN & P. KRISHNA KUMAR, JJ.

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F.A.O.No.51 OF 2020

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Dated this the 11th day of March, 2026

JUDGMENT

P.Krishna Kumar, J.

The appellant filed an application under Rule 90 of Order XXI of the Code of Civil Procedure, 1908 ("the Code", for short) seeking to set aside a sale conducted by the Subordinate Judge's Court, Thodupuzha, in an execution petition filed by the first respondent herein against respondent Nos. 2 to 4. By the order impugned in this appeal, the court dismissed the application.

2. In execution of a decree obtained by the first respondent against respondents 2 to 4, immovable property having an extent of 32.27 cents was sold in court auction on 06.11.2019, for a sale price of Rs.25,01,000/-. The first respondent himself purchased the property in the auction, with the permission of the court. The decree obtained by the

first respondent directs that there would be a charge on the scheduled property for realising the decree amount of Rs.20,29,054/- with interest. According to the first respondent, the amount due to him at the time of sale was Rs.31,11,429/-, and thus there would be no surplus amount after adjusting the decree debt.

3. The appellant had also obtained a decree for money against respondent Nos. 2 to 4. He filed an execution petition against them and obtained an order of attachment of the very same property, on 06.10.2016. In the petition for setting aside the sale, the appellant contended that, as the property sold in auction was under attachment, the sale proceedings conducted without disclosing it are vitiated by fraud, collusion, and grave irregularities. He further contended that the sale was effected by suppressing the fact that the property would have fetched a very high price.

4. By the impugned order, the Execution Court dismissed the application for setting aside the sale and confirmed the sale on the finding that the appellant failed to show any

material irregularity or fraud in publishing or conducting the sale. The court also found that the valuation of the property was fair and proper, as it has no road frontage.

5. We have heard Sri. M. Narendra Kumar, the learned counsel appearing for the appellant, and Sri. Manu Vyasan Peter, the learned counsel appearing for the first respondent.

6. As observed above, the sale was conducted in execution of a decree for recovery of money passed in favour of the first respondent, creating a charge on the scheduled property. The appellant has also obtained a decree against respondent Nos. 2 to 4 for recovery of money, but it is not a decree charged on the property. According to the appellant, the judgment debtors have no other property. The suit, decree, and the execution petition filed by the appellant are earlier in time than the corresponding proceedings of the first respondent, it is contented. However, the first respondent contended that the appellant obtained a compromise decree in collusion with the predecessor of respondent Nos. 2

to 4, based on a fabricated agreement for sale dated 18.12.2012, for defeating the rights of the first respondent under an agreement for sale executed prior to it, i.e., on 24.11.2012. According to him, the sale is valid and the sale price was fair and reasonable.

7. During the course of hearing, Sri. M. Narendra Kumar, the learned counsel appearing for the appellant, assailed the impugned order by raising the following contentions: As per Section 63(1) of the Code, the court which shall receive or realise the property in execution of a decree shall be the court which first attaches the property, and the saving clause in sub-section (2) of Section 63 of the Code does not extend to permitting a decree holder who has purchased the property at a sale held in execution of a decree to set off the purchase money to the extent of the price payable by him. Thus, though the property was purchased in auction by the first respondent himself, he is liable to deposit the sale price before the court for rateable distribution with the appellant, as held in **E.P.Abdul Latheef v. K.Vinodan and Another** (2007 (1) KHC 624). Even when the first respondent

obtained a decree creating a charge on the property in a suit for return of amount advanced towards sale price, the first respondent cannot claim any preference under Section 73 of the Code. Merely because a person has obtained such a decree, his claim for recovery of the amount need not necessarily be treated as one arising under a charge, in view of the ratio in ***Mammad Koya v. Ismayil*** (1979 KLT 9). If at all it is a charged decree, Order XXXIV Rule 14 of the Code bars a decree holder from bringing a mortgaged or charged property to sale otherwise than by instituting a suit specifically for sale in enforcement of the mortgage or charge.

8. Sri. Manu Vyasan Peter, the learned counsel appearing for the first respondent, submitted that when the property is liable to be sold in execution of a decree subject to a charge, a simple money decree holder cannot claim rateable distribution under Section 73 of the Code. He further contended that, at the time when the appellant filed the application for setting aside the sale, his execution petition was not even pending, as it had been dismissed for default on 11.02.2019. It is further contended that the

amount for which the scheduled property was sold in auction was fair, as the property does not have direct road access, and therefore there was no irregularity or fraud in conducting the sale. Relying on ***Francis @ Porinju v. Navodaya Kuries & Loans (P) Ltd. and Others*** (2010 KHC 726), it is further contended that non-mentioning of a prior attachment in the sale proclamation would not violate Rule 66(2) of Order XXI.

9. In view of the above contentions, the point that arises in this appeal is whether the sale is liable to be set aside and whether the appellant has any right to obtain a rateable distribution of the assets held by the execution court.

10. As per Rule 90 of Order XXI, an application to set aside a sale on the ground of material irregularity or fraud in publishing or conducting the sale can be made by a person entitled to share in a rateable distribution of the assets. The appellant filed the application invoking the above provision. Hence, it must first be considered whether the

appellant is entitled to rateable distribution of the assets.

11. As per Section 73 of the Code, when assets are held by a court (in this case, the sale price obtained in the auction sale), and more than one person has made applications to the court for execution of decrees for payment of money passed against the same judgment debtor, such assets shall be rateably distributed among all such persons, provided that the applications (the execution petitions) were made before the receipt of the assets. It is not obligatory for the decree-holders who claim rateable distribution under Section 73 to specifically apply for such rateable distribution (***Suraj Lal Bal Krishna Das vs Padrauna Raj Krishna Sugar Works***, AIR 1961 All. 371). Section 73 of the Code reads as follows:

> "73. Proceeds of execution-sale to be rateably distributed among decree-holders.—
> (1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons:
>
> Provided as follows:—

(a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale;

(b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold;

(c) where any immovable property is sold in execution of *a decree ordering its sale* for the discharge of an incumbrance thereon, the proceeds of sale shall be applied–
First, in defraying the expenses of the sale;
Secondly, in discharging the amount due under the decree;
Thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any); and
Fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

(3) Nothing in this section affects any right of the Government."

(Emphasis added)

The basic principle underlying Section 73 is equality among unsecured decree holders. Nevertheless, the provision does

not override the priority of secured claims arising under a mortgage or charge. For example, a mortgagee is not affected by the sale of the property inasmuch as he retains his right to proceed against the mortgaged property and thus he can enforce his rights against the auction purchaser. It is evident from clause (b) of the proviso to Section 73(1) of the Code that where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the court can order sale of such property free from the mortgage or charge only with the consent of the mortgagee or incumbrancer. By virtue of clause (c) of the proviso to Section 73(1) of the Code, when an immovable property is sold in execution of ***"a decree ordering its sale"*** for the discharge of an incumbrance, the proceeds of sale, after defraying the expenses of the sale, shall first be applied in discharging the amount due under that decree, in preference to the money due on subsequent incumbrances. The provision further contemplates that the claim of other holders of decrees for payment of money against the same judgment debtor arises only after applying the surplus sale proceeds towards subsequent incumbrances. It is thus apparent from clause (c)

that when an immovable property is sold in execution of a decree *directing its sale for the discharge of an incumbrance*, the amount due under that decree has priority, after defraying of the expenses of the sale. In ***M. L. Abdul Jabbar Sahib v. M. V. Venkata Sastri and Sons*** (AIR 1969 SC 1147), the Apex Court made this position clear.

12. The first respondent claims preference in executing the decree by sale of the said property on account of the charge created in the decree. The decree in question does not in express terms direct sale of the property, but it creates a charge over the property for realisation of the decree amount. The operative portion of the decree reads thus:

> "That the plaintiff is allowed to recover ₹20,29,054/- with interest @ 6% per annum from the date of the suit towards refund of advance amount from the defendant and by charging the plaint schedule property. The plaintiff is also entitled to the cost of the suit."

Whether this would make any difference in the question of applicability of Section 73(1)(c) (where it is said that the property is sold in execution of *a decree ordering its sale,* not merely creating a charge) will be considered later, after adverting to the contentions of the learned counsel for the

appellant with respect to Rule 14 of Order XXXIV.

13. It is contended that a charge holder is not entitled to bring the charged property to sale otherwise than by instituting a separate suit for sale in enforcement of the charge, in view of the prohibition contained in Rule 14 of Order XXXIV. Let us now consider this question in some detail. As per Rule 15 of Order XXXIV, all the provisions contained in Order XXXIV which apply to a simple mortgage shall, *'so far as may be'*, apply to a charge within the meaning of Section 100 of the Transfer of Property Act, 1882 ("the T.P. Act", for short). Though a charge created by a decree pursuant to the statutory provisions contained in Section 55(6)(b) of the T.P. Act has some distinction from a charge under Section 100 of the said Act, Rule 15 read with Rule 14 of Order XXXIV of the Code is applicable to such statutory charges as well (***Vuddagiri Ammanna v. Gada Subbayya*** (1935) 69 Mad LJ 854, Madras High Court; ***Maddali Tiruvengalam v. Saladi Ammaanna*** (1966) 2 An.W.R.142, High Court of Andhra Pradesh). However, if the charge is created for the first time by a decree, Rule 14 has no application (***A. Choudhary v. Alliance Industrial Syndicate India***, AIR 1963 Tri 46).

Nevertheless, if the charge is pre-existing and the decree merely declares or recognises it, Rule 14 would apply (***Teluguntla Hema Bala Sundari and Others v. Pandiri Sakuntalamma and Others***, AIR 1983 AP 49). In the present case, the charge is pre-existing in view of Section 55(6)(b) of the T.P. Act. It is thus necessary to examine the scope of Rule 14 of Order XXXIV of the Code carefully, which reads thus:

> "**14. Suit for sale necessary for bringing mortgaged property to sale:** (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, Rule 2.
> (2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882 (4 of 1882), has not been extended."

What Rule 14 postulates is that a mortgagee or charge holder who has obtained a decree for payment of money simpliciter is not entitled to bring the mortgaged or charged property to sale in execution of such money decree. However, he can institute a separate suit for sale of the mortgaged or charged property, notwithstanding the bar under Rule 2 of

Order II. Nevertheless, this bar applies only if the money suit was filed in satisfaction of a claim *arising under the mortgage or charge*. Rule 14 also does not bar the mortgagee or charge holder from executing such a decree against the judgment debtor personally or against other properties of the judgment debtor. This provision corresponds to Section 99 of the T.P. Act, which was repealed by Act 5 of 1908.

14. The primary object underlying Rule 14 is to prevent the mortgagee from bringing to sale the bare equity of redemption in execution of an ordinary money decree. Unless the mortgagee proceeds under Order XXXIV for a decree for sale of the mortgaged property, it cannot be said that the right of equity of redemption is lost (***Hargovind v. Balmukund***, AIR 1994 MP 191). This aspect is further explained by Sir Dinshah Fardunji Mulla in the *Commentary on the Code of Civil Procedure* (18th Edition, Volume 3, pp. 3220–3221, LexisNexis publication) as follows:

> "It is clear that where a mortgagee brings a regular suit for sale and a decree is passed in such suit, what would be sold is the mortgaged property free from the mortgage; while in the other case where the suit is not for sale, but

> only on the mortgage-debt, what would be sold is the mortgaged property subject to the mortgage; in other words, it is only the mortgagor's equity of redemption that would be sold. The present rule is for the protection of the mortgagor. It prevents mortgagees from suing their mortgagors on the mortgage-debt as such and, in execution, selling the bare equity of redemption, thereby depriving the mortgagors of the right of redemption that would be given to them by the decree for sale."

15. In *Teluguntla Hema Bala Sundari* (supra), a Division Bench of the Andhra Pradesh High Court considered the question whether an unpaid seller, who is entitled to a charge under Section 55 of the T.P. Act, can enforce the charge without filing a separate suit under Order XXXIV Rule 14 of the Code. It was held that when such a seller brings the property to sale in execution of a decree for the purchase money due under the decree, no separate suit is necessary under Order XXXIV of the Code. The Bench distinguished the law laid down in *Vuddagiri Ammanna v. Gada Subbayya* and *Maddali Tiruvengalam v. Saladi Ammaanna* (supra), wherein it was held that when a charge decree was obtained in respect of unpaid purchase money, the decree holder could not bring the property to sale without first obtaining a preliminary decree for sale under Order XXXIV of the Code,

since the decree in such a suit does not create a charge but merely declares a pre-existing statutory charge.

16. There were divergent views in respect of the effect of a decree directing sale for the recovery of money, and a decree which merely creates a charge on the property. The question whether a decree charging it on an immovable property can be executed by sale of the charged property without instituting a separate suit has been set at rest by the amendment made to Rule 15 of Order XXXIV of the Code by Section 82 of Act 104 of 1976. By the said amendment, sub-rule (2) was added to Rule 15. Rule 15, after the amendment, reads as follows:

> "15. Mortgages by the deposit of title deeds and charges.—
> (1) All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title deeds within the meaning of Section 58, and to a charge within the meaning of Section 100 of the Transfer of Property Act, 1882 (4 of 1882);
>
> **(2) Where a decree orders payment of money and charges it on immovable property on default of payment, the amount may be realised by sale of that property in execution of that decree."**

(Emphasis added)

By virtue of this amendment, even if the decree orders payment of money without further directing sale of the immovable property, but charges the decree debt on an immovable property, the amount due under the decree can be realised by sale of that property in execution of that decree itself. Therefore, the question whether a charge holder under a decree for refund of an amount paid towards sale consideration is required to institute a fresh suit for sale of the property does not arise after the said amendment. The Statement of Objects and Reasons of the amendment clarifies the position as follows:

> "The question whether a decree creating a charge can be executed and the property may be sold in execution or whether a separate suit is necessary has been discussed in many cases. Where a decree directs sale or provides that the money charged shall be recovered from the property, there is no difficulty. But where the decree does not direct sale and recovery of money from the property, and merely creates a charge on the property, the position is not very clear. Though it would depend on the construction of the decree, there has been some uncertainty and conflict in judicial interpretation. New sub-rule (2) is being inserted in Rule 15 with a view to clarifying the position."

In view of this amendment, a decree ordering a charge on immovable property for the decree debt cannot be

distinguished from a decree ordering sale of the property. Sub section (c) to the proviso of Section 73(1) is thus indubitably applicable to a decree wherein a charge is created on an immovable property, even if the decree does not specifically order sale of the property in execution. Such a distinction, for the purpose of clause (c) of the proviso to Section 73(1) of the Code, would be unrealistic and inconsistent with the legislative intent for the reasons aforesaid. In such circumstances, the first respondent/decree holder is indeed entitled to first preference as per Section 73(1)(c) of the Code. As stated above, there is no surplus in the purchase money after adjusting the decree debt. Thus, the appellant is not entitled to receive any amount by way of rateable distribution.

17. Considerable reliance was placed on ***Mammad Koya v. Ismayil*** (supra) by the learned counsel appearing for the appellant to contend that a suit for return of advance amount cannot be considered as one arising under a mortgage or charge within the meaning of Section 73(1)(b) of the Code. We do not find any such proposition in the said decision. That was a case where a suit was laid for recovery of Rs.30,000/-

which had been paid towards advance purchase price. It appears from the judgment that neither a decree charging the property was sought by the plaintiff therein nor was such a decree granted. When the decree holder brought the property to sale in execution of the decree, the judgment debtor raised a contention that the execution petition was not maintainable in view of Rule 14 of Order XXXIV of the Code. It was then held that the essential condition for applying Rule 14 is that the decree must be one obtained by a person in his capacity as a mortgagee or a charge holder and must also be for payment of money in satisfaction of a claim arising under a mortgage or charge. The court further observed that merely because a person might have a statutory charge in respect of an amount due to him, the provision contained in Rule 14 of Order XXXIV of the Code would not automatically be attracted, as it is perfectly open to such a person to institute a simple money suit for recovery of the amount without seeking to enforce the charge. On the facts, the court held that the decree holder's claim for recovery of the amount was not one arising under a mortgage or charge. Further, the Division Bench was not at all considering the

scope of Section 73 of the Code. In the present case, it is evident from the decree that the suit was for recovery of the amount seeking enforcement of the charge, as the decree itself permits the first respondent to realise the decree amount by charging the property.

18. There is yet another hurdle for the appellant in claiming rateable distribution in this case. The execution petition filed by the appellant was dismissed for default on 11.02.2019. A Division Bench of this Court in ***Cheriyan v. Acheyamma Mathen*** (1961 KLT 531) held that, for claiming rateable distribution by a decree holder, his execution petition should have been pending when the assets were received by the court. While holding so, the Bench disapproved a contrary finding of a Full Bench of the High Court of Hyderabad, wherein it was held that once an application for execution has been made, it does not matter if it is dismissed and was not pending when the amount was received in court. Placing reliance on ***Bincy Scaria v. Joseph @ Josemon*** (2024 (3) KHC 102) and ***Danish Varghese v. Jancy Danish*** (2021 (1) KHC 1), the learned counsel for the appellant attempted to get over this difficulty by contending

that the pendency of an application for restoration of the execution petition would suffice for the purpose of claiming rateable distribution. However, in the said decisions, this Court held only that a sale will not become absolute until the ancillary proceedings to set aside the sale are ultimately disposed of, either at the original side or at the appellate side.

19. Though the auction sale was assailed by the appellant on the ground that there was fraud and collusion between the first respondent and the judgment debtors, there are no materials to substantiate the said contentions. Another challenge raised against the sale was that the mandatory provision under Order XXI Rule 66(2) of the Code was not complied with. As per the said Rule, the incumbrances to which the property is liable shall be specified in the sale proclamation. The 1st respondent had produced the encumbrance certificate for the relevant period. However, it is urged that the first respondent/decree holder did not disclose that the property had already been attached in the execution petition filed by the appellant. It is settled law that an attachment made by a court does not by itself amount

to creation of a charge and therefore cannot be treated as an incumbrance for the purpose of Order XXI Rule 66(2). An attachment merely prohibits private alienation of the property by the judgment debtor and does not create any proprietary interest in favour of the attaching creditor. In ***Jayan Kuttichakku v. Common Man Chitties and Loans (P) Ltd.*** (2007 (1) KLT 932), a learned Single Judge of this Court clarified this legal position while considering the scope of Order XXI Rule 66(2) of the Code, after referring to the law laid down by the Apex Court in ***S. Noordeen v. V.S.T. Venkita Reddiar*** [(1996) 3 SCC 289]. A Division Bench of this Court in ***Nirmala v. Sundaresan (deceased)*** [2023 LiveLaw (Ker) 374] reiterated the above legal position by following *Jayan Kuttichakku v. Common Man Chitties and Loans (P) Ltd*. The Division Bench thus held that if the sale proclamation does not mention an attachment made by the court, it cannot be considered a material irregularity or fraud in conducting the sale. Therefore, the above contention is also liable to be rejected. Though it was argued that the property would have fetched a much higher amount than the purchase price, no material has been placed before us to substantiate that

argument. Thus, none of the challenges raised against the execution sale are sufficient to invalidate the sale.

Therefore, the appeal is dismissed, upholding the impugned order. No costs.

Sd/-

SATHISH NINAN

JUDGE

Sd/-

P. KRISHNA KUMAR

JUDGE

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