

(1935) 10 MAD CK 0005
In the Madras High Court

A.P.N. Venkatachalam Chettiar and Another
Vs

APPELLANT

Alagarswami Chettiar and Others

RESPONDENT

Date of Decision : 11-10-1935

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89

Citation : AIR 1936 Mad 264 : 162 Ind. Cas. 34 : (1936) 43 LW 342

Hon'ble Judges : Wadsworth, J

Bench : Single Bench

Judgement

Wadsworth, J.—This appeal raises the interesting question whether a purchaser from he judgment-debtor of property which has been

actually sold in execution of the decree on a puisne mortgage can, by reason of his purchase after the Court auction sale but before its confirmation

and by reason of the discharge of the prior mortgage on that property before the confirmation of the Court auction sale, claim to be subrogated to

the rights of the prior mortgagee as against the Court auction-purchaser. The facts are simple. The appellant is the 7th defendant puisne mortgagee

decree-holder and Court auction-purchaser. The plaintiffs are the sons of the private purchaser from the mortgagor. The first mortgage was to one

Sami Chetty who is the brother of the plaintiff's father; next there was a mortgage to the 7th defendant; thirdly, there was another mortgage, to the

7th defendant on which third mortgage the 7th defendant sued and got a decree. In execution of that decree on the third mortgage the property

was purchased in Court auction by the 7th defendant on November 6, 1926. On December 3, 1926, that is, just under a month after the Court

sale, the judgment-debtor sold the same property to the plaintiffs' father the consideration for the sale being the discharge of the first mortgage in

favour of Sami Chetty. The lower Appellate Court finds that the first mortgage was probably discharged on December 4 or 5, 1926, that is to say,

before the earliest date on which the Court sale could have been confirmed; and it is also found that possession was given to the plaintiffs father.

The only question, therefore, is whether this transaction clothed the plaintiffs' father with such an interest in the property as would entitle him to be

subrogated to the rights of his brother Sami Chetty.

2. Now there is no allegation that the plaintiffs' father purchased in good faith without knowledge of the Court sale. The rights of the plaintiffs,

therefore, must be based on the actual possession of an interest in the property at the time when he discharged the first mortgage. I have not been

referred to any case precisely similar to the present. The appellant relies on a ruling in *Govinda Padayachi and Others Vs. Lokanatha Aiyar and*

Others, , which was a case in which a person who claimed subrogation claimed on the basis of a sale effected long after the confirmation of the

Court sale and the private sale was further qualified by a direction that he should obtain a re-sale from the Court auction-purchaser. That was,

therefore, quite clearly a case in which the would-be subrogator's vendor had no manner of title or interest in the property. Another case relied on

by the appellant is that of *Pichaiyappa Chetti and Another Vs. Govindaraju Mudaly and Others*, , which is also a case in which the purchaser

acquired no title at all as his vendor had no title and there was no material for holding that he purchased in good faith. The case of *Chinna*

Alagumperumal Karayalar v. Vinayaga-thammal 55 M.L.J. 861 : 117 Ind. Cas. 731 : 29, L W 6 : AIR 1929 Mad. 110, is a case of a void sale by

a de facto guardian, the purchaser discharging and othi on the property, but not doing so in good faith and having ab initio no title or interest in the

purchased property. A similar case is that of *Nanduri Saradamba v. Pattabhiramayya* (1930) 53 M 952 : 129 Ind. Cas. 463 : (1930) M W N 601

: Ind. Rule (1931) Mad. 271 : AIR 1931 Mad. 207 : 33 L W 20 : 60 M.L.J. 13, wherein cases in which the purchaser claiming subrogation

claimed on the basis of a title which though voidable, was for the time being good, are distinguished. On behalf of the respondent the cases quoted

in the lower Appellate Court's judgment are relied on. Thus there is that reported in *Syamalarayudu v. Subbarayudu* 21 M 143, which is a case

where the person who claims subrogation has title but that title is not good as against another person who had an earlier agreement to sell in his

favour. It was certainly an instance of subrogation being allowed to a man whose conduct was not bona fide, but it was allowed on the strength of

an interest subsisting at the time when he discharged the prior mortgage. Similarly the case in *Chama Swami v. Padala Ananda* 31 M 439, is one in

which there was a subsisting title which was voidable but had not been avoided at the time when the prior encumbrance was paid off. So also the

case in *Pala-malai Mudaliyar v. The South Indian Export Company* 33 M 334 : 5 Ind. Cas. 280 : (1910) M W N 44 : 7 M L T 203 : 20 M.L.J.

275, was a case of a voidable transfer made in fraud of creditors which clothed the purchaser with title at the time when he discharged a prior

encumbrance, though it was liable to be set aside at the instance of the creditors. It seems to me that the law on the subject is clear though its

application to the facts of the present case is not so simple. A mere volunteer who discharges a prior encumbrance has no right to claim

subrogation; and if a person who has a title void ab initio and no other interest in the property discharges a prior mortgage, he is in the position of a

mere volunteer and cannot claim to be subrogated. Mere possession alone is not sufficient to support a claim of subrogation unless that possession

is accompanied by some interest in the property which the person in possession is entitled to protect. This, however, may possibly be qualified if

the discharge of the prior encumbrance was necessary to prevent an immediate dispossession. On the other hand it is quite clear that a person who

holds property under a title which, though voidable, is good for the time being, is entitled to claim subrogation to the rights of the mortgagee whom

he has discharged.

3. Now what is the position in the present case? The plaintiffs, according to the lower Appellate Court's findings, got into possession at a time

when the title of the Court auction-purchaser had not yet been perfected, by the confirmation of the sale. It has been found that the discharge of the

prior mortgage was also prior to the confirmation of the sale. It is true that as against the Court auction-purchaser the purchase by the plaintiffs"

father conveyed nothing, for under the terms of Order XXI, Rule 89, the plaintiffs" father was not entitled to pay the decree amount and the

statutory solatium and get the sale set aside. But as against the judgment-debtor the plaintiffs' father acquired the right to immediate possession of the land until the completion of the sale and also the right, if the judgment-debtor should exercise his option under Order XXI, Rule 89, to the title which the judgment-debtor would thereby revive.

4. I am of opinion that in such circumstances it cannot be said that the plaintiffs' father had no interest in the property. It is true that the interest which he had was of little or no value unless the judgment debtor got the sale set aside under Rule 89 and in fact there is nothing to indicate any intention to get the sale so set aside. The probability seems to be that this sale to the plaintiffs' father was intended primarily to give a basis for resisting the transfer of possession to the Court action-purchaser. Nevertheless, I think it must be held, legally speaking, that the plaintiffs' father did acquire an interest in this property which he was entitled to protect by the discharge of the prior mortgage. Had the judgment-debtor taken action under Order XXI, Rule 89, the matter would be perfectly plain. Even in the absence of such action, I am constrained to hold that there was an interest in the plaintiffs' father which he was entitled to protect and that he is entitled to be subrogated to the rights of the prior encumbrancer.

5. The appeal is, therefore, dismissed with costs.