

(1925) 01 MAD CK 0038
In the Madras High Court

Chinna Vavanan alias Kanakathu Meera Levai Rowther, by the Official Receiver APPELLANT

Vs

Chettiappa Chetti (by the Aauthorised Agent, Lakshmana Chetti) and Others RESPONDENT

Date of Decision : 15-01-1925

Acts Referred:

Citation : (1925) 22 LW 439 : (1925) 49 MLJ 452

Hon'ble Judges : Wallace, J;Dlevadoss, J

Bench : Full Bench

Judgement

Dlevadoss J.

1. The appellant was the 1st defendant in O.S. No. 1412 of 1917. The suit was by a mortgagee against the mortgagor (1st defendant) and the

purchaser was impleaded as 2nd defendant as he had a mortgage subsequent to that of the plaintiff. The appellant was ex parte in the District

Munsif's Court. A decree was; passed in favour of the plaintiff and the hypotheca was sold arid was purchased by the 2nd defendant. The ex

parte decree was reversed on appeal and the 1st defendant applied to have the sale set aside. The 1st defendant having been adjudicated an

insolvent, the Official Receiver continued the proceedings before the District Munsif. The District Munsif held that the 2nd defendant was not a

decree-holder and therefore the sale was not liable to be set aside. On appeal by the Official Receiver the Subordinate Judge held that the order of

the District Munsif was right and dismissed the appeal. The Official Receiver has preferred this appeal.

2. The contention of the appellant is that the purchase by the 2nd defendant is liable to be set aside as the decree in execution of which he

purchased the property was set aside on appeal. It is well settled that, if a decree-holder purchases the property of the judgment-debtor in execution of his decree which is afterwards set aside, his purchase is liable to be set aside at the instance of the judgment-debtor. The contention for the respondent is that the 2nd defendant is not a decree-holder and therefore his purchase is good against the judgment-debtor. In *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* ILR (1887) A 166 it was held that a sale to a bona fide purchaser in execution of a decree was not liable to be set aside if the decree was afterwards reversed on appeal. Their Lordships observed at page 172 : ""It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the bona fide purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a Valid decree, and when the order for the sale was a valid order."" The question is whether the protection given to bona fide purchasers extends to persons who are parties to the suit in which the decree is passed, but who are not given any relief under the decree. In order that a purchaser may have the benefit of the sale under a decree which is afterwards set aside, he must be a bona fide purchaser. If he is not a bona fide purchaser then the purchase by him is liable to be set aside. A stranger to the decree is not bound to enquire into the merits of the plaintiff's claim or into the validity of the decree; but a party to the suit is in a different position, and it is his duty to enquire into the nature of the plaintiff's claim and the validity of the decree passed in plaintiff's favour. Supposing the plaintiff asked for relief in the alternative against two defendants, if the 2nd defendant satisfies the Trial Court that the 1st defendant alone is liable and on the strength of that a decree is passed and his property is brought to sale, and if on appeal the decree is set aside and the 2nd defendant is held liable, can it be said that the 2nd defendant is entitled to keep the property of the 1st defendant purchased by him in Court auction notwithstanding the reversal of the decree supposing a defendant contests the plaintiff's suit on the merits and a decree is passed not against him but against another defendant and if the property of the defendant against whom the decree is passed is brought to sale and if the defendant who put forward the contention that the plaintiff's claim is a

fraudulent one purchases the property and if the decree is afterwards set aside, can the defendant who purchased the other defendant's property

be entitled to say that his purchase is good notwithstanding the fact that he was aware of the fraudulent nature of the plaintiff's claim. It may be said

in such a case that he is not a bona fide purchaser. The decision in *Zain-ul-Abdin Khan v. Muhammad, Asghar Ali Khan* ILR (1903) M 98 applies

only to bona fide purchasers. In that case, the purchasers, whose purchase was upheld by the Privy Council, were strangers to the decree. It does

not appear from the report whether they were, or were not, strangers to the suit. It cannot be assumed that the decision has no application to

purchasers who are parties to the suit, but in whose favour no decree has been passed, from the mere fact that Sir Barnes Peacock uses the

expression ""bona fide purchasers who are no parties to the decree"". A party to a suit cannot be said not to be a party to the decree if he gets no

relief under it. If a party to a suit is on record, the decree is bound to make mention of him; and the principles of *res judicata* or of *estoppel* may

apply to him whether he gets or not any relief under the decree. The decision, therefore, in my opinion covers the case of a party in whose favour

no relief is given under the decree.

3. The contention of Mr. Krishnaswami Aiyar is that the principle of restitution is applicable only to decree-holders who purchase the property of

the judgment-debtor in execution of, or who get some benefit under, their decree, and persons in whose favour a decree is not passed are not

bound to make restitution of what they have got by purchase in a Court auction. The cases relied upon by him do not support the contention that

the defendant, in whose favour there is no decree, is entitled to keep the property which he purchased in execution of the decree against another

defendant even if the decree be upset either in appeal or in any subsequent proceeding. In *Syed Nathadu Sahib v. Nallu Mudaly* ILR (1903) M 98

it was held that where a property is purchased at a sale in execution of a decree, the purchase is subject to the final result of the litigation between

him and the judgment-debtor. In *Moitheensa Rowthan v. Apsa Bivi* ILR (1911) M 194 the purchaser was a stranger to the decree. In *R.*

Raghavachari Vs. M.A. Pakkiri Mahomed Rowther and Others, the purchaser was not a party to the suit. As observed in *Duraiswami Aiyar v.*

Annaswami Aiyar ILR (1899) M 306, "" the principle of doctrine of restitution is that on the reversal of a judgment the law raises an obligation in

the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost."" It is

contended for the respondent that this must be limited to the decree-holder who gets benefit by reason of his decree. But I am unable to accept

this view. In this case, if the hypotheca had fetched a very large price and if a balance remained after satisfying the plaintiff, the balance would go to

satisfy the 2nd defendant who is a puisne mortgagee. Even though a defendant may not have a decree in his favour, in many cases, he may get

ultimately a benefit under the decree. In such cases it cannot be said that h,e is a stranger to the decree. The decision in Zain-ul-Abdin Khan v.

Muhammad Asghar Ali Khan ILR (1887) A 166 does not seem to have been brought to the notice of the learned Judges who decided

Duraiswami Aiyar v. Annaswami Aiyar ILR (1899) M 306. The American decision in Quart Wo Chung-Co. v. Laumeister 17 Am. State Reports

262, 263 in laying down, ""all that the one has gained and all that the other has lost is due to the agency of the Court and therefore no injustice is

done in restoring the party wrongfully dispossessed without stopping to investigate the rights of the party who has thereby gained the possession,

has stated the principle too broadly. I think the correct principle is that a bona fide purchaser who is not a party to the suit or proceeding in which

the auction sale is held, is entitled to hold the property even though the decree or order in execution of which the auction sale is held is

subsequently reversed or set aside.

4. In Yellappa v. Ramcharidra ILR (1896) B 463, Farran, C.J. observes : ""The Privy Council in a case very analogous to the present has decided

that where a person, a stranger to the proceedings, purchases property bona fide at an auction sale held in execution of a decree, his sale cannot

be set aside on the ground that the existence of a cross-decree rendered the sale in execution improper, "" If the contention of the respondent is

good, then a defendant, in whose favour there is no decree, would be entitled to keep the property which he purchased in Court auction, even

though he knew that there was a cross-decree in favour of the defendant whose property was sold in execution. I think the principle of the decision

in *Rewa Mahton v. Ram Kishen* (1886) 13 IA 106 and in *Yiellappa v. Ramcharidra* ILR (1896) B 463 is against the contention of the respondent.

5. This point was specifically raised and decided by a Bench of the Calcutta High Court in a case reported in *Narendra Chandra v. Jogendra*

Narain (1913) 20 C LJ 469; In that case Mookerjee, J., after an exhaustive examination of English and American cases observed: ""An

examination of these cases show that protection is afforded to the purchaser only when he is a stranger to the suit."" This principle is not only

consonant with equity but it also saves the Court the trouble of enquiring whether the defendant, in whose favour there is no decree at the time of

the sale, would be entitled to some benefit after the sale. I think the protection which is given to a bona fide purchaser should not be extended to a

defendant or a party to the suit even though he gets no benefit directly under the decree; in pther words, it is only a bona fide purchaser who is not

a party to the suit or proceeding that is entitled to keep the property purchased by him. In all other cases the purchase is liable to be defeated on

the reversal of the decree in execution of which the sale is effected. ½

6. In the result the appeal is allowed and the sale to the 2nd defendant is set aside with costs throughout.

Wallace, J.

7. I have had the advantage of perusing the judgment of my learned brother and I am not prepared to differ from his opinion in the case. I was at

first inclined to hold that in such a case the principle of restitution, that is the restoration to his status quo ante of a person wrongfully dispossessed

by the agency of the Court, should be enforced only against the party at whose instance the decree has been enforced, but on further consideration

I think, as at present advised, that this salutary principle of restitution should be enforced as the rule, and that exceptions to that rule should be

allowed only so far as authority by which we are bound has allowed them. The Privy Council *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khari*

(1887) ILR 10 A 166 (PC). has laid down that a bona fide purchaser not a party to the decree forms an exception to the rule, and we are not

referred to any case which has definitely extended the exception to auction purchasers who are parties to the suit or decree, but who had not

themselves enforced the decree and brought about the auction sale.

8. I therefore agree in the order proposed by my learned brother.