

(1949) 12 MAD CK 0028
In the Madras High Court
Case No : A.A.O. No. 308 of 1947

Irulayee Ammal

APPELLANT

Vs

T.V. Murugiah and Others

RESPONDENT

Date of Decision : 07-12-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144, 151, 47

Citation : AIR 1950 Mad 640 : (1942) 55 LW 280 : (1950) 2 MLJ 17

Hon'ble Judges : Subba Rao, J;Somasundaram, J

Bench : Division Bench

Advocate : V. Ramaswami Iyer, for the Appellant; K.V. Ramachandra Iyer, V. Meenakshisundaram, P.K. Narayanaswami, K. Virasami and K.N. Kasiviswanathan, for the Respondent

Final Decision : Allowed

Judgement

Somasundaram, J.—This is an appeal against (be order in E. A. No. 627 of 1946 in E. P. No. 138 of 1943 in O. S. No. 20 of 1936, on

the file of the Subordinate Judge's Court, Madura.

2. The circumstances under which this appeal is preferred are these. O. S. No. 20 of 1936 was filed by the plaintiff, respondent 2 herein, for

recovery of the amount due under a mortgage executed by defendants 1 to 4 in the suit. Defendants 5 to 8 and 9 to 12 are purchasers of portions

of the hypotheca. Defendant 13 is a purchaser of three houses from defendant 9 and defendant 14 is a purchaser of one of the three houses from

defendant 13. Defendant 29, the contesting respondent 1 in this appeal, is the legal representative of defendant 14. On 13th September 1937, a

preliminary mortgage decree was passed in O. S. No. 20 of 1936. Petitions for scaling down the debt under Madras Act IV [4] of 1938 were

filed by the mortgagors, defendants 1 to 4 and the purchasers defendants 5 to 8 and defendants 9 to 12. The applications of the mortgagors and of defendants 9 to 12 were allowed. On the ground that defendants 5 to 8 were not agriculturists their applications were rejected. With regard to the defendants whose applications were allowed, the decree amount was scaled down to Rs. 36,000. Defendants 5 to 8 appealed and the appeal was allowed by the High Court, so that after this appeal was allowed by the High Court the total amount payable by defendants 1 to 12 was Rs. 36,000. There were other defendants with whom we are not concerned in this appeal and there was a balance amount due under the decree, The scaled down amount of RS. 36,000 was deposited by the mortgagors and others and so far as they were concerned, satisfaction was entered At that time defendant 13 who purchased three houses from defendant 9 did not join in filing the petition for scaling down the debt. Subsequently he filed E. A. No. 91 of 1914 under Order 21, Rule 2, Civil P. C. His application was rejected on 22nd April 1944. He then preferred an appeal to the High Court, C. M. A. No. 410 of 1944. Pending disposal of that appeal, he prayed for stay of execution of E. P. No. 138 of 1943 by the decree-holder in bringing the properties to sale for the balance of the decree amount. The High Court in C. M. P. No. 3640 Of 1944 passed a conditional order of stay on his (defendant 13's) undertaking to deposit Rs. 300 on or before 14th October 1944. In passing the said conditional order, they limited stay of execution to the pro-parties in the possession of defendant 13. There was thus no stay with regard to the execution as against the property sold to defendant 14 and which was in her possession. The decree-holder therefore executed his decree against this property and on 18th December 1944 this house was brought to sale and the decree-holder purchased the same. The sale was duly confirmed and delivery was effected to him on 20th March 1945. On 8th January 1946 judgment was delivered in C. M. A. No. 410 of 1944 allowing the appeal holding that the decree should be deemed to have been discharged even as against defendant 13 inclusive of defendants 14 and 29. It may be mentioned here that defendant 29 did not take any steps to have the debt scaled down so far as he was concerned nor was he a party to the appeal here. The decree-holder, after getting possession of the property, sold it to the appellant herein on 3rd July 1946. Respondent 1, i. e., defendant 29 taking

advantage of the decision of this Court in C. M. A. No. 410 of 1944 put in this petition for redelivery of the house purchased by the decree-holder

and sold subsequently to the appellant herein. In the lower Court the petition was filed under Sections 47, 144 and 151 and Order 21, Rule 95,

Civil P. C. The lower Court held that Section 144 did not apply but held u/s 151 that respondent 1 was entitled to the benefits of restitution and on

the question as to whether it can be allowed against the appellant herein, held that where a party is bound to restore possession his legal

representatives or assigns are equally liable. It also held that the principle of Section 52. T. P. Act, applies and that the transfer was affected by lis

pendens. Against the said order, the purchaser from the decree-holder who was respondent 2 in the lower Court has filed this appeal.

3. A preliminary objection is raised by learned counsel for the respondent that the order of the lower Court being one u/s 151, Civil P. C., no

appeal lies and this appeal is therefore incompetent. In support of this contention, he relies on M.P. Palaniappa Chettiar and Others Vs. S.A.

Ramanathan Chettiar and Another, . Learned counsel for the appellant relying on Rami Reddi v. Satyam, A. I. R. 1936 Mad. 636 : 167 I. C. 356,

contends that this is really an application u/s 47, Civil P. C., and therefore, an appeal lay. In the above decision at P. 638 Wadsworth J. observes

that granting that an order under the inherent powers of the Court is not per se appealable, if that order is in fact an order passed on an application

made by one of the parties as against another party and relating to the execution, discharge or satisfaction of the decree, it falls u/s 47 and for that

reason it is appealable. He further holds that an order u/s 161 for something analogous to restitution would also fall u/s 47 and be subject to an

appeal and as pointed out in Somasundaram v. Chockalingam, 40 Mad. 780 : A. I. R. 1917 Mad. 185, Section 47, Civil P. C. covers all cases of

restitution. Learned counsel also relies on Unnamalai Ammal Vs. Mathan alias Arunachalam and Another, to show that Section 47 governs such

restitution and therefore the order is appealable. We think this is a case which relates to the discharge and satisfaction of the decree and falls u/s

47, Civil P. C., and therefore, the order is appealable.

4. The next and the more important question is whether defendant 29 can dispossess the appellant who was a purchaser from the decree-holder. It

was not pleaded in the lower Court that he was not a bona fide purchaser from the decree-holder nor is that fact disputed here. The question

therefore is how far the purchase is affected by the order of the High Court in the civil miscellaneous appeal. It may be stated here that at the time

the decree-holder brought the property to sale, there was no stay of sale in respect of this house and the decree therefore so far as this property is

concerned can validly and legally be executed. The Court therefore had undoubted jurisdiction to sell the property. There was no flaw in the

decree so as to fix the purchaser with any notice of such a defect. In such cases, it has been held that the equitable right to set aside such a decree

cannot prevail against the rights of the subsequent purchaser for value without notice. In *Marimuthu Udayan v. Subbaraya Pillai*, 13 M. L. J. 231,

the learned Judges observe at p. 235 :

A purchase by the decree-holder, without the permission of the Court, being, u/s 294, Civil P. C., (Order 21, Rule 72 of the present Code), not

void, but only voidable, it cannot for the above reasons be avoided against a transferee in good faith for valuable consideration, and this is in

accordance with the principle of law that as a general rule, the right to avoid an avoidable contract is determined when the vendee has, before the

vendor's election to avoid, transferred the property to a purchaser in good faith for valuable consideration.

In *Sheik Ismail Rowther v. Rajab Rowther*, 30 Mad. 295 : 17 M. L. J. 165 it has been held following *Marimuthu Udayan v. Subbaraya Pillai*, 13

M. L. J. 231 that a party claiming through a court purchaser is entitled to rely upon the plea that he is a bona fide purchaser for value without

notice. They further observed :

Assuming that defendant 1 in obtaining the decree had been guilty of misrepresentation or fraud, the proceedings were only voidable, and a bona

fide purchaser from him is entitled to rely on his title as such. The plaintiff had only an equity to set aside the proceedings which were the result of

fraud or misrepresentation, and that equity cannot be allowed to prevail against persons in the position of the appellants.

Again in *G. R. Rhodes v. Padmanadha, Chettiar*, 1 M. L. W. 1033 : AIR 1915 Mad. 150 *Sadasiva Aiyar and Napier JJ.* state the law as follows :

In *Shivlal Bhagwan v. Shambhuprasad*, 29 Bom. 435: 7 Bom. L. R. 585, the

following passages occur: "A purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties and that it has on that Investigation properly decreed a sale. He has no right to call upon the Court to protect him from a title not in issue in the cause and no way affected by the decree, but if he gets a proper conveyance of the estate, so that no person whom the decree affects can invalidate the title, although the decree may be erroneous and therefore to be reversed, I think the title of the purchaser ought not to be invalidated. If we go beyond this, we shall introduce doubt on sales under the authority of the Court which would be highly mischievous." The effect of the reversal of a decree on a sale held under it was considered by the House of Lords in *Tommey v. White*, (1850) 3 H. L. C. 49: 88 R. R. 26 Lord Brougham in delivering his opinion said : "We cannot set aside the sale, for the sale was under the decree of the Court, to a bona fide purchaser, there being no fraud and consequently the setting aside that sale is utterly and absolutely out of the question ; the sale must stand."

Referring to *Sheik Ismail Rowther v. Rajab Rowther*, 30 Mad. 295 : 17 M. L. J. 165, they state :

It was held that even where the decree-holder himself purchases in court auction and had been guilty of fraudulent proceedings in obtaining the sale, the title of a third party who had no notice of any defect in the decree and who purchased it bona fide from the decree-holder purchaser cannot be impeached.

Referring to *Zainulabdin v. Muhammad Ashgar Ali*, 10 ALL. 166: 15 I. A. 12, they state :

Their Lordships of the Privy Council said that bona fide purchasers who were not parties to the decree which was then valid and in force had nothing to do further than to look to the decree and to the order for sale.

This has been referred to again in *Kannusami Chetti Vs. M. Rahimat Ammal and Another*, . There Sundaram Chetty J. says :

In *Zainul abdin Khan v. Muhammad Ashgar Ali Khan*, 10 All 166 : 15 I. A. 12, their Lordships of the Privy Council have recognised the

distinction between the cases of bona fide purchasers in court auction who are not parties to the decree and the cases of the decree-holders

themselves being the court auction purchasers. It was held that a sale which had

taken place in execution of a decree in force at the time could not afterwards be set aside as against a bona fide purchaser not a party to the decree because on further proceedings that decree was subsequently reversed by an appellate Court. In another case the Privy Council held that where property was sold in execution of a valid decree and purchased bona fide by a third party, the existence of a cross decree for a higher amount in favour of the judgment-debtor would not support a suit by the latter against the purchaser to set aside the sale.

5. The above decisions clearly lay down the proposition that where a decree is voidable and is not avoided before the property was transferred to

a purchaser in good faith and for valuable consideration, the title of the purchaser to the property cannot be affected by any subsequent decision

affecting the decree. Learned counsel for the respondent relied on Sobhanadri, Apparao v. Govindaraju Seetaramiah, 3 M.L.W. 1066: A. I. R.

1916 Mad. 706 which is refer-red to in L. Balarama Reddi and Others Vs. Govinda Reddi, . The first is a case where the decree-holder

purchased the property in execution of an ex parte decree which was set aside. The learned Judges held that the sale became ipso facto void. They

observed:

The decree-holder was the party having the conduct of the suit and it is difficult to see what equities can arise in his favour in cases where he

obtains an ex parte decree which is set aside on the ground that the defendants were not served. Cases where strangers Have purchased in

execution are distinguishable as also where the purchaser is a defendant. It is unnecessary to consider whether in cases of purchase by defendant,

the sale is voidable or absolutely void.

In L. Balarama Reddi and Others Vs. Govinda Reddi, Happeil J. has held that a sale held in execution of an ex parte decree is void when the ex

parte decree is set aside. These two cases, as pointed out in Sobhanadri Apparao v. Govindaraju Seetaramiah, 2 M. L. W. 1066: A. I. R. 1916

Mad 706 are distinguishable on the ground that the decree itself is void. The distinction, as already stated, is that where a decree is voidable and

unless avoided, the title which passed under the decree in force cannot be disturbed.

6. Coming to the facts of this case, it is clear that the decree so far as defendant

29 was concerned is only voidable as he could have resisted execution by claiming the benefit under Madras Act IV [4] of 1938. He did not choose to do so and the appeal to the High Court was only by defendant 13 and though the effect of this judgment may enure to the benefit of defendant 29 still at that time, as he did not oppose the execution of the decree, he cannot now come forward and call upon the appellant who has purchased the property bona fide and in good faith from the decree-holder to deliver possession of the same. We therefore hold that the purchaser has acquired good title to this property.

7. No other question arises in the case.

8. In the result, the order of the lower Court is set aside and the appeal is allowed with costs here and Court below as against respondent 1.