

(1892) 02 MAD CK 0015
In the Madras High Court

Iyyanki Venkata Subbarayudu

APPELLANT

Vs

Koppula Kotaya Naidu and Others

RESPONDENT

Date of Decision : 12-02-1892

Acts Referred:

Citation : (1892) 2 MLJ 166

Judgement

1. This is an appeal from the decree of the district Judge of Kistna in Original Suit No. 23 of 1890. The appellant is the 1st defendant, a first grade

pleader, who became the purchaser in court auction of the village of Devarapalli. The plaintiff as trustee of the temple of Sriranganayakaswami sues

to set aside the sale alleging fraud on the part of the 1st defendant. The District Judge found that 1st defendant's purchase was tainted with fraud,

and set aside the sale.

2. The first question is whether the 1st plaintiff is the Dharmakarta of the temple, and as such entitled to maintain the suit. The village of Devarapalli

originally formed part of the Zamindari of Vallur, but in July 1847 it was assigned by the then Zamindar in favor of 1st plaintiff's grandfather

Koppula Seetaya Naidu, as an endowment of the temple of Sriranganayakaswami, which had been erected by Seetaya Naidu. The village was sub-divided from the Zamindari, and a peishcush of Rs. 541 fixed for it by the Collector, and the village was handed over to Seetaya Naidu on his

agreeing to pay the peishcush. He was succeeded by his son Pattabhirama-swami Naidu on whose death the village was registered in the name of

his widow Subbamma, and his nephew Koppula Kotaya, the 1st plaintiff. In 1881 the Zamindar of Vallur instituted a suit (Original Suit No. 52 of

1881) against Subbamma and Koppula Kotaya to establish his right as

Dharmakarta. In June 1881 there was a razinamah decree in favor of the Zamindar, the defendants relinquishing their rights to the Dharmakartaship of the temple and to the village of Devarapalli. It was argued in the Lower Court that the transfer was invalid, but the District Judge, without actually deciding that the transfer was invalid, found on the evidence that the transfer was a mere paper transaction nominally executed to salve the pride of the Zamindar, that the actual management of the temple and its endowment, the village of Devarapalli, never passed out of the hands of the Koppula family, and he therefore held that the objection taken to plaintiff's right to maintain the suit could not be supported.

[After setting out some of the facts in support of that finding the judgment proceeds :]

3. The plaintiffs, being members of the family, in which the trusteeship of the temple is hereditary, and in virtue of their position as trustees, the 1st plaintiff was incompetent to delegate his office or his duties, and the transfer of 1881 was therefore invalid. The Privy Council have held in *Rajah Vurmah Valia v. Ravi Vurmah Kunhi Kutty* I. L. R 1 M 235 that a person holding a religious trust is incapable of transferring it, and the ruling has been followed in many cases of this nature. The transfer being invalid, the Zamindar acquired no title by the razinamah decree of 1881, and the plaintiffs are entitled to treat it as a nullity and to sue as Dharmakartas.

4. It is then argued that the fraud with which plaintiffs charge 1st defendant ought to have been set forth in the petition which 1st plaintiff put in u/s 311 of the Civil Procedure Code, that having had his opportunity of setting aside the sale on the ground of fraud, and failed to take advantage of it, the court is now precluded from dealing with it. In support of this argument reliance is placed on the case of *Siva Pershad Maity v. Nundo Lall Kar Mahapatra* I. L. R. 18 C. 139. That case however is not in point, for there the question was whether a suit will lie on the ground of fraud, notwithstanding the provisions of Section 244. That section has no application to the present case, as the 1st defendant was neither a party nor the representative of a party to the suit. The legal objection to the charge of fraud cannot therefore be sustained.

5. The next question is whether the fraud of the 1st defendant has been made out, and whether under the circumstances of the case, the sale should

be set aside. We concede that fraud and dishonesty are not to be assumed upon conjecture, however probable the conjecture may appear, but

that fraud must be affirmatively made out. The facts are as follows:

In Original Suit No. 972 of 1884 the present 2nd defendant obtained a decree against the Zamindar of Vallur (3rd defendant), the 1st plaintiff, the

father of the 2nd plaintiff, and 4 other members of the Koppula family, on a mortgage executed by 1st plaintiff as Dharmakarta. The decree

rendered the property liable. The village was attached and advertised for sale for 11th March 1889. The 1st defendant, who for the last 20 years

has appeared as pleader for the family of 2nd defendant, represented her in the suit, appeal and execution proceedings. He applied for and

obtained (on 11th March 1889) leave to bid for and purchase the mortgaged property on behalf of the judgment-creditor. On the day of sale the

3rd defendant's pleader applied for an adjournment for one week in order that he might discharge the decree debt. Without giving notice to the

other side, the Munsif ordered the sale to be stayed for eight days, and granted 3rd defendant a certificate u/s 305. Later on in the day the 1st

defendant applied for a reconsideration of the ex parte, order, but consented to an adjournment for seven days. His petition was rejected. Nothing

further was done until June when a fresh proclamation of sale was issued and the 29th July fixed for sale. That the 2nd defendant was not kept

informed of what was going on is apparent from two letters which 1st defendant received on his return from Madras about the 27th July. One was

from 2nd defendant's son-in-law asking the date of sale, and whether 3rd defendant had paid the money and urging the Vakil to see that some

one bid on behalf of the 2nd defendant, so that she might receive the full amount of her decree. The other was from 2nd defendant herself (dated

25th July) enquiring whether the sale had taken place, stating that the money was urgently needed, and telling him to obtain permission to bid for

her. On the day of sale 3rd defendant's pleader applied for an adjournment on the ground that terms of compromise were under consideration,

and that the people in the town did not know of the auction. It is evident and, considering the denial of the 1st defendant as to the receipt of a letter

on this day from 2nd defendant, significant, that 1st defendant also applied for an "adjournment, for the order of the court runs thus, ""At the request

of both parties the sale is ordered to continue for five days."" On the 3rd August 3rd defendant's pleader again applied for an adjournment of the

sale. His application was opposed by 1st defendant and the sale proceeded. First defendant bid Es. 1,250 on behalf of the judgment-creditor. The

bidding was then taken up by Sama Sastrulu who had been secretly instructed by 1st defendant to bid for him and he bid 1275 Rs. There were

only 2 other bidders, neither of whom has been called as a witness and the village was at 7 P. M. knocked down to Sama Sastrulu for Rs. 5,010.

On the 31st August the 3rd defendant's pleader and on the 4th September the 1st plaintiff's pleader put in petitions objecting to the sale on

various grounds. On the 31st October 1st defendant as Vakil for Sama Sastrulu put in a petition maintaining the validity of the sale. ""Witnesses

appear to have been examined; for on the 4th November 2nd defendant's son-in-law gave evidence, and stated that he had instructed 1st

defendant to agree to the sale being sot aside as the defendants offered the decree-amount. On the 10th November the 1st defendant entered into

correspondence with the 3rd defendant, who expressed great pleasure at receiving a letter from 1st defendant, and invited him to come to

Bezwada on the 17th and see him. First defendant went and returned with a letter from the Zamindar to his Vakil directing him to withdraw the

objection petition. This was done and on the 22nd November orders were passed confirming the sale. The same day Sama Sastrulu put in a

petition stating that he had purchased on behalf of 1st defendant and asking that sale certificate might issue in 1st defendant's name.

6. The fraud charged against the 1st defendant consists (1) in his failing to act according to the instructions of his client on the 3rd August and in his

pressing on with the sale in order to purchase the village himself, (2) in his preventing bidders from being present at the sale by falsely representing

to them that the sale had been adjourned, and (3) in his stifling enquiry by causing the 3rd defendant to withdraw his petition for cancellation of the

sale.

(After finding the 1st and 3rd charges proved the judgment proceeds:)

7. On behalf of the appellant it is argued that the decision reported at I. L. R. 10 M. 111. Alagirisami v. Ramanathan, covers this case, that

appellant purchased qua Vakil and that he did not occupy any fiduciary position

with reference to his client, his duty being only to see that the village did not sell for less than the amount of her decree and that having secured that he was at liberty to purchase on his own behalf.

8. All that the court held in the case of Alagirisami v. Ramanathan was that a Vakil was not an officer of court within the meaning of Section 292 of the Code of Civil Procedure, and that purchase of property in court auction by a Vakil of the plaintiff was not illegal as being prohibited by Section 292.

9. In England the law treats the mortgagee (as to any benefit acquired by him at the expense of the mortgagor, and by taking advantage of his position as mortgagee) as one in a position analogous to that of a person standing in a fiduciary relation, Consequently, the solicitor or agent of the mortgagee is under the same restrictions as the principal, so far as any acts done by them on behalf of the principal are concerned. Hence the rule that purchase at a court sale by a mortgagee directly or through his agents without the leave of the court is liable to be set aside by the mortgagor.

The law is the same in India (Act II of 1882, Section 90, and Section 294, Civil Procedure Code). But the English law goes further and makes a

purchase by the solicitor or agent of the mortgagee for the benefit of the solicitor or agent himself voidable, *Martinson v. Clowes* 21 Ch. D. 857

and *Guest v. Smythe* 5 L. R. Ch., 551. The general rule of equity is that a man cannot place himself in a situation in which his interest conflicts with

his duty. The cases show that that principle is acted upon whenever a person occupying the position of solicitor to a mortgagee acquires a benefit,

however honest the transaction may be in itself, on the ground that it is often very difficult, if not impossible, to find out how the advantage was

gained, see *Greenlaw v. King* 3 Beav. 61.

10. There being no legislative enactment bearing on the present question and no decided cases having been pointed out, we think that we must

decide according to the rules of equity and good conscience. The 1st defendant had as the agent of the mortgagee or judgment-creditor obtained

leave from the court to purchase on behalf of his client. We are unable to agree with Mr. Mitchell that he was only authorised and required to raise

the bids so as to secure the amount of the decree. We think that he was bound, if possible, to purchase the village on behalf of his client. That

being so he deliberately placed himself in a position in which his interest was in direct conflict with his duty. It was his interest to get the village

knocked down to himself at as low a price as possible and his conduct showed an utter disregard of his client's interests, and of the duty which he

as the Vakil for the mortgagee bidding for her at the sale owed to the mortgagor. In the case above referred to, I. L. R 10 M 111, the Vakil

purchased in his own name and was not instructed to purchase for his client, and in these respects the present case is clearly distinguishable. In the

case of *Greenlaw v. King* the Master of the Rolls, said, "" The question is not whether there was fraud or no fraud, but whether the court will permit

a person standing in the fiduciary and confidential situation in which B was, to make himself an interested party in the very transaction which he as

trustee was bound most vigilantly to superintend."" The words appear to us to apply most aptly to this case. We do not say that the pleader was

under an actual incapacity to purchase but we think that the rule which the court should impose upon persons in his position is that the onus lies

heavily on them to prove the transaction free from all suspicion and we do not think that the 1st defendant has done that. He should have given his

client information that he intended to bid, and have obtained the permission of the court instead of acting, as he did, in an underhand manner.

11. For all those reasons we think that the sale must be set aside. We do not understand the finding of the judge on the 5th issue. There is no

evidence to show that the income of the village has been improved recently by the extension of irrigation, and that an income of RS. 1,500--2,000

may now be expected. It lay upon 1st defendant to prove that the sum of Rs. 5,010 was a fair price and we do not think he has shown that. The

appellant is clearly liable for mesne profits and we shall not interfere with the order of the Lower Court.

12. The sale amount must be refunded by the 2nd and 3rd defendants who are 3rd or 4th respondents. The 3rd defendant only will pay interest at

6 per cent, on the money drawn by him from, the date of receipt to date of repayment. With this modification we confirm the decree of the District

Judge and dismiss the appeal with costs.