
(1952) 12 MAD CK 0023
In the Madras High Court
Case No : Appeal No. 180 of 1949

Kombi Achan and Others

APPELLANT

Vs

K.C. Velayudhan and Others

RESPONDENT

Date of Decision : 05-12-1952

Acts Referred:

Trusts Act, 1882 — Section 90

Citation : AIR 1954 Mad 144 : (1955) ILR (Mad) 425 : (1953) 66 LW 565 : (1953) 2 MLJ 17

Hon'ble Judges : Rajamannar, C.J; Venkatarama Ayyar, J

Bench : Division Bench

Advocate : D.A. Krishna Wariar and A. Vasudeva Menon, for the Appellant; N. Sundara Iyer, for the Respondent

Final Decision : Allowed

Judgement

Venkatarama Ayyar, J.—This is an appeal by defendants 1, 26 and 27 against the Judgment and decree in O. S. No. 9 of 1947 on the file of the Court of the Subordinate Judge, Palghat. The properties, which are the subject-matter of this litigation, consist of 63 items of land. Items 1 to 41 belong in jenmi to Thiruvvara Devaswom & they are subject to a kanom for Rs. 2600 in favour of Vedakke Meledom, of which defendants 1 to 25 are the members. Items 42 to 63 belong in jenm to Kavalappara Estate and they are subject to a kanom for Rs. 395 in favour of the same Edam. Defendant 1, who was originally the karnavan of this Edam, was removed from management by a decree passed in O. S. No. 35 of 1917 on the file of the Court of the District Munsif of Alathur. That decree also provided that defendant 1 should get annually 300 paras of paddy for his maintenance. Defendant 2, who succeeded to the management, was also removed by a decree passed in O. S. No. 14 of 1925 on the file of the Court of the District Munsif, Alathur, and defendants 3 and 12 became the managers. On 1-11-1927 all the members of the Edam excluding defendants 1 and 2 executed a usufructuary mortgage of their rights over the suit properties in favour of

plaintiff I for a sum of Rs. 7350 (Ex. A-2). Out of this sum, Rs. 621-13-9 was paid to the mortgagors for discharge of two debts and the balance of Rs. 6728-2-3 was reserved with the mortgagee for discharge of eight debts, which are set out in the deed. On 24-7-1929, there was a further usufructuary mortgage over the suit properties in favour of plaintiff I by all the members of the Edam excepting defendants 1 and 2 for a sum of Rs. 4450. This deed provided "inter alia" that the mortgagee should pay 300 paras of paddy to defendant 1 as provided in the decree in O. S. No. 35 of 1917; 305 paras of paddy to the Edam and appropriate the balance towards the Government revenue, michavaram and the interest. In pursuance of these two deeds, plaintiff 1 got into possession of the suit properties and discharged all the debts mentioned in Ex. A-2 except a mortgage debt of the year 1921 in favour of one Kunhiraman Nayar for a sum of Rs. 1225. Kunhiraman Nayar filed O. S. No. 79 of 1933 on the file of the District Munsif's Court, Alathur, for recovering the amount due under his mortgage and obtained a decree. One Ramaswami Iyer obtained an as signment of this decree and in execution thereof brought the suit properties to sale. Plaintiff 1 became the purchaser in court auction held on 19-12-1934 for a sum of Rs. 5120 and the sale was confirmed on 21-1-1935 (Vide Sale certificate Ex. A-4). After payment of the amount due under the decree in O. S. No. 79 of 1933, there was a balance of Rs. 3284-13-10 and that was drawn by plaintiff 1 and appropriated towards the amount due under Ex. A-2.

2. After the sale, plaintiff I took up the position that by reason of the purchase on 19-12-1934 the mortgages dated 1-11-1927 and 24-7-1929 had become extinguished and that he became the absolute owner of the kanom rights of the Edam free from the two mortgages aforesaid. In that view, he declined to deliver the paddy either to defendant I or to the Edam as provided in the mortgage dated 24-7-1929. Defendant I then applied to execute the decree in O. S. No. 35 of 1917 on the file of the District Munsif's Court, Alathur, and attached the purappad payable by plaintiff I under the mortgage deed, got himself appointed receiver for collecting the same and as Receiver filed O. S. No. 90 of 1943 in the District Munsif's Court, Alathur, for recovery of 2400 paras of paddy being the maintenance payable for 8 years from 1935 to 1943. Plaintiff 1 contested the suit on the ground that by reason of his purchase on 19-12-1934 the mortgages had become extinguished and that therefore he was released from the obligations contained in the mortgage deeds including the liability to pay 300 paras of paddy to defendant I. This contention was overruled and the suit decreed on 10-4-1944. This decision was affirmed on appeal by the Subordinate Judge of Faighat in A. S. 89 of 1944 and toy this court in S. A. No. 1045 of 1945 (Vide the judgment reported in -- Kannan alias Raman Nair Vs. Valia Meladethil alias Vadakke Meladethil Kothamma Nethiar Amma's son Kombi Achan and Others, . It was therein held that as plaintiff I was under an obligation to discharge the mortgage in favour of Kunhiraman Nayar and as the suit and the execution sale resulted from the breach of this obligation by him his purchase enured for the benefit of the mortgagors u/s 90, Trusts Act and that he could not rely on that sale in bar

of the rights of the Edam under the mortgages and that his position was only that of a mortgagee under the mortgages dated 1-11-1927 and 24-7-1929.

3. Subsequent to this decision, defendant 26 obtained an assignment of the purappad due to defendant 12 and filed O. S. No. 303 of 1946 in the District Munsif's Court, Alathur, for recovery of the same; defendant 27 obtained an assignment of the purappad due to defendant 4 and filed O. S. No. 53 of 1947 in the same Court for recovery of the same. Defendant 14 filed O. S. No. 267 of 1946 in the same Court for partition of the Edam properties. The present plaintiff 1 was impleaded as defendant in all these actions. On 10-2-1947, plaintiff 1 instituted O. S. No. 9 of 1947 in the Court of the Subordinate Judge, palghat, out of which this present appeal arises, for a declaration that by reason of his purchase on 19-12-1934 he had become the full owner of the kanom rights belonging to the Edam of defendants 1 to 25 and that the mortgages dated 1-11-1927 and 24-7-1929 had become extinguished and the defendants could claim no rights thereunder. It was also alleged that the decree in O. S. No. 90 of 1943, which was affirmed in A. S. No. 89 Of 1944 and S. A. No. 1045 of 1945 was "not sustainable either in law or equity". The suit wft3 resisted on two grounds. Firstly, it was pleaded that the purchase made by plaintiff 1 on 19-12-1934 was vitiated by fraud and collusion in that he deliberately made default in the payment of the amount due to Kunhiraman Nayar and instigated him to file O. S. No. 79 of 1933 in the District Munsif's Court, Alathur, obtained an assignment of the decree passed therein in the name of Bamaswami Aiyar benami for himself and purchased the properties in court auction with the set purpose of evading his obligations under the mortgage deeds and that in consequence the sale could not be relied on as extinguishing the mortgages. Secondly it was contended that the suit was barred as "res judicata" by reason of the decision in O. S. No. 90 of 1943 on the file of the District Munsif's Court, Alathur, A. S. No. 89 of 1944 on the file of the Subordinate Judge's Court, Palghat and S. A. No. 1045 of 1945 on the file of the High Court, Madras. Plaintiff 1 died pending the suit and plaintiff 2, who had obtained an assignment of the rights of plaintiff 1 was brought on record as his representative.

4. The Subordinate Judge of Palghat held that the defendants had not established any fraud or collusion either in the institution of O. S. No. 79 of 1933 or in the conduct of the execution sale; that they had not established that Ramaswami Ayyar was only a benamidar for plaintiff 1; that as the mortgagors of the Edam were parties to the suit and the execution proceedings, they had ample opportunities of protecting their rights by payment of the decree amount; that plaintiff 1 was entitled to purchase the properties in court auction like any other stranger and that therefore his purchase dated 19-12-1934 operated to extinguish the mortgages. He also held that the decision in O. S. No. 90 of 1943 on the file of the District Munsif's Court, Alathur, which was affirmed on appeal by the Subordinate Judge's Court., Palghat and by the High Court did not operate as "res judicata", as it was rendered by a Court which was not competent to try the present suit for want of pecuniary jurisdiction. In the result,

he granted the declaration as prayed for. It is against this decree that defendants 1, 26 and 27 have brought this present appeal.

5. The substantial question for determination in this appeal is whether the purchase made by plaintiff 1 on 19-12-1934 is hit by Section 90, Trusts Act. If it is, then it must be held to enure for the benefit of the Edam, which was the mortgagor and plaintiff 1 could not as against the defendants set up title as owner by reason of the purchase dated 19-12-1934. His rights would then be only as mortgagee under the deeds dated 1-11-1927 and 24-7-1929.

6. The undisputed facts are that plaintiff 1 entered into possession of the suit properties only under the two usufructuary mortgages aforesaid and one of the obligations which he had undertaken under Ex. A-2 was the discharge of the mortgage in favour of Kunhircaman Nayar. He defaulted in the discharge of that mortgage & it was that default that resulted in the institution of O. S. No. 79 of 1933 in the District Munsif's Court, Alathur, the passing of a decree therein and the sale of the suit properties in execution of that decree. On these facts, the appellants contend that the purchase by plaintiff 1 would fall within the scope of Section 90, Trusts Act. On behalf of plaintiff 2 respondent 1, it is conceded that plaintiff 1 had committed a breach of the obligation which he had undertaken in Ex. A-2 of discharging the mortgage in favour of Kunhircaman Nayar. But it is contended that that would confer on the Edam only a right to recover damages for breach of covenant and that without more the purchase on 19-12-1934 cannot be brought u/s 90, Trusts Act. It is argued that the defendants did charge that plaintiff 1 had collusively brought about the institution of the suit, O. S. No. 79 of 1933 on the file of the District Munsif's Court, Alathur, obtained as assignment of the decree in the name of Ramaswami Iyer benami for himself and fraudulently purchased the property at the court auction but that all these charges had been negatived by the Subordinate Judge and that therefore there was only a breach of covenant by plaintiff 1 and no equity such as will attract Section 90, Trusts Act.

7. If it was necessary for the appellants to establish fraud before they could obtain relief u/s 90, Trusts Act, it must be held, on the materials, that they have failed to make it out. But the section only provides that if the mortgagee by availing himself of his position as such, gains an advantage, he should hold it for the benefit of the persons interested in the property. Illustration (c) to the section is as follows:

"A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to B. Subject to the repayment of the amount, due on the mortgage and of his expenses properly incurred; as mortgagee, B holds the land for the benefit of A."

That shows that when a person enters into possession of properties as a mortgagee and deliberately fails to pay the Government revenue and purchases

the property in the revenue sale, his purchase falls within the purview of the section. Considerable reliance was placed on behalf of respondent I on the words "with a view to the land being put up for sale and his becoming himself the purchaser of it" occurring in the illustration. It was argued that it was not sufficient merely to establish that there was a breach of an obligation imposed by the deed, but that it must further be proved that the breach was with a view to the land being put up for sale and the mortgagee himself becoming the purchaser and that there was no such proof in the instant case. Now, when the breach of an obligation must necessarily result in the properties being brought to sale, it must be taken that the breach was made with a view to the properties being put up for sale, for a person must be taken to intend the natural and probable consequences of his act. Likewise, when that person purchases the properties himself at the sale, it is a legitimate inference to draw that it was with that intention that the properties were allowed to be brought to sale. Therefore, when there was a default on the part of the mortgagee, a sale consequent thereon and a purchase by him at such sale, it could, if nothing else appears, be properly inferred that the default was made with a view to the hypotheca being sold and purchased by himself.

8. In this case, the matter rests not merely on inferences from facts proved, but on admissions made by the present plaintiff 1, in O. S. No. 90 of 1943, where this was the very question that had to be decided. Therein, he deposed that he had all along the funds necessary for the discharge of the mortgage in favour of Kunhiraman Nayar, but that he did not pay him as owing to the fall in the price of paddy, the terms of the mortgage bond had become unprofitable and that he purchased the properties so as to evade the obligations to pay 300 paras of paddy to defendant 1 and 305 paras of paddy to the Edam (Vide Ex. B-3). Thus it was a case of deliberate default made with a view to bring about the sale of the properties in court auction and to purchase them free from the obligations under the mortgage. It was argued on behalf of respondent I that, at the time of the court sale, the price of paddy had fallen, that in consequence it had become unremunerative for plaintiff 1 to hold under the usufructuary mortgages and that Section 80 would not apply to that situation. There is, in the first place, a dispute as to whether there was in fact a fall in the price of paddy at the time of the court sale. It was contended for respondent 1 that there was such a fall and reliance was placed on the finding of the Subordinate Judge that the price of paddy had fallen subsequent to the mortgage and that was the reason why the mortgage in favour of Kunhiraman Nayar was not discharged. This finding is based on a statement made by plaintiff I in his deposition fix. B-3. But, further on, in Ex. B-3, he admitted that in Andu 1110, when the court sale took place, the price of paddy was the same as at the time of the mortgage. The Subordinate Judge makes no reference to this admission and goes on to observe that the defendants could have easily established that there was no fall in the price of paddy by summoning the account books of the traders. We are unable to see why they should do it, when the only evidence adduced on behalf of the

plaintiffs, Ex. B-3, showed that there was no fall in the price. And, secondly even if it was proved that there was a fall in the price I of paddy that would, in our opinion, be wholly immaterial. If there was an obligation cast on the mortgagee and there was a breach of that obligation, the consequences mentioned in Section 90, Trusts Act would follow and it would be wholly irrelevant to consider whether the transaction was under the circumstances profitable or not. If the price of paddy had risen, the defendants would not have been entitled to demand of the mortgagee that he should deliver more paddy to them; nor, conversely, would he be entitled to be relieved from his obligation to deliver the same as provided in the deed because the price had fallen. In either event, the obligations of the parties under, the mortgage bond would stand and the operation of Section 90 cannot be avoided.

9. It was also argued that as the mortgagors of Edam were parties to O. to. No. 79 of 1933 on the file of the District Munsif's Court, Alathur, they were in a position to avert the sale by payment of the decree amount and that therefore plaintiff 1 could not be said to have availed himself of his position as mortgagee as required by Section 90. It is difficult to see how the fact that the mortgagors were impleaded as parties to the action would detract from the obligations of plaintiff 1 to pay the mortgage amount to Kunhiraman Nayar as provided in Ex. A-2, or to alter the quality of his title founded on a sale which was brought about by his own default. If a stranger purchased at the auction, the Edam would no doubt lose its title to the properties. But that does not enable plaintiff 1 to retain the fruits of his own wrongful action.

10. Mr. Sundaram Aiyar, learned counsel for respondent I, cited the decisions in -- "Janki Singh v. Debinandan Prashad", 7 Ind Cas 772 (Cal) (B) and -- "Deo Nandan Prashad v. Janki Singh", AIR 1916 PC 227 (C), as supporting the position that for Section 90 Trusts Act to apply, there must be something more than a mere breach of covenant and that there should be fraud or unfair conduct on the part of the defaulting mortgagee such as suppression of notice to the parties concerned. In -- "7 Ind Cas 772 (B)", the facts were that in an estate in which 12 annas share was held by a number of co-sharers, some of them plaintiffs 17 to 20 created on 23-12-1904 a usufructuary mortgage over a 3 annas share belonging to them and subsequently assigned their shares to the plaintiffs 1 to 6. The mortgage bond provided that the mortgagee was to pay the Government revenue. He however made default in the payment with the result that the estate was sold by the Government and he himself became the purchaser thereof at the revenue sale. Then, the co-sharers sued to recover the properties from the mortgagee-purchaser. The subordinate Judge dismissed this suit on the ground that no fraud on the part of the purchaser had been established and that the sale could not therefore be set aside. This judgment was reversed on appeal by Holmwood and Chatterjee JJ. They firstly considered the rights of plaintiffs 1 to 6, who were the representatives of the mortgagor, and held that the mortgagee in possession was in the position of a trustee, that as the sale was occasioned by his default he could not rely on his purchase for defeating the title of the

mortgagors and that it was immaterial whether there was fraud or not. They observed:

"He is a trustee for them in the matter of the purchase and is bound to reconvey on receipt of a fourth of the purchase money with interest at 6 per cent per annum from the date of the purchase. This would be so whether there was any fraud or chicane on his part, or not; for in certain respects and for certain purposes the mortgagee in possession is a trustee for the mortgagor and cannot take advantage of that position to the detriment of the mortgagor."

The learned Judges then went on to consider the case of plaintiffs 7 to 16, who were non-mortgagors-co-sharers. With reference to them, they held that there was a "stronger ground" for upholding their title because defendant 1 had deliberately kept them in ignorance of the non-payment of the Government revenue and the revenue sale and that his purchase was fraudulent. We are not concerned in this case with the question as to under what circumstances a purchase by one co-sharer will enure for the benefit of the other co-sharers u/s 90, Trusts Act. What we have before us is a simple case of a usufructuary mortgagee purchasing at a sale which was the direct consequence of his own default and as to that it was held in -- "7 Ind Cas 772 (Cal) (B)", that Section 90 would apply, even if no fraud was established. This decision was affirmed on appeal, by the Privy Council vide -- "AIR 1916 PC 227 (C)". Learned advocates for the respondent relies on the following observations in the Judgment of the Board as supporting his contention. Sir Lawrence Jenkins observed:

"Equally in relation to the co-owners was the default designed with a view to a subsequent sale and to a purchase on the minor's behalf, and the advantage gained by this scheme, must, in like manner, be held for the benefit of the co-owners, who are not shown to have been aware of the default or sale, or to have disentitled themselves to this equitable relief."

From this it is argued that the equity u/s 90 would arise only if it was proved that there was a concealment of the facts from the persons interested. But these passages are in relation to the rights of co-sharers, who were plaintiffs 7 to 16. As regards mortgagors co-sharers plaintiffs 1 to 6 and 17 to 20, after remarking that defendant 1 mortgagee was a minor at the relevant date and that no fraud could be imputed to him, the Board observed as follows:

"He was, however, represented by agents, and When the position created by them is regarded as a whole, it leads to the conclusion that the Government revenue was intentionally allowed by them to fall into arrear with a view to the properties being put up for sale and bought on behalf of the minor. If this be the true view, as their Lordships hold, then; however free from personal blame the minor may have been, he cannot profit by his agents' deliberate default committed in breach of the terms of the mortgage. As against his mortgagor, therefore, the mortgagee cannot be allowed to hold for himself the advantage gained by the default for which his agents were responsible."

These passages, far from supporting respondent 1 clearly lay down that if there is deliberate breach of obligation contained in the deed resulting in the sale of the properties and the purchase is by the defaulting mortgagee, the equity u/s 90 will fasten upon the property in his hands.

11. Two other decisions cited on behalf of respondent 1 may now be considered. In -- "Govindarajan Pillai v. Alagappa Chettiar" AIR 1943 Mad 202 (D), the facts were that a mortgagor sold a portion of the hypotheca to A directing him to discharge the mortgage and then sold the other properties to B free from mortgage. A having failed to pay the mortgage amount, the mortgagee brought a suit on the mortgage and obtained a decree, for sale of the hypotheca. The decree directed that the items purchased by A should be sold first for the satisfaction of the decree and then the other items. While execution proceedings were pending the properties purchased by A were sold, for arrears of land revenue and purchased by the decree-holder for a nominal sum. He then sought to proceed against the properties in the hands of B, who resisted execution on the ground that the purchase of the properties of A by the decree-holder under the revenue sale should, under the circumstances, be held to be hit by Section 90, Trusts Act. Krishnaswami Aiyangar and Kunhi Raman JJ. held that as there was no obligation cast on the decree-holder to pay the Government revenue, Section 90, Trusts Act had no application and observed:

"When the Government brought the property to sale, any stranger could have purchased it & obtained a clear title incapable of being assailed by anybody. We cannot see why a mortgagee should be held to be in a worse position, so long as the sale was not due to any wrongful conduct on his part."

While the decree-holder in -- "AIR 1943 Mad 202 (D)", was under no obligation to pay the Government revenue, plaintiff 1 in the present case was under an obligation to pay the amount due on the mortgage of Kunhiraman Nayar and it is this distinction that makes all the difference in the application of Section 90, Trusts Act.

12. In -- "Gauri Shanker v. Sheotahai Gir", AIR 1936 Pat 434 (E), a tenant mortgaged his properties with possession. The mortgage bond provided that the mortgagee was to pay the rents due to the landlord. The mortgagee having made default in the payment of the rents, the landlord brought the holding to sale and himself became the purchaser. Sometime later, the mortgagee purchased the holding from the landlord. The mortgagor's representative thereafter sued to redeem the mortgage on the footing that the mortgage had re-attached itself to the holding when it was purchased by the mortgagee from the landlord. It was held that the purchase by the landlord at the sale extinguished the mortgage and that it was not revived when the property was sold by the landlord to the mortgagee. Obviously, Section 90, Trusts Act could not apply as the purchaser at the rent sale was not the defaulting mortgagee but landlord himself. This decision would have no application where the purchase is by the defaulting mortgagee himself. The further question whether the mortgage re-

attaches to the property when the mortgagee purchases it from the landlord does not arise for decision in the present case; and when it does arise, it will be a matter for consideration whether the decision in -- "AIR 1936 Pat 434 (E)", should be followed in preference to the decision in -- "Sanagapalli Lakshmayya v. Intooru Bolia Reddi", 26 Mad 385 (F)".

13. The appellants rely strongly on the decision in -- Kannan alias Raman Nair Vs. Valia Meladethil alias Vadakke Meladethil Kothamma Nethiar Amma's son Kombi Achan and Others, ", as establishing that the purchase made by plaintiff 1 fell within the ambit of Section 90, Trusts Act. That decision was given in a litigation "inter partes" which came up to this Court and the point for decision therein was precisely what arises for determination in this litigation. The learned Judges, Lakshmana Rao and Happen JJ. stated the points for determination thus:

"In our opinion the essential questions in the case are whether defendant 1 in failing to pay off the prior mortgage and then himself purchasing the property at the court auction sale took advantage of his position within the meaning of Section 900; and if the answer to the first question is in the affirmative, what consequences ensue."

The learned Judges then proceeded to observe:

"Mr. Kuttikrishna Menon contends that, in any case, there is no proof that defendant 1 availed himself of his position as mortgagee with a view to gaining an advantage by the purchase of the properties at the court auction sale. The plaintiff of course could not adduce evidence to prove what was in defendant 1's mind but he did point to the circumstances and he cross-examined him, successfully to show that the price of paddy had not fallen but had risen and he was in a position to discharge the mortgage debt. Both the lower Courts have found that defendant 1 refrained from paying off the prior mortgage with a view to purchasing the property himself. Their findings are inferences of fact, and perfectly reasonable inferences. We should certainly not be justified in differing from these findings in second appeal."

Then the learned Judges discussed the authorities bearing on the question and stated their conclusion as follows:

"For the reasons given, we are of opinion that defendant 1 holds the property for his mortgagees subject to the same rights and liabilities as obtained at the date of sale except for the obligation on the part of the mortgagees to pay the expenses, if any, properly incurred by defendant 1."

14. One would have expected that this judgment would have furnished the basis for decision in this case. But the Subordinate Judge would appear to have considered that it rested upon findings of fact of the Courts below which are binding on this Court on second appeal, but not on him as the matter was not "res judicata". Being free to come to his own independent conclusions and considering the matter afresh, he came to a conclusion opposite to that which

was reached on the prior occasion and held that the purchase by plaintiff 1 was not hit by Section 90, Trusts Act. He put aside the judgment of this Court in -- Kannan alias Raman Nair Vs. Valia Meladethil alias Vadakke Meladethil Kothamma Nethiar Amma's son Kombi Achan and Others, ", with the following observation:

"It will thus be seen that their Lordships accepted the findings of fact arrived at by the first two Courts and refrained from interfering with the same in second appeal." He made no reference to the authorities which were discussed in that judgment and the most surprising part of it is that the materials on which he gave his decision were precisely what had been before the Courts in the prior litigation and his conclusions were the reverse of what had been held by this Court to be "perfectly reasonable inferences." We are clearly of opinion that there are not sufficient grounds for the Subordinate judge not adopting the conclusions reached by this Court in -- Kannan alias Raman Nair Vs. Valia Meladethil alias Vadakke Meladethil Kothamma Nethiar Amma's son Kombi Achan and Others, ".

15. It is unnecessary to discuss the numerous authorities which have considered the scope of Section 90, Trusts Act. They are referred to in -- Kannan alias Raman Nair Vs. Valia Meladethil alias Vadakke Meladethil Kothamma Nethiar Amma's son Kombi Achan and Others, " and there is no need to cover the same ground once again. But there is one decision which called for special mention, and that is -- Thakur Jaikaran Singh and Others Vs. Sheo Kumar Singh and Another, . There, a tenant with permanent right of occupancy executed a usufructuary mortgage in favour of one Nand Kumar. The deed provided that the mortgagee should pay the rent due to the landlord. He, however, made default in the payment of rent with the result that the landlord obtained a decree against both him and the tenant for arrears of rent and in the rent sale the mortgagee purchased the property. In an action for redemption by the heirs of the mortgagor-tenant, the mortgagee, claimed that the rent sale had extinguished the mortgage. Negating this contention, Sulaiman J. served as follows:

"Although, therefore, the zamindar had obtained a decree jointly against his tenant and his mortgagees, it is apparent that in equity the mortgagor was not really liable, and that if he were made to pay anything to the zamindar, he would have equities against his mortgagees who had in fact committed default. A wrong was, therefore, committed by Nand Kumar, admittedly as regards part of the decree and in our opinion as regards the whole amount due, and it was in consequence of that wrong that the tenancy was put up for sale and sold. Fortunately for the mortgagor, the property was actually purchased by the mortgagee himself who had committed the wrong If property is sold owing to the wrongful act and default of the mortgagee himself, he cannot be allowed to claim it on the ground of his own wrong, for no cause of action can arise out of the wrong. In our opinion the mortgagee undoubtedly committed a breach of his contract when he made default in paying the rent due to the zamindar. He cannot, therefore, be allowed to gain advantage out of his own breach of that contract."

This decision establishes two propositions, that a purchase by the mortgagee based on a breach of obligation by him must in equity enure for the benefit of the mortgagors and that further it makes no difference in the enforcement of this equity that the mortgagor is also a party to the decree under which the sale is held. This decision gives the answer to the contention of respondent 1 that as the mortgagors of the Edam were parties to O. S. No. 79 of 1933, the purchase by plaintiff 1 would be freed from the equities u/s 90, Trusts Act.

16. In the result, we must hold that the purchase of the suit properties by plaintiff 1 in the auction held on 19-12-1934 enures u/s 90, Trusts Act for the benefit of the Edam of which defendants 1 to 25 are members and that the mortgages dated 1-11-1927 and 24-7-1929 have not been extinguished by that purchase.

17. In this view it is unnecessary to discuss the question whether the present suit is barred by "res judicata" by reason of the decree in O. S. No. 90 of 1943 on the file of the District Munsif's Court, Alathur. As the present suit is beyond the pecuniary jurisdiction of the Court which heard and decided O. S. No. 90 of 1943, there can be no question of "res judicata". It was contended for the appellants that the subject-matter of the present suit, in so far as it relates to the liability of the plaintiffs to pay 300 paras of paddy to defendant 1, would be within the jurisdiction of the District Munsif and that to that extent, the present suit would be "res judicata", though not with reference to the larger question of the rights of the Edam to the suit properties. This contention is well founded vide -- "Pathuma v. Saliamma", 8 Mad 83 (H) and -- "Ranganatham Chetti v. Lakshmu Animal", 25 Mad LJ 379 (I).

18. It remains to consider one other contention which was raised by the learned advocate for respondent 1 at the very end of his argument. The suit was in the first instance decreed "ex parte", and in an application under Order 9, Rule 13 it was restored as regards some of the defendants but not as regards defendants 3 and 12 who were the managers of the Edam. It is argued on behalf of respondent 1 that so long as the decree against the managers stands, the other defendants would be bound by it, and that therefore no relief could be granted to them inconsistent with the decree which has been passed against defendants 3 and 12. This contention was not raised in the Court below. If it had been raised, it would have been within the power of the Court to set aside the decree under Order 9, Rule 13 against all the defendants. If we are to accept the contention now advanced on behalf of respondent 1, it would come to this that though the suit had been restored against the other defendants, the order of restoration was useless even when it was passed as there was nothing to try in the suit. Respondent 1, however, took no such objection in the Court below but was content to proceed with the trial of the suit and took the chance of a judgment in his favour which in fact he obtained. Under the circumstances, to permit him to raise this point at this stage would work great injustice on the other defendants. We must therefore decline to entertain the objection now raised for the first time

in the course of the argument.

19. In the view taken by us on the application of Section 90, Trusts Act to the purchase made by plain tiff 1, the suit must be dismissed in its entirety. This appeal is accordingly allowed and the suit dismissed with costs of the appellants through out.