

(1902) 11 MAD CK 0010
In the Madras High Court

Marimuthu Udaiyan and Others		APPELLANT
	Vs	
Subbaraya Pillai and Others		RESPONDENT

Date of Decision : 24-11-1902

Acts Referred:

Citation : (1903) 13 MLJ 231

Judgement

1. The 1st defendant sued the 1st and 8th plaintiffs and the 9th defendant in O.S. Suit No. 503 of 1885 on the file of the District Munsif's Court,

Salem, on a mortgage bond executed by them, and in execution of the decree obtained therein, the mortgaged properties were sold on the 27th

October 1887 and were purchased by the 2nd defendant, who was placed in possession of the same after the sale had been confirmed and

certificate issued to him.

2. In April 1881, the 3rd defendant, father of defendants 4 to 7, became the purchaser of the property from the 2nd defendant and obtained

possession of the same.

3. In June 1888 plaintiffs 2, 3, 4, 5 and 7, all these minors, the sons of the 1st and 8th plaintiffs and of the 9th defendant applied u/s 294, Civil

Procedure Code, to have the sale set aside on the ground, among others, that the 1st defendant himself purchased the property through his agent

the 2nd defendant without having obtained the permission of the Court to bid at the sale. The District Munsif holding that the mortgage which had

been made before the birth of the applicants was binding upon them, and that besides, their application was barred by the law of limitation,

dismissed it on the 20th July 1888. The 3rd defendant also was a party to these proceedings. In appeal the order of the District Munsif was

reversed and the application remanded (on the 23rd July 1890) for disposal on the merits, The District Munsif after going into the merits of (he case, came to the conclusion that the 1st defendant himself was the purchaser, and holding that the 3rd defendant had no locus stand to take part in the proceedings and that he " need not therefore recognize him as a necessary party at all to these proceedings," set aside the sale by his order, dated the 28th September 1891 (Exhibit F). This order appears to have been confirmed on an appeal which was preferred by the 2nd defendant to the District Court.

4. Thereupon the plaintiffs and the 9th defendant applied to the District Munsif for restoration of possession from the 3rd defendant, but the application was rejected on the ground that their remedy was by a regular suit, and this order of the Munsif was also upheld on appeal by the District Judge (31st July 1894). Hence the present suit, instituted on the 25th April 1895.

5. The District Munsif decreed the plaintiff's suit by his decree, dated the 14th September 1896. On appeal by defendants 3 to 7, the then District Judge reversing the Munsif's decree remanded the suit to be disposed of on the merits, holding that the 3rd defendant was not bound by the order of the District Munsif (Exhibit F, dated the 28th September 1891), setting aside the sale inasmuch as the District Munsif in passing that order held that the 3rd defendant had no locus stand and was therefore not a necessary party at all. On this remand, the District Munsif, after framing and trying 17 issues, passed a decree in favour of plaintiff, 2 to 7 alone, adjudging to them their shares in the mortgaged. property and dismissed the suit so far as it related to the shares of the 1st and 6th plaintiffs and the 9th defendant. This decree was confirmed on appeal by the (present) District Judge, and this second appeal is preferred by defendants 3 to 7 against that portion of the decree which adjudged to plaintiffs 2 to 7, their respective shares in the property.

6. The only findings of fact which alone need be noticed here and which are conclusive in this second appeal are that the mortgage debt is binding upon plaintiffs 2 to 7, that the 2nd defendant's purchase in the auction sale was benami for the 1st defendant, who admittedly did not obtain the permission of the Court u/s 294, and that the 3rd defendant purchased the

property in good faith, for valuable consideration, from the 2nd defendant.

7. Plaintiffs 2 to 7 were not parties to O.S. No. 803 of 1885, and the application for setting aside the sale was not made by their fathers, viz., the

1st and 8th plaintiffs and the 9th defendant who alone were the judgment-debtors therein. The decree as such will not bind plaintiffs 2 to 7, and if in

the present suit it had been established that the mortgage debt was not binding upon them, the sale in execution of the decree in O.S. No. 503

would not have affected their shares and they would have been entitled to the decree which has been passed in their favour. u/s 294, Civil

Procedure Code, the application for setting aside the sale may be made by the judgment-debtor or any other person interested in the sale. Persons

entitled u/s 295 to reteable distribution in the assets realized by the sale and as such interested in the sale may be entitled u/s 294 to apply for

setting aside the sale, and Article 166 of the second schedule to the Limitation Act, 1877, prescribes a period of 30 days to be reckoned from the

date of the sale, for making an application u/s 294, Civil Procedure Code, and under Sections 312 and 314, Civil Procedure Code, no sale can be

confirmed and become absolute before the expiration of the said period of 30 days. Plaintiffs 2 to 7 were neither judgment-debtors in O.S. No.

503, nor persons interested in the sale under the decree therein, and it was not therefore competent to them to intervene u/s 294 and apply for

setting aside the sale, and that, after the sale had been confirmed and seek to avoid the sale as against the 3rd defendant who had become a

bonal fide purchaser for value without notice, prior to such application. Even assuming that they could thus apply, they could not be in a better

position than if they had been joint judgment-debtors with their fathers. If they had been so, the ordinary period of 30 days prescribed by Article

166 of Act XV of 1877, would not by reason of their minority be prolonged by Section 7 of the Limitation Act inasmuch as at the time when the

right to apply u/s 294 accrued, i.e., the date of sale, all the judgment-debtors were not minors. Periasami v. Krishnayyan ILR 25 M. 431.

8. In cases in which u/s 294, a sale is liable to be set aside on the ground that the decree-holder himself made the purchase, directly or through

another, the section only contemplates the setting aside of the sale in to and

does not warrant its being set aside in part. The effect of setting aside a sale u/s 294, Civil Procedure Code, is that the judgment-debtor who has been benefited by satisfaction of the decree, either in whole or in part as the case may be, by reason of the sale sought to be set aside, has to make restitution by the execution of the decree being re-opened (and the purchase money if paid, being also refunded to the decree-holder purchaser), the decree-holder however being by law held responsible for any deficiency in the price which may happen on the resale, and for the expenses incidental thereto. But such restitution is impracticable in favour of a purchaser for value from the decree-holder or from the purchaser benami for the decree-holder. A purchase by the decree-holder, without the permission of the Court (whether made by himself or through another person), being, u/s 294, Civil Procedure 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 (Babcock v. Lawson 5 Q. B. D. 284 affirmed on appeal. The House of Lords 2 P. D. 213. Leake on Contracts, 3rd Edition at p. 327). In the present case, it being found that the 1st defendant, the decree-holder in O.S. No. 503, purchased the property through the 2nd defendant, the purchase money must have been naturally paid into Court and drawn by the 1st defendant. Whether the decree was thus fully satisfied and whether out of the purchase money, any balance remained, which was paid to the judgment-debtors, it does not appear. If a sale could, u/s 294, be set aside as against a transferee in good faith for consideration (like the 3rd defendant herein) from the decree-holder purchaser, the result would be that the party seeking to set aside the sale would be in a more advantageous position than if the decree-holder purchaser had not transferred the property to a third person.

9. The plaintiffs in bringing the present suit do not even offer any restitution in favour of the 3rd defendant, who is the only contending defendant in the suit. In our opinion, the proceedings of the Court in O.S. No. 503 of 1885, setting aside the sale u/s 294, CPC on application made by

plaintiffs 2 to 7--and even that, long after the confirmation of the sale¹/₂ cannot affect the 3rd defendant, who became a bona fide purchaser for

value prior to the commencement of the proceedings instituted by plaintiffs 2 to 7 u/s 294, Civil Procedure Code. As already stated, the District

Munsif in his final order, dated the 28th September 1891 setting aside the sale held that the 3rd defendant had no locus stand in respect of the

proceedings and was therefore not a necessary party at all thereto. From the materials on record, it is not easy to determine whether

notwithstanding such declaration by the District Munsif, the 3rd defendant should or should not legally be regarded as having been a party to the

said order. If the correct view be that the 3rd defendant should in law be regarded as a party to the said order, it may be that the same should

formally be set aside to entitle the 3rd defendant to an adjudication in this suit, inconsistent with the said order. The order of the District Judge,

however, which confirmed the same was u/s 588, Civil Procedure Code, final and no appeal lay there from to the High Court, and it is therefore

competent to the High Court to set aside such order u/s 622, Civil Procedure Code, as in either view, the District Munsif in setting aside the sale,

acted illegally and with material irregularity.

10. We accordingly set aside the order of the District Munsif (Exhibit F), dated the 28th September 1891 as, also the order of the District Judge "

confirming it on appeal.

11. The only cause of action on which plaintiffs 2 to 7 could succeed in this suit is that the mortgage debt is not binding upon them and that

therefore the sale is inoperative so far as their shares in the mortgaged property are concerned, but as they have entirely failed to establish this, and

it has been practically conceded that they are bound by the mortgage debt the suit ought to have been dismissed.

12. The second appeal is therefore allowed and in reversal of the decrees of both the lower courts, the plaintiff's suit is dismissed with costs

throughout.