
(1918) 01 BOM CK 0019
In the Bombay High Court
Case No : First Appeal No. 168 of 1915

Narsinhbhat Chintamanbhat

APPELLANT

Vs

Bandu Krishna Kulkarni

RESPONDENT

Date of Decision : 16-01-1918

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1918 Bom 231 : (1918) 20 BOMLR 495

Hon'ble Judges : Stanley Batchelor, J; Kemp, J

Bench : Division Bench

Judgement

Stanley Batchelor, Kt., Acting C.J.

1. The present appeal, which is brought by the 3rd defendant in the suit, arises out of the same proceedings as those which have been described in the appeal just decided Ante, p. 481. The facts already noticed it is unnecessary to recapitulate. It is enough to refer to the following additional facts. In 1884 one Ramabai, the widow of a deceased coparcener in the family of the defendants Nos. 1 and 2, obtained a decree for maintenance against defendants Nos. 1 and 2 and another member of the family. That decree provided for payment of arrears of maintenance, and for future maintenance, and it directed that if the defendants failed to pay regularly, then the plaintiff Ramabai might take possession of certain lands, and if the defendants failed to pay the maintenance, or to put the plaintiff Ramabai in possession of the lands, then the defendants would be liable personally, and their Immovable property would also be answerable for the decree. In 1898 Ramabai filed a Darkhast to recover the maintenance due by attachment and sale of the defendants' Inami rights in the village of Ashte. In pursuance of this Darkhast these Inami rights were sold, and, on the 4th September 1901, they were purchased by the present appellant, the 3rd defendant. On the 6th of November 1901, the sale was confirmed.

2. Now in regard to the position of the plaintiff, he, as I have already stated in the foregoing appeal, obtained a decree on an award on the 17th November

1897. Among the properties put in mortgage by that decree was this village of Ashte. On the 4th January 1901, the plaintiff presented an application for execution, and as the result of it this village of Ashte was put to sale by the Court, and, on the 6th January 1903, was purchased by the plaintiff. The sale was confirmed on the 11th July 1903. The defendant No. 3 subsequently applied for possession in virtue of his purchase. He was resisted by the plaintiff, and the plaintiff's obstruction was in 1905 removed by the Court. Thereupon the plaintiff filed Suit No. 355 of 1905 against the 3rd defendant for a declaration that the plaintiff's title as auction-purchaser had priority over the defendant's title. That suit after some vicissitudes was ultimately dismissed. No appeal appears to have been presented by the plaintiff, but on the 2nd December 1909 he presented this present Darkhast in which he joined the 3rd defendant for the first time.

3. On behalf of the 3rd defendant Diwan Bahadur Rao's first contention is that u/s 47 of the present Code, his client was not a proper or a permissible party to these proceedings. Other objections also were raised by the learned pleader, but as, in my opinion, he succeeds upon this first point, it is unnecessary to consider the other contentions. This objection really depends upon the answer to the small question whether the auction-purchaser is or is not a representative, within the meaning of Section 47 of the Code, of the judgment-debtor. Mr. Rao contends that he is not, and if that contention is justified, then the proceedings as against the 3rd defendant were clearly without authority. It seems to me that by a long course of decisions of this High Court, we are now committed to the view that an auction-purchaser is not a representative of the judgment-debtor within the meaning of Section 47 of the Code. If that view is wrong, it must be left to the Legislature to correct it. Certainly we could not now correct it. Nor do I think the question is one which needs reference to a Full Bench, for it appears to me, with all respect to the learned Judges of the Allahabad and Calcutta High Courts, where the other opinion has been accepted, that there is at least as much to be said in favour of the Bombay view as in favour of the contrary view. The decisions to which I refer are *Gulzari Lal v. Madho Ram* ILR (1914) All. 447 and *Ishan Chunder Sirkar v. Beni Madhub Sirkar* ILR (1890) Cal 62, v. n. In Madras, however, the decision has gone the other way : see *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* ILR (1910) Mad. 417. I quite concede that the word "representative" occurring in Section 47 cannot be restricted to the sense of the phrase "legal representative", as that phrase is specially defined in Section 2, Clause (ii), of the Code. It still, however, remains to be considered whether the auction-purchaser at a Court-sale can fall within the definition.

4. Now in *Dinendronath Sannial v. Ramkumar Ghose* (1890) L.R. 8 IndAp 65, their Lordships of the Privy Council observe upon the marked difference which exists in the position of a private purchaser and that of a Court purchaser. "There is", they say, "a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. In the former the price is fixed by the vendor and purchaser alone ; in the latter the sale must be made by public auction conducted by a public officer, of which notice must be given as directed

by the Act, and at which the public are entitled to bid. Under the former the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter the purchaser, notwithstanding he acquires merely the right, title and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor".

5. It is this distinction which, as I read the cases, lies at the basis of this Court's decisions that a purchaser at a Court-sale cannot be regarded as the representative of a party, adversely to whom he has acquired his position. This is pointed out by Sir Charles Sargent in *Vasanji Haribhai v. Lallu, Akhu* ILR (1885) Bom. 285, where it is said : "There could be no question of estoppel by conduct between the judgment-debtor and the purchaser at auction, who derives his title from proceedings which are entirely in invitum as regards the former". In *Shivram Chintaman v. Jivu* ILR (1888) Bom. 34 and *Vishvanath Chardu Naik v. Subraya Shivapa Shetti* ILR (1890) Bom. 290, we have clear decisions that the Court-purchaser does not possess this representative capacity ; and this view has consistently prevailed in this Court, as may be ascertained on reference to such cases as *Narayan Sadoba Halvai Vs. Umbar Adam Memon*, ; *Pita v. Chunilal* ILR (1906) Bom. 207 : 9 Bom. L.R. 15 and *Gokulsing Bhikaram v. Kisansingh* ILR (1910) Bom. 546 : 12 Bom. L.R. 539 Some attempt to divert this current of authority seems to have been made by reason of the Privy Council's decision in *Prosonno Coomar Sanyal v. Kasi Das Sanyal* (1892) I.R. 191. But that this attempt was based upon a misapprehension of their Lordships' ruling is clearly pointed out by Sir Lawrence Jenkins C.J. in *Maganlal v. Doshi Mulji* (1901) L.R. 25 Bom 631 : 3 Bom L.R. 255. Sir Lawrence there says, what a study of the Privy Council decision makes plain, that "their Lordships did not hold the auction-purchaser to be a party or a representative : they merely held that his interest in the result did not prevent the question being one between parties". In that case, for the sake of the argument then before the Court, Sir Lawrence Jenkins was content to assume that the auction-purchaser filled the representative character. But it must be noticed that the assumption was made only for the purposes of the argument, and the Chief Justice says that " I doubt whether he can claim this character". In view of this uniform course of decisions on this side of India, which appears to me to have a reasonable basis in the words of the Code, I think that Mr. Rao's argument must be conceded that the auction-purchaser here, his client the 3rd defendant, was improperly joined as a party to these proceedings. It follows, therefore, that on this ground, and on this ground alone, the present appeal must be allowed, and the 3rd defendant must have his costs throughout.