

(1892) 02 MAD CK 0007
In the Madras High Court

Subbarayudu

APPELLANT

Vs

Kotayya and Others

RESPONDENT

Date of Decision : 12-02-1892

Acts Referred:

Citation : (1892) ILR (Mad) 389

Hon'ble Judges : Wilkinson, J; Subramanya Ayyar, J

Bench : Division Bench

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 first 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 Sriranganaya-kaswami,

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

fraud, and set aside the sale.

2. The first question is whether the first 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 favour of first plaintiff's grandfather

Koppu-la Seetaya Naidu, as an endowment of the temple of Sriranganayakaswami, which had boon 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 Pattabhiramaswami Naidu, on whose death the village was registered in the name of

his widow Subbarnma, and his nephew Koppula Kotaya, the first 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 favour 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. Here it is argued that as the dharmakarta is the only person who can maintain a suit for the recovery of temple lands, and as by the decree in Original Suit No. 52 of 1881, third defendant, the zamindar of Vallur, was declared to be the dharmakarta, the plaintiffs cannot sue to set aside the sale and recover the temple lands until they have set aside the razinamah decree. We have been referred to certain documents, road-cess accounts, dowles and jamabundy accounts, as showing that the transfer was not nominal but real, and that the management has since the transfer been with the zamindar. A great many of these documents have not been proved, and should not have been placed upon the record, and the others do not establish the zamindar's management. The plaintiff's oral evidence goes to show that the Koppula family has always performed the duties of dharmakarta. The first plaintiff was sued as dharmakarta in the suit in which the sale now in question took place, and was recognised as proprietor of the village of Devarapalli by the Collector in 1890. The plaintiff's being members of the family in which the trusteeship of the temple is hereditary and in virtue of their position as trustees, the first plaintiff was incompetent to delegate his office or his duties and the transfer of 1881 was therefore invalid. The Privy Council have held [*Rajah Vurmah Valia v. Ravi Vunnah Kunhi Kutty* ILR 1 Mad. 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.

3. It is then argued that the fraud with which plaintiffs charge first defendant ought to have been set forth in the petition which first plaintiff put in u/s

311 of the 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 Lull Kar Maha-

patra ILR 18 Cal. 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 214. That section has no application to the present case, as the first 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.

4. The next question is whether the fraud of the first 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.

5. In Original Suit No. 972 of 1884 the present second defendant obtained a decree against the zamindar of Vallur (third defendant), the first

plaintiff, the father of the second plaintiff, and four other members of the Koppula family, on a mortgage executed by first plaintiff as dharmakarta.

The decree rendered the property liable. The village was attached and advertised for sale for 11th March 1889. The first defendant who for the

last 20 years has appeared as pleader for the family of second 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 third 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 third defendant a certificate u/s 305. Later on in the day the

first 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 the sale. That the second defendant was not kept informed of what was going on is apparent from two letters which first defendant received on his return from Madras about the 27th July. One was from second defendant's son-in-law asking the date of sale, and whether third defendant had paid the money, and urging the vakil to see that some one bid on behalf of the second defendant so that she might receive the full amount of her decree. The other was from second defendant herself, dated 25th July, inquiring 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 third 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 first defendant as to the receipt of a letter on this day from second defendant, significant, that first 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 third defendant's pleader again applied for an adjournment of the sale. His application was opposed by first defendant and the sale proceeded. First defendant bid Rs. 1,250 on behalf of the judgment-creditor. The bidding was then taken up by Sama Sastrulu who had been secretly instructed by first defendant to bid for him and he bid Rs. 1,275. There were only two 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 third defendant's pleader and on the 4th September the first plaintiff's pleader put in petitions objecting to the sale on various grounds. On the 31st October first 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 second defendant's son-in-law gave evidence, and stated that he had instructed first defendant to agree to the sale being set aside as the defendants offered the decree amount. On the 10th November the first defendant entered into correspondence with the third defendant, who expressed great pleasure at receiving a letter from first defendant, and invited him to come to Bezwada on the 17th and see him. The 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 first defendant, and asking that sale certificate might issue in first defendant's name.

6. The fraud charged against the first 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 third defendant to withdraw his petition for cancellation of the

sale. The District Judge added another charge, viz., one of making disparaging remarks to the District Munsif during the course of the sale and

appears to consider it proved. It was not set up in the plaint and rests on the evidence of one witness alone. If true it should have been proved by

the District Munsif who was not called. We do not consider this charge sustainable.

7. As to the first charge, we think that it is fully made out. We see no reason to doubt that second defendant did write a letter on the 29th July to

the first defendant directing him to apply for an adjournment; and we are unable to understand first defendant's absolute denial of the receipt of any

such letter. As already remarked, his application for an adjournment on that date is only applicable on the assumption that he had second

defendant's instructions. The witnesses who prove the despatch and receipt of the letter of the 29th July also speak to the oral message of the 3rd

August. They appear to us to be independent and reliable witnesses and we see no reason to suppose that they have entered into a base

conspiracy to ruin the first defendant. The names of the second, third, fourth, fifth, sixth and sixteenth witnesses who now depose as to the letter

and the message are to be found in the list of witnesses put in by third defendant in support of his objection petition. It is true that in that petition the

blame is not thrown upon the first defendant but upon the judgment-creditor (second defendant) who is accused of having induced the belief that

the sale would be postponed, in consequence of which intending bidders stayed away. It is not apparent whether the fact that first defendant was

the real purchaser was known on the 31st August by the third defendant and his legal adviser, and there is nothing on the record to throw light

upon this part of the case. The tenth witness T. Venkat Reddi who drew up the petition after consulting the third defendant was not questioned as to his instructions and the third defendant has not been examined. All that can be said is that in that petition of the 31st August the judgment-creditor's promise to communicate with her pleader and get the auction stopped is distinctly set forth, and the low price at which the village was knocked down is attributed to the belief that no sale would take place, having kept bidders away. To turn to the witnesses who depose on this point. There can be no doubt that the first witness, Vallabhachari, is a dependant of the second defendant, and that she employs him to take messages, etc., is apparent from Exhibits xxxiii and xxi. The second witness, Narasimhacharlu, who was present when the verbal message was delivered to first defendant, is an inamdar. No valid reason has been assigned why his evidence should not be relied on. The third witness, Seshacharlu, is the archaka of the temple. He would naturally be anxious that the village which forms the endowment of the temple should not pass out of the hands of the dharmakarta, and that he at all events visited second defendant on the morning of the 3rd August with the intention of obtaining a postponement of the sale is clear from Exhibit xxiv. This is the document on which first defendant relies in support of his assertion that he was not only not directed to obtain an adjournment but actually directed to push on with the sale. The letter is written by second defendant's uncle (defendant's second witness) and we have no doubt it was concocted for the purpose of being used in this suit. The second defendant denies having given any instructions to Bashiakarlu in connection with the suit or sale and Exhibits xxxiii and xxxiv render probable her statement that she had ceased to employ him in her affairs. The witness admits that he lives apart from second defendant in consequence of some quarrel and that he had not second defendant's instructions to write the letter. There is every probability that witnesses Nos. 4 and 5, P. Gopalakrishnamma and S. Nagabushanam, did attempt to get the sale postponed, seeing that the father of the fourth witness had spent Rs. 9,000 in erecting a matam in the temple, and that fifth witness was at that time the gumastah of the third defendant. It is true that the relatives of the fourth witness have come forward in support of the second charge, but if their evidence on that point is not reliable, we are unable, on that account, to discredit the evidence

of the fourth witness, corroborated as it is by what seems to us unimpeachable testimony.

8. We are unable to agree with the Judge in thinking the second charge satisfactorily made out. Witnesses Nos. 7, 8, 9 and 11 are related to one

another and to Gopalakrishnamma. The only witness whose name is to be found in the list put in by third defendant on the 31st August is Tatayya

(seventh witness). Now, if the evidence of this witness is to be credited he, in the presence of the Acting District Munsif and many others, openly

charged the first defendant with having fraudulently-sent bidders away, and this only a few days after the sale. It is impossible to believe that if this

were true such an allegation would not have found a place in the petition in support of which seventh witness was cited to give evidence. Although

the name of the twelfth, the only apparently independent witness, is not to be found in the said list, the names of two persons, who he says were

with him, but who have not been called, are entered. The evidence given by these witnesses is evidence which it is very difficult to test, or to prove

false, but considering it as a whole, we do not think it worthy of credit and must acquit first defendant of the second charge.

9. With reference to the third charge, there can be no doubt that the zamindar withdrew his objection petition immediately after an interview with

the first defendant, and it is difficult, if not impossible, to resist the conclusion that the withdrawal was the consequence of first defendant's

representations. It would appear from Exhibit ix, the petition of withdrawal, that it was the prospect of obtaining the large amount which would

remain over after discharging the judgment-creditor's debt, that induced the zamindar to withdraw his opposition. The first defendant has

endeavoured to make out that it was the zamindar who applied to him for advice, but from Exhibit xxv it appears that it was in consequence of a

letter written by the first defendant on the 10th November, a letter which gave great pleasure to the zamindar, that first defendant was invited to

pay a visit to the zamindar at Bezwada. As to what took place at that interview, we have only first defendant's uncorroborated statement. He

returned to Masulipatam with a letter to the zamindar's pleader authorising him to withdraw the petition, and when he delivered it to the seventh

witness, first defendant asked the pleader to withdraw the petition at once. It was not until after the petition had been withdrawn that first defendant

came forward publicly as the purchaser, and we cannot but look upon his conduct in connection with the withdrawal as dishonest. On behalf of the

appellant it is argued that the decision in *Alagirisami v. Ramanathan* ILR 10 Mad. 111 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.

10. All that the Court held in the case of *Alagirisami v. Ramanathan* ILR 10 Mad. 111 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.

11. 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* L.R.

21 Ch. D. 857 and *Guest v. Smythe* L.R. 5 Ch.]. 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. 49].

12. 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 first 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. Michell that he was only authorized, 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 [Alagirisami v. Ramanathan ILR 10 Mad. 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 3 Beav., 49 the Master of the Bolls 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 first 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.

13. For all these reasons we think that the sale must be set aside.

14. We do not understand the finding of the Judge on the 5th issue. There is 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 first defendant to prove that the

sum of Rs. 5,010 was a fair price and we do not think he has shown that.

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

16. The sale amount must be refunded by the second and third defendants who

are third and fourth respondents. The third 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.