

(1916) 12 MAD CK 0027
In the Madras High Court

Tirumalaisami Naidu

APPELLANT

Vs

Subramanian Chettiar

RESPONDENT

Date of Decision : 15-12-1916

Acts Referred:

Citation : (1917) ILR (Mad) 1009

Hon'ble Judges : Phillips, J;Oldfield, J

Bench : Division Bench

Judgement

Oldfield, J.—The question before us is in its most general form whether the plaintiff, a Court-sale purchaser, whose suit for possession of the property put up for sale has failed, is entitled to recover the purchase money by suit or whether, as the lower Appellate Court held, he can do so only by petition under Order XXI, Rule 93 of the Code of Civil Procedure, Such a right of suit in cases, to which the present Code can be applied without reservation, was dismissed in Mohideen Imbrahim Vs. Mahomed Mura Levai through his agent Mahomed Mira Sahib, , one learned Judge being unwilling to negative it, though expressing no decided opinion, and the other negating it directly, because the purchaser had no longer a substantive right to recover, but only a statutory right to do so by application in special, circumstances; and the latter opinion was confirmed obiter in Parvathi Ammal v. Govindasami Pillai ILR (1916) Mad. 803. The contrary view however has been taken in Rustomji Ardeshir Irani v. Vinayak Gangadhar Bhat ILR (1911) Bom. 29 , the purchaser's right of suit being based on the existence of a contractual relation between him and the decree-holder and of a Warranty by the latter of some saleable interest to be implied from the provisions of the Code. With all respect I cannot follow the reasoning Dorab Ally Khan v. Abdool Azeez (1878) 5 I.A. 116 and Sundara Gopalan v. Venkata Varada Ayyangar ILR (1894) Mad. 228 are referred to in the judgment. But they show that in the absence of fraud (and none was referred to there or has been in the present case) the doctrine of warranty of title cannot be applied to Court sales or be the basis of proceedings, except those, which the processual law permits; and, if there is no warranty between the decree-holder and purchaser, there was no other basis for

a contractual relation between them, since the former had no ownership of the property sold. In a Court-sale nothing passes beyond the right, title, and interest of the debtor; and, as there is no guarantee that it exists or is of any particular extent, the purchaser would have no cause of action apart from the Statute. The former code accordingly conferred on him a special right, which the present Code has restricted and for the enforcement of which it provides special procedure. Taking this view I am against the plaintiff's general contention.

2. The plaintiff however has relied mainly on the special circumstances of his case, that he made his purchase and brought his suit for possession, impleading the defendant, when his right was regulated by Sections 313 and 315 of the Code then in force. In that suit he asked for delivery of the suit land and profits. It was decided against him in 1909, after the provisions referred to had been superseded by Order XXI, Rule 93, under which, as I have held, his right is only to apply to the Court for a refund. It is not disputed that he was originally entitled to sue. The argument for consideration is only that the change in the law did not deprive him of his right to do so.

3. The effect of a change in the law is to be ascertained in the absence of special provision in the new enactment (and Section 154 of the present Code preserves only existing rights of appeal, not other remedies), by reference to Section 6(c) and (e) Act X of 1897, its material portion being that a repeal:

shall not (c) affect any right or privilege acquired or accrued under the enactment repealed or (e) affect any legal proceeding or remedy in respect of such right or privilege; and any such legal proceeding or remedy may be instituted, continued or enforced as if the repealing Act had not been passed.

4. The first question then is whether the plaintiffs right to repayment of his purchase money had accrued to him before the change in the law. Under the former law, Section 315 of the former Code, he would have been entitled to receive back the money, when the sale was set aside u/s 312 or 313 or, the contingency we are concerned with:

When it was found that the judgment-debtor had no saleable interest in the property and the purchaser (plaintiff) was for that reason deprived of it.

5. Was it so found and was the plaintiff deprived, as the defendant contends, only when the former's suit failed in 1909, after the present code came into force? In that event his right had not accrued and his remedy was affected, or did the right accrue earlier before his suit was filed in 1907?

6. To support the former view the defendant has relied on the decisions in *Nilakanta v. Imam Sahib* ILR (1893) Mad. 361 and *Mohideen Imbrahim Vs. Mahomed Mura Levai* through his agent Mahomed Mira Sahib, the latter approved in *Sidheswari Prasad Narain Singh v. Goshain Mayanand* ILR (1913) All. 419 in which it was held that the plaintiff's cause of action for a claim such as that before us, accrues, when there has been a suit against the person in possession

on its determination against him. But though such determination may be part of plaintiff's cause of action in the sense in which the term is used in *Read v. Brown* (1888) 22 Q.B.D. 128 and subsequent Indian cases, as including:

Every fact, which it would be necessary for the plaintiff to prove, if traversed to support his right to the judgment of the Court.

It does not follow that it is necessary to the accrual of his "right" the term used in the enactment under consideration. If it did, it would follow further that his right was dependent on and arose only on his becoming conscious of it in consequence of his discovery that the debtor had no saleable interest and of his deprivation of the property by reason thereof, although the title opposed to his own must have existed at the date of his purchase and could not have been affected by any proceedings subsequent to it. It is possible to avoid this anomaly only by holding that his "right" dates from his purchase and is primarily to the property and secondarily in the alternative and contingently to repayment, the latter branch of it becoming enforceable only on failure in respect of the former. If this view is correct, the plaintiff's right had accrued before the repeal of Section 315 of the former Code. I refer next to authority for the position that such an alternative and contingent right will be preserved u/s 6(c), Act X of 1897.

7. In *Colonial Sugar Refining Company v. Irving* (1905) A.C. 369 the question was as to the effect on a right of appeal direct to the Privy Council of a change in the law pending the trial of an action, which would have interposed an appeal to the Local High Court. That right of appeal existed at the date of the change in the law in the sense that it had been conferred by law on every suitor; it was suspended and contingent in the sense that it would be exercisable, only when and if the decision were given against him. It was held not only that the right was not one merely of procedure, but also that it had vested in the suitor, before the change took place. This case was followed in *Kalinga Hebbra Vs. Narasimha Hebbra*, and *Salimamma and Another Vs. Valli Husanabba Beari*, with reference to the right of appeal; and in *Madurai Pillai v. Muthu Chetty* (1915) ILR 38 : Mad. 823 with reference to another consequential and contingent remedy. In *Rajah of Pittapur v. Venkata Subba Row* I L.R. (1916) Mad. 645 it was applied even more generally in a manner, to which I return. On the other hand, *Abbott v. Minister for Lands* (1895) A.C. 425 was cited for the defendant, as deciding that a mere right to take advantage of the provisions of a repealed statute is not a "right accrued." But the judgment runs:

The mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment without any act done by an individual towards availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the enactment.

and the case can accordingly be distinguished on two grounds. Firstly, if the doing of an act is necessary, the plaintiff before us had done one towards availing himself of his right, when he sued the person in possession. Secondly, the

plaintiff's right differed essentially from the right (if it was properly so called), which the Judicial Committee was considering; for the latter was a mere option to take up land, enforceable against the Minister for Lands only after it had been exercised by the making of an application with the necessary formalities and a specification of the land claimed, whilst the former was definite and enforceable from its origin. This case therefore is in no way opposed to the conclusion, which is otherwise adequately supported that plaintiff's right, including the branch of it, which he is now enforcing, had accrued, "before the former Code was repealed.

8. That conclusion has been reached on direct consideration of the law. But it can be supported also by reference to a rule of construction. Although the plaintiff was proceeding in a legal way towards recognition of his right to repayment and could have been met by no objection, if the law had not changed, in terms the change made his further progress impossible; and in the absence of any specific provision or necessary implication the repealing statute will therefore not be construed against him. His only course under the present Code would have been to move for the setting aside of the sale under Order XXI, Rule 91 and Article 166, Schedule I of the Limitation Act within thirty days of its confirmation, and to apply for repayment under Rule 93 and Article 181 within three years from its being set aside. This course he could not take since his first application would have been out of time at the date of the repeal. A repealing enactment cannot impose an impossible condition on pain of forfeiture of a vested right or be applied to cases, in which its provisions cannot be obeyed, *Gopeshwar Pal v. Jiban Chandra Chandra* ILR (1914) Calc. 1125; and similarly it was held by a Full Bench of this Court in *Rajah of Pittapur v. Venkata Subba Row* ILR (1916) Mad. 645 that a new rule of limitation must be read subject to an implied exception in cases where its provisions would absolutely destroy the right of suit, which was in existence when that rule came into force. On this ground also the plaintiff is entitled to succeed.

9. Two other points have been referred to in argument. Firstly the defendant contended in his written statement that the judgment-debtor should be made a party. This cannot be considered since it was not pressed at the trial. Secondly the Sub-Judge awarded interest up to date of suit at 12 per cent, the rate claimed in the plaint. The interest at the usual Court rate is however all that plaintiff is entitled to in accordance with the authorities. *Rodger v. The Comptoir D'Escompte De Paris* (1871) L.R. 3 P.C. 465, *Ayyavayyar v. Shastram Ayyar* ILR (1886) Mad. 506 and *Arunachellam v. Arunachellam* ILR (1892) Mad. 203.

10. The result is that the Sub-Judge's decree is restored subject to the modification that the plaintiff will be entitled to interest at 6 per cent instead of 12 per cent to date of that decree and subsequent interest at 6 per cent on the amount so decreed. The parties will give and receive proportionate costs.

Phillips, J.

11. I agree.