
(1997) 03 AP CK 0003
In the Andhra Pradesh High Court
Case No : C.M.S.A. No. 20 of 1991

Veeramachaneni Krishna Rao and Others	APPELLANT
Vs	
Dandamudi Baburao and Others	RESPONDENT

Date of Decision : 26-03-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 30, 100, 144

Citation : (1997) 2 ALT 372 : (1997) 2 APLJ 259

Hon'ble Judges : Ramesh Madhav Bapat, J

Bench : Single Bench

Advocate : T. Veerabhadraiah, for the Appellant; E. Ayyapu Reddy, for the Respondent

Final Decision : Dismissed

Judgement

Ramesh Madhav Bapat, J.—Aggrieved by the order passed by the learned Subordinate Judge, Gudivada, in A.S.No. 50 of 1987 dated 31-1-1991 reversing the order in E.A. No. 118 of 1985 in E.P.No. 29 of 1981 in O.S.No.63/80 on the file of the Court of the District Munsif, Gannavaram, dated 13th August, 1987, the respondents in A.S. 50 of 1987 filed this second appeal.

2. In order to appreciate the controversy between the parties, it is necessary to narrate few facts,

3. The 2nd respondent herein had instituted OS. 63/80 in the Court of District Munsif, Gannavaram, for recovery of certain amount basing on the pronote. The suit was filed against the appellants herein. The suit was decreed ex parte on 29-7-1980. The 1st appellant herein filed I.A.No. 696 of 1983 under Order IX Rule 13 of the Code of Civil Procedure. On hearing both sides, the ex parte decree was set aside. It further appears that the 2nd respondent herein, who was the decree holder, filed E.P.No. 29 of 1981 and sought attachment of 3 acres 50 cents of land belonging to the 1st appellant herein. The executing Court attached the property and it was sold in public auction on 17-11-1982. The 1st

respondent was the highest bidder. He was put in possession by the Amin of the Court and delivery was accorded on 20-2-1983 and since then the 1st respondent has been in peaceful possession of the suit schedule land.

4. It further appears from the record that an application filed by the 1st appellant - I.A.No.696 of 1983 was allowed as stated above, on 2-3-1985. There upon, the 1st appellant herein filed E.A.No. 118 of 1985 u/s 144 of the CPC for restoration of suit schedule property. The learned District Munsif, Gannavaram, allowed the said application. Aggrieved by the aforesaid order, the 1st respondent herein (auction purchaser) filed A.S. 50/87 in the Court of the Subordinate Judge, Gudivada. The said appeal was allowed by setting aside the order of restoration passed by the District Munsif in E.A. 118/85. Aggrieved by the said order, the appellants have preferred this appeal.

5. Learned Counsel Mr. Veerabhadraiah, appearing on behalf of the appellants and judgment-debtors herein, submitted that the order passed by the trial (sic 1st appellate) Court is totally perverse and whatever the evidence was led in the executing Court was not taken into consideration by the 1st appellate Court and, therefore, the second appeal has to be allowed by setting aside the order passed by the learned Subordinate Judge, Gudivada, in A.S. No. 50/87.

6. Learned Counsel Mr. Veerabhadraiah further submitted at the Bar that the auction purchaser i.e., 1st respondent herein was the highest bidder but he was only for name sake. The 2nd respondent was the man behind him who had financed the 1st respondent. Under these circumstances, it was submitted by the learned Counsel that the 1st respondent was not a bona fide purchaser for the value without notice and therefore the appeal has to be allowed by setting aside the order of the 1st appellate Court. In order to substantiate the aforesaid contention, the learned Counsel relied upon a ruling reported in Chinnamal and others Vs. P. Arumugham and another, . My attention was drawn by the learned Counsel to paras 9 to 19 of the said judgment in which the Supreme Court held as follows :-

"In Janak Raj Vs. Gurdial Singh and Another, , a stranger auction purchaser was protected against vicissitudes of fortunes of the litigation. In Sardar Govindrao Mahadik and Another Vs. Devi Sahai and Others, such protection was not afforded to auction purchaser who happens to be the decree holder himself. The reason seems to be that the decree holder is not a stranger to the suit. Indeed, he is not since he is eo nomine party to the appeal against the decree which he seeks to execute. He is aware of the fact that due to economic hardship the judgment-debtor was unable to have the decree stayed. He, however, does not wait for final outcome of the litigation which he has initiated. He exploits the helpless situation of the judgment-debtor and hastens the execution of the decree. The Court, therefore, should not lend its assistance to him to retain the property purchased if the decree is subsequently reversed.

There is thus a distinction maintained between the decree holder who purchases

the property in execution of his own decree which is afterwards modified or reversed, and an auction purchaser who is not party to the decree. Where the purchaser is the decree holder, he is bound to restore the property to the judgment-debtor by way of restitution but not a stranger auction purchaser. The latter remains unaffected and does not lose title to the property by subsequent reversal or modification of the decree. The Courts have held that he could retain the property since he is a bona fide purchaser. This principle is also based on the premise that he is not bound to enquire into correctness of the judgment or decree sought to be executed. He is thus distinguished from an eo nomine party to the litigation.

There cannot be any dispute on this proposition and it is indeed based on a fair and proper classification. The innocent purchaser whether in voluntary transfer or judicial sale by or in execution of a decree or order would not be penalised. The property bona fide purchased ignorant of the litigation should be protected. The judicial sales in particular would not be robbed of all their sanctity. It is a sound rule based on legal and equitable considerations. But it is difficult to appreciate why such protection should be extended to a purchaser who knows about the pending litigation relating to the decree. If a person ventures to purchase the property being fully aware of the controversy between the decree holder and judgment-debtor, it is difficult to regard him as a bona fide purchaser. The true question in each case, therefore, is whether the stranger auction purchaser had knowledge of the pending litigation about the decree under execution. If the evidence indicates that he had no such knowledge he would be entitled to retain the property purchased being a bona fide purchaser and his title to the property remains unaffected by subsequent reversal of the decree. The Court by all means should protect his purchase. But if it is shown by evidence that he was aware of the pending appeal against the decree when he purchased the property, it would be inappropriate to term him as a bona fide purchaser. In such a case the Court also cannot assume that he was a bona fide or innocent purchaser for giving him protection against restitution. No assumption could be made contrary to the facts and circumstances of the case and any such assumption would be wrong and uncalled for.

The Patna High Court in *Chhota Nagpur Banking Association v. C.T.M. Smith* (AIR 1943 Patna 325) expressed a similar view. Fazli Ali, C.J., as he then was, said (at 327) that where there is clear and cogent evidence that a stranger purchaser was fully aware of the merits of the controversy in regard to the property purchased by him and was also aware that the validity of the decree was under challenge, there is no room for presumption that he was a bona fide purchaser. Reference may also be made to the decision of the Sind Judicial Commissioner's Court in *Jamnolal Gurdinomal v. Gopaldas*, AIR 1924 Sind 101 where similar comment was made.

The Madras High Court in *R. Raghavachari v. M.A.Pakkiri Mohammed Rowther*, AIR 1971 Madras 250 has, however, taken a contrary view. It was held that

restitution u/s 144 CPC cannot be demanded as against a bona fide purchaser who was not a party to the decree. The High Court also remarked that the reversal of the decree by the appellate Court or the knowledge of the purchaser about the pendency of the appeal makes no material difference to the operation of that rule,

This proposition, we are, however, unable to accept. In our opinion, the person who purchases the property in court auction with the knowledge of the pending appeal against the decree cannot resist restitution. His knowledge about the pending litigation would make all the difference in the case. He may be a stranger to the suit, but he must be held to have taken calculated risk in purchasing the property. Indeed, he is evidently a speculative purchaser and in that respect he is in no better position than the decree holder purchaser. The need to protect him against restitution, therefore, seems to be unjustified. Similarly the auction purchaser who was a name lender to the decree holder or who has colluded with the decree holder to purchase the property could not also be protected to retain the property if the decree is subsequently reversed.

There is one other aspect which is more important than what we have discussed hitherto. It was emphasized by Lord Cairns in *Rodger v. The Comptoir D'Escompte De Paris*, (1969-71) LR 3 Pc 465 at P. 475): "..... that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression "the act of the Court", issued, it does not mean merely the act of the Primary Court or of any intermediate Court of Appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter upto the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court".

This is also the principle underlying Section 144 of the Code of Civil Procedure. It is the duty of all the Courts as observed by the Privy Council "as aggregate of those tribunals" to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court. The above passage was quoted in the majority judgment of this Court in *A.R. Antulay Vs. R.S. Nayak and Another*, . Mukherjee, J., as he then was, after referring to the said observation of Lord Cairns, said (at P. 672 of SCC: at 1561 of AIR) : "No man should suffer because of the mistake of the Court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the handmaids of justice and not the mistress of the justice. Ex debito justitiae, we must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied."

It is well to remember that the CPC is a body of procedural law designed to facilitate justice and it should not be treated as an enactment providing for punishments and penalties. The laws of procedure should be so construed as to render justice wherever reasonably possible. It is, in our opinion, not

unreasonable to demand restitution from a person who has purchased the property in Court auction being aware of the pending appeal against the decree.

We have carefully considered the evidence in the case. The judgment-debtor who has been examined in the case has stated that the auction-purchaser is a sambandhi of the decree-holder. The decree-holder's daughter has been given in marriage to the son of auction-purchaser. That evidence remains unchallenged. The evidence further indicates that after the purchase both of them have entered into an agreement with a third party for sale of the second item of properties for Rs. 96,000/- and a case seems to be pending on the basis of that agreement. The evidence also discloses that the auction-purchaser had no money of his own to purchase the property. These circumstances are sufficient to hold that the auction-purchaser was not a bona fide purchaser. The auction-sale in his favour must, therefore, fall for restitution. The Court cannot lend assistance for him to retain the property of the judgment-debtor who has since succeeded in getting rid of the unjust decree.

In the result the appeal is allowed, the judgment of the Division Bench of the High Court is reversed and that of learned single Judge is restored. The appellants however, must pay the costs of this appeal to the auction-purchaser which we quantify at Rs. 5,000/-".

7. The learned Counsel for the appellants submitted that the Apex Court of this Country was pleased to hold that the judgment-debtor is entitled to restoration if the application filed by him for setting aside the ex parte order under Order IX Rule 13 is allowed even though the property is sold to 3rd party in an auction held by the Court provided the judgment-debtor is in a position to show that the auction purchaser was not a bona fide purchaser who had colluded with the decree holder and he had no financial capacity to pay the amount of sale.

8. Learned Counsel Mr. Veerabhadraiah further submitted at the Bar that the evidence led on behalf of the parties would go to show that the auction purchaser i.e., 1st respondent herein and 2nd respondent herein are related to each other, 1st respondent was quite aware of the proceedings between the original plaintiff and defendant even then 1st respondent herein purchased the property not with a bona fide intention but only with a mala fide intention and, therefore, the second appeal has to be allowed.

9. Mr. Veerabhadraiah further submitted at the Bar that the 1st appellate Court has drawn its own conclusion regarding the oral evidence led before the executing Court and had come to a perverse conclusion. Learned Counsel has taken me through the entire evidence of the parties and submitted that the judgment-debtor has been able to prove the relation between the decree holder and the auction purchaser and he was also able to prove that the auction purchaser had no capacity to pay the said amount and, therefore, inference has to be drawn that he was financed by the decree holder and therefore the auction purchaser cannot be styled as a bona fide purchaser for value without notice.

10. While rebutting the aforesaid arguments of Mr. Veerabhadraiah, learned Counsel for the respondents, Mr. Ayyapu Reddy, submitted at the Bar that the submissions made by Mr. Veerabhadraiah are not legally correct. Learned Counsel Mr. Ayyapu Reddy also submitted that while dealing with second appeal the Court cannot go deep into the facts which have been decided by the Courts below as the scope of the second appeal is very limited. The evidence which was appreciated by the 1st appellate Court cannot be reappreciated in second appeal. In order to substantiate the aforesaid position of law, learned Counsel Mr. Ayyapu Reddy relied upon a decision reported in *Dudh Nath Pandey (Dead) by Lrs Vs. Suresh Chandra Bhattasali (Dead) by Lrs*, wherein their Lordships held that the High Court in exercise of powers u/s 100 of the CPC cannot make a fresh appraisal of evidence and come to a different finding contrary to the finding recorded by the 1st appellate Court. The finding on the question of limitation recorded by the 1st appellate Court on appraisal of evidence after taking into consideration the entire circumstances of the case is a finding of fact and cannot be set aside by the High Court in exercise of powers u/s 100 of C.P.C.

11. Learned Counsel Mr. Ayyapu Reddy further submitted at the Bar that while filing the application i.e., E.A.No. 118/85 u/s 144 of C.P.C. for restoration, the judgment-debtor did not plead that the auction purchaser had no capacity to pay the amount though he gave the highest bid but it was only pleaded that the auction purchaser and the decree holder are related to each other and, therefore, it was contended by Mr. Ayyapu Reddy that the learned executing Court erroneously allowed the party to lead evidence on the facts which were not pleaded in the petition.

12. I have gone through the entire pleadings made by the judgment debtor in E.A.No. 118/85 and I have no hesitation in holding that the submissions made by the learned Counsel, Mr. Ayyapu Reddy, for the respondents herein, are correct. The judgment-debtor did not plead that the auction purchaser had no financial capacity to pay the sale amount but it was only pleaded that the auction purchaser and the decree holder are closely related to each other. The evidence on record would go to show that not only the auction purchaser is related to the decree holder but the decree holder is also related to the judgment-debtor and, therefore, this Court has no hesitation in putting on record that all the parties were related to each other.

13. Now the question arises before this Court for consideration as to whether the auction purchaser can be called a bona fide purchaser for value without notice?

14. It appears from the judgment of the 1st appellate Court that the auction took place on 17-11-1982. Till then, the decree under execution was not challenged in any Court by the Judgment-debtor. The learned Judge further held that the material on record disclosed that there was no petition pending by that time for setting aside the ex parte decree. The decree was set aside on 2-3-85 in I.A.No.696 of 1983, filed by the 1st judgment-debtor in the year 1983. By the time of the Court auction sale, the period of limitation of entertaining the petition

for setting aside the ex parte decree was already over. The ex parte decree was left unchallenged for more than two years after it was passed. It was only after property was put to sale the petition under Order XXI Rule 30 (sic.) was filed by the judgment-debtor, but it was dismissed and the auction sale was confirmed and delivery was given to the auction purchaser. With this factual position on record it was observed by the 1st appellate Court that there was no scope for the auction purchaser to make any type of queries before he gave highest bid to ascertain whether any litigation was pending in the Court as there was no litigation regarding the subject matter pending in any of the Courts. Under these circumstances, the auction purchaser gave the highest bid and bid was knocked down in his favour.

15. Considering the above factual position, this Court has no hesitation in holding that the auction purchaser was a bona fide purchaser.

16. As stated earlier, as far as the paying capacity of the auction purchaser is concerned it was not pleaded by the judgment-debtor that the auction purchaser had no capacity to pay the amount in E.A.No. 118/85 and, therefore, this Court has no hesitation in holding that though the executing Court allowed the parties to lead evidence on that point, it can be safely ignored as it is the settled principle of law that no evidence can be allowed on the point which is not pleaded. As far as the relation between the parties is concerned, I have already stated in the above paragraphs of my judgment that all the parties viz., judgment-debtor, decree holder and the auction purchaser are related to each other.

17. It appears from the judgment of the 1st appellate Court that the judgment-debtor led the evidence in order to establish that the decree holder and the auction purchaser were closely related to each other by examining himself and one more witness but the 1st appellate Court held that their evidence is inconsistent and not satisfactory. It is a finding on facts. Therefore it cannot be disturbed in second appeal as per the ruling cited above in Dudh Nath v. Suresh Chandra case which was delivered by the apex Court of this Country.

18. One more point that is very important in this case is that right from the delivery of possession to the auction purchaser he himself has been cultivating the land and taking Kharif as well as Rubby (sic. Rabi) crops, till this date. Therefore it cannot be sated that the decree holder financed him for giving the highest bid. It must be presumed that the auction purchaser paid money out of his pocket. This fact would go to show that he was interested in buying the land and accordingly he bought the land and put the land under cultivation. This is an additional factor which would go to establish that the auction purchaser wanted to purchase the land for his own purpose. Therefore, this Court has no hesitation in holding that the auction purchaser was a bona fide purchaser for value without notice.

19. Considering the above aspects of the matter, this Court is reluctant to

interfere with the fact finding recorded by the 1st appellate Court. Therefore, this appeal is dismissed with no costs, confirming the order of the 1st appellate Court.