

Chinnammal and Others

Vs

P. Arumugham and Another

Civil Appeal No. 140 of 1990

(K. Jagannatha Shetty, Dr. T.K. Thommen JJ)

17.01.1990

JUDGMENT

K. JAGANNATHA SHETTY, J. -

1. Special leave is granted.
2. This appeal is from a decision of the Madras High Court which denied the appellants claim for setting aside a judicial sale.
3. The facts giving rise to the appeal, as found by the courts, may be summarised as follows :

Arumugham-respondent 1 obtained money decree on the basis of a promissory note from the Subordinate Judge, Salem, in O. S. No. 388 of 1968. Sethuramalingam the judgment debtor appealed to the High Court but could not get the decree stayed. He could not furnish security for the decretal amount which was a condition for stay. The decree was put into execution notwithstanding the pendency of the appeal. In February 1973, his two items of properties : (i) three houses, and (ii) 10.93 acres of land were brought to court sale. They were purchased by Kuppa Goundar, respondent 2 for Rs. 7550 and Rs. 15,050 respectively. In October 1975, the High Court allowed the appeal on merits. The promissory note which was the basis of the suit was disbelieved and rejected. The trial court judgment was set aside and the plaintiff was non-suited. Thereupon the judgment debtor moved the executing court for setting aside the sale. He has alleged inter alia, that the sale was vitiated by material irregularities and properties were deliberately sold for under value. The sale was collusive between decree holder and the auction purchaser. The latter was sambandhi of the former and just a name lender. It was also his contention that since the decree has been reversed, the sale should be nullified and restitution should be ordered. The court rejected all the contentions relating to material irregularities for want of satisfactory evidence. The court also held that subsequent reversal of the decree could not be depended upon since the sale has been confirmed in favour of the auction purchaser who was a stranger to the litigation. The judgment debtor appealed to the High Court and succeeded at first instance, before learned Single Judge. The learned Judge found in effect that (a) the sale was vitiated by material irregularities resulting in fetching a low price to properties; (b) the decree holder and auction purchaser are close relatives and the sale seems to be collusive; and (c) after the court sale they seemed to have entered into an agreement for selling the second item of properties for Rs. 96,000. With these conclusions the sale was set aside. But on

appeal, the Division Bench of the High Court has expressed contrary views on all those points and reversed the decision of learned Single Judge.

4. The judgment debtor died during the pendency of the appeal before the High Court. His legal representatives have now appealed.

5. Mr. A. K. Sen, learned counsel for the appellants raised a number of questions. The important and central issue, however, relates to the underlying jurisdiction of the court to set aside the confirmed sale upon subsequent reversal or modification of the decree. The question is whether the auction purchaser's interest should be protected as against the judgment debtor who has since succeeded in getting rid of the decree against him. There are two authorities of this Court bearing on the question (i) Janak Raj v. Gurdial Singh ((1967) 2 SCR 77 : AIR 1967 SC 608) and (ii) Sardar Govindrao Mahadik v. Devi Sahai ((1982) 1 SCC 237 : (1982) 2 SCR 186). In Janak Raj case ((1967) 2 SCR 77 : AIR 1967 SC 608), the appellant was a stranger to the suit in which there was an ex-parte money decree. In the execution of the decree, the immovable property of the judgment debtor was brought to sale in which the appellant became the highest bidder. The judgment debtor filed an application for setting aside the ex-parte decree and the court allowed it before confirming the sale. Thereupon the judgment-debtor objected to the confirmation of sale on the ground that the auction-purchaser was in conspiracy and collusion with the decree holder and as such not entitled to have the sale confirmed. The execution court, however, overruled the objection and confirmed the sale. Mitter, J., agreed with that view and observed : (SCR pp. 70-80)

"The result is that the purchaser's title relates back to the date of sale and not the confirmation of sale. There is no provision in the Code of Civil Procedure of 1908 either under Order XXI or else where which provides that the sale is not to be confirmed if it is be found that the decree under which the sale was ordered has been reversed before the confirmation of sale. It does not seem ever to have been doubted that once the sale is confirmed the judgment debtor is not entitled to get back the property even if he succeeds thereafter in having the decree against him reversed. The question is, whether the same results ought to follow when the reversal of the decree takes place before the confirmation of sale.

There does not seems to be any valid reason for making distinction between the two cases. It is certainly hard on the defendant-judgment debtor to have to lose his property on the basis of a sale held in execution of a decree which is not ultimately upheld. Once however it is held that he cannot complain after confirmation of sale, there seems to be no reason why he should be allowed to do so because the decree was reversed before such confirmation. The Code of Civil Procedure of 1908 contains elaborate provisions which have to be followed in cases of sales of property in execution of a decree. It also lays down how and in what manner such sale is may be set aside. Ordinarily, if no application setting aside a sale is made under any of the provisions of Rules 89 to 01 of Order XXI, or when any application under any of these rules is made and disallowed, the court has not choice in the matter of confirming the sale and the sale must be made absolute. If it was the intention of the legislature that the sale was not to be made absolute because the decree had ceased to exist, we should have expected a provision to the effect either in Order XXI or in Part II of the Code of Civil Procedure 1908 which contains Section 36 to 74 (inclusive)."

6. Finally, the learned Judge rounded off the judgment thus : (SCR p. 86)

"The policy of the legislature seems to be that unless a stranger auction purchaser is protected against the vicissitudes of the fortunes of the suit, sales in execution would not attract customers and it would be to the detriment of interest of the borrower and the creditor alike if sales were allowed to be impugned merely because the decree was ultimately set aside or modified. The Code of Civil Procedure of 1908 makes ample provision for the protection of the interest of the judgment debtor who feels that the decree ought not to have been passed against him."

7. In *Sardar Govindrao Mahadik* ((1982) 1 SCC 237 : (1982) 2 SCR 186), D. A. Desai, J., while referring to the principle in *Janak Raj* case ((1967) 2 SCR 77 : AIR 1967 SC 608) said : (SCC p. 269, Para 60 : SCR p. 226)

"Ordinarily, if the auction purchaser is an outsider or a stranger and if the execution of the decree was not stayed of which he may have assured himself by appropriate enquiry, the court auction held and sale confirmed and resultant sale certificate having been issued would protect him even if the decree in execution of which the auction sale has been held is set aside. This proceeds on the footing that the equity in favour of the stranger should be protected and the situation is occasionally reached on account of default on the part of the judgment debtor in not obtaining stay of the execution of the decree during the pendency of the appeal."

8. The learned Judge further said : (SCC p. 269, Para 61).

"But what happens if the auction purchase is the decree holder himself? In our opinion, the situation would materially alter and this decree holder-auction purchaser should not be entitled to any protection. At any rate, when he proceeds with the execution he is aware of the fact that an appeal against the original decree is pending. He is aware of the fact that the resultant situation may emerge where the appeal may be allowed and the decree which he seeks to execute may be set aside. He cannot force the pace by executing the decree taking advantage of the economic disability of a judgment debtor in a money decree and make the situation irreversible to the utter disadvantage of the judgment debtor who wins the battle and loses the war. Therefore, where the auction purchaser is none other than the decree holder who by pointing out that there is no bidder at the auction, for a nominal sum purchases the property, to wit, in this case for a final decree for Rs. 500, Motilal purchased the property for Rs. 300, an atrocious situation, and yet by a technicality he wants to protect himself. To such an auction purchaser who is not a stranger and who is none other than the decree holder, the court should not lend its assistance."

9. In *Janak Raj* case ((1967) 2 SCR 77 : AIR 1967 SC 608), a stranger auction purchaser was protected against vicissitudes of fortunes of the litigation. In *S. G. Mahadik* case ((1982) 1 SCC 237 : (1982) 2 SCR 186) 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.

10. 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 nominee party to the litigation.

11. 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 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 a 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 i.e. 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.

12. The Patna High Court in *Chhota Nagpur Banking Association v. C. T. M. Smith* (AIR 1943 Pat 325 : 22 Pat 315) expressed a similar view. Fazl Ali, C.J., as he then was, said (at p. 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 Commissions Court in *Jamnimal Gurdinomal v. Gopaldas* (AIR 1924 Sind 101 : 80 IC 1002) where similar comment was made.

13. The Madras High Court in *R. Raghavachari v. M. A. Pakkiri Mahomed Rowther* (AIR 1917 Mad 250 : 30 MLJ 497) has however, taken a contrary view. It was held that restitution under Section 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.

14. 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.

15. There is one other aspect which is more important than what we have discussed hitherto. It was emphasized by Lord Cairns in *Rodger v. Comptoir D'escompte De Paris* ((1869-71) LR 3 PC 465, 475).

"..... that one of the first and highest duties of all courts is to take care that the act of the court does not injury to any of the suitors, and when the expression "the act of the court" is used, 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 up to 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.

16. 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 v. R. S. Nayak* ((1988) 2 SCC 602, 672 : 1988 SCC (Cri) 372). Mukharji, J., as he then was, after referring to the said observation of Lord Cairns, said; (SCC p. 672, para 83)

"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 hand maids 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."

17. It is well to remember that the Code of Civil Procedure 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.

18. 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. 96000 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 assistance for him to retain the property of the judgment debtor who has since succeeded in getting

rid of the unjust decree.

19. 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. 5000.

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