

Padanathil Rugmini Amma

Vs

P.K. Abdulla

Civil Appeal No. 93 of 1995

(M.M. Punchhi, Sujata V. Manohar JJ)

17.01.1996

JUDGEMENT

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Mrs. SUJATA V. MANOHAR, J. :-

1. The property in dispute originally belonged to one Padanattil Chengottu Kunnath Tarwad. One Mohammed Haji filed a suit being suit No. 397 of 1941 for recovery of possession of some properties held by this Tarwad on tenancy rights. On 12th September, 1942 an ex parte decree was passed in the suit in favour of Mohammed Haji for recovery of possession of the leasehold property and also for arrears of rent. The ex parte decree was executed. A number of items of properties belonging to the Tarwad including the suit properties were attached and sold in Court auction held on 18-3-45 in execution proceedings. The suit property herein (one acre and ten cents of agricultural land) was purchased by the decree-holder Mohammed Haji in the Court auction. The delivery of the suit property was given to the decree-holder auction purchaser on 12-3-1946 as per order on E. A. 389 of 1946.

2. After purchase the suit property was given on lease by Mohammed Haji to one Raghavan Nair on 2-5-46. Raghavan Nair in turn sold his rights in the suit property to one Ayyappan who in turn sold his rights to one Raman Menon. Raman Menon sold his rights in the said property on 3-10-1950 in favour of the respondent, P. K. Abdulla.

3. One of the members of the Tarwad challenged the ex parte decree in OS No. 397 of 1941 by filing an application under order IX, Rule 13 of the Civil Procedure Code. The trial Court declined to set aside the ex parte decree. The order of the trial Court was reversed by the appellate Court. Ultimately the High Court by its judgment and order dated 29-1-1958 set aside the ex parte decree.

4. After the ex parte decree was set aside, proceedings by way of restitution were started by the first defendant and Karnavan of the Tarwad by filing E. P. 29 of 1959. All the properties which had been taken possession of by Mohammed Haji in execution of the ex parte decree and of which restitution was sought were set out in a schedule in the proceedings for restitution. Item No. 6 in E. P. 29 of 1959 was the suit property. E. P. 29 of 1959 had originally contained a prayer for only symbolic re-delivery of the properties which had been taken possession of in execution by Mohammed Haji. But the application was subsequently amended and actual delivery was asked for.

5. This restitution application was allowed and the properties were re-delivered pursuant to these restitution proceedings. Such re-delivery of the suit property is evidenced by Exh. 82 dated 5-4-

1966. Exhibits A 25 And A 27 are a report and account of the Amin who re-delivered possession of the suit property to the Tarwad.

6. The respondent, P. K. Abdulla, thereupon filed suit being OS 288 of 1966 contending that he was not evicted from the suit property pursuant to the restitution proceedings and there was no redelivery of the suit property to the Tarwad. He prayed for an injunction to restrain the defendant from interfering with his possession of the property.

7. The trial Court dismissed his suit holding that there was a proper re-delivery of the property and the Tarwad got back the property. In appeal the trial Court's judgment was confirmed. A second appeal was filed by the respondent P. K. Abdulla before the Kerala High Court. He also filed a petition for amending the plaint to incorporate a prayer for a declaration of his title and for recovery of possession of the suit property. This prayer was granted and the judgment and decree of the Courts below was set aside and the matter was remanded to the trial Court permitting the respondent to amend the plaint as indicated in the judgment and directing the trial Court to dispose of the suit in accordance with law and in the light of the findings and observations in the High Court's judgment.

8. After remand the trial Court found that the Tarwad had obtained possession of the property pursuant to the restitution proceedings. It also found that the respondent who was the plaintiff therein had established his title to the suit property and his right to recover possession. It accordingly decreed the suit allowing recovery of possession. This finding was confirmed by the District Court and by the High Court. Hence the present appeal has come before us.

9. The appellant before us is the successor-in-interest of the Tarwad and its members who were the defendants in OS No. 397 of 1941. After the ex parte decree in OS No. 397 of 1941 was set aside the suit has been heard on merit and the Munsif's Court by its judgment and order dated 26th November, 1962 has dismissed the suit of Mohammed Haji for eviction and recovery of possession but has decreed the suit for arrears of rent and costs. It is, therefore, not in dispute that the appellant as the successor-in-interest of the original defendants in OS No. 397 of 1941, is entitled to restitution in so far as it is permissible in law, in respect of the properties which were sold in execution of the ex parte decree which was set aside.

10. It is, however, contended by the respondent that he is a lessee from the decree-holder auction purchaser. The appellant cannot seek restitution of properties leased to him by the decree-holder auction purchaser. The lease in his favour is protected, he being a third party to the Court proceedings and the auction sale. This contention has been upheld by the Kerala High Court and is challenged before us. Now, under Section 144 of the Civil Procedure Code where and insofar as a decree or an order is varied or reversed or is set aside, the Court which passed the decree or order, shall, on the application of any party entitled to any benefit by way restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order. For this purpose the Court may make such orders including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order.

11. In the present case, as the ex parte decree was set aside, the judgment-debtor was entitled to seek restitution of the property which had been sold in Court auction in execution of the ex parte decree. There is no doubt that when the decree-holder himself is the auction purchaser in a Court auction sale held in execution of a decree which is subsequently set aside, restitution of the property can be

ordered in favour of the judgment-debtor. The decree-holder auction purchaser is bound to return the property. It is equally well settled that if at a Court auction sale in execution of a decree, the properties are purchased by a bona fide purchaser who is a stranger to the Court proceedings, the sale in his favour is protected and he cannot be asked to reconstitute the property to the judgment-debtor if the decree is set aside. The ratio behind this distinction between a sale to a decree-holder and a sale to a stranger is that the Court, as a matter of policy, will protect honest outside purchasers at sales held in the execution of its decrees, although the sales may be subsequently set aside, when such purchasers are not parties to the suit. But for such protection, the properties which are sold in Court auctions would not fetch a proper price and the decree-holder himself would suffer. The same consideration does not apply when the decree-holder is himself the purchaser and the decree in his favour is set aside. He is a party to the litigation and is very much aware of the vicissitudes of litigation and needs no protection.

12. In the case of *Binayak Swain v. Ramesh Chandra Panigrahi*, (AIR 1966 SC 948) this Court considered a case where in execution of an *ex parte* decree the property of the judgment-debtor was purchased by the decree-holder. The decree was set aside in appeal and the case remanded for fresh disposal. This Court said that the judgment-debtor was entitled to restitution even though ultimately after fresh disposal a decree was passed in favour of the decree-holder. It said that the principle of the doctrine of restitution is that on the reversal of a decree the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree; and the Court in making restitution is bound to restore the parties so far as they can be restored to the same position they were in at the time when the Court by its erroneous action had displaced them.

12A. As far back as in 1988, however, a distinction was made between sales to decree-holder and sales to outsider purchaser. In the case of *Zain-Ul-Abdin Khan v. Muhammad Asghar Ali Khan*, (1988) ILR 10 Allahabad 166, the Privy Council held that there was a great distinction between the decreeholders who come in and purchase under their own decree which is afterwards reversed on appeal and the bona fide purchasers who come in and buy at the sale in execution of a decree to which they are not parties and at a time when the decree is a valid decree and when this order for sale is a valid order. It held that the sales in favour of bona fide purchasers who were not parties to the decree at a time when the decree was valid would be protected. In the case before the Privy Council there were three sets of purchasers. Some of the defendants who had purchased were the decree-holders. Some persons had purchased from decree-holders or came under them, while others were merely purchasers in execution and strangers to the decree upon which the execution has issued. The Privy Council said that the decreeholder purchasers as well as persons who came in under them are in the same position and they have to be classed under the head of decree-holders as against strangers to the decree. The Privy Council was required to consider only the case of strangers to the decree. But from the judgment it is quite clear that it categorised the decree-holder auction purchaser as well as those claiming under such decree holder purchasers in the same category of decreeholders. This category, therefore, would be liable to render restitution.

13. In the case of *Satish Chandra Ghose v. Rameshwari Dasi*, (AIR 1915 Calcutta 363, the Calcutta High Court relied upon these observations of the Privy Council and held that the decree-holders and those who claim under decree-holders will form one class as against strangers to the decree who purchase in a Court auction sale. The title of a purchaser from one who has bought at the sale in execution of his own decree is liable to be defeated when the decree is subsequently set aside. The

Calcutta High Court said, "The Court as a matter of policy has a tender regard for honest purchasers at sales held in execution of its decrees though the sales may be subsequently set aside, where those purchasers are not parties to the suit and the decree has not been passed without jurisdiction. But the same measure of protection is not extended to purchasers who are themselves the decree-holders; nor can the purchasers from such decree-holders claim that the Court owes them any duty....." The policy which prompts the extension of protection to the strangers who purchases at Court auctions is based on a need to ensure that proper price is fetched at a Court auction. This policy has no application to sales outside the Court. The purchasers from a decreeholder auction purchaser have bought from one whose title is liable to be defeated. The title acquired by the purchaser from the decree-holder is similarly defeasible. The Court further observed, "The defeasibility of a decree-holder's title where the decree is ex parte is of such common occurrence that the plea of a purchaser for value without notice hardly applies."

14. The same view has been reaffirmed by the Calcutta High Court in the case of Abdul Rahman v. Sarat Ali, (AIR 1916 Calcutta 710) where it has held that the assignee of a decree-holder auction purchaser stands in no better position than his assignor. The special protection afforded to a stranger who purchases at an execution sale is not extended to an assignee of the decree-holder auction purchaser.

15. The distinction between a stranger who purchases at an auction sale and an assignee from a decree-holder purchaser at an auction sale is quite clear. Persons who purchase at a Court auction who are strangers to the decree are afforded protection by the Court because they are not in any way connected with the decree. Unless they are assured of title; the Court auction would not fetch a good price and would be detrimental to the decree-holder. The policy, therefore, is to protect such purchasers. This policy cannot extend to those outsiders who do not purchase at a Court auction. When outsiders purchase from a decree-holder who is an auction purchaser clearly their title is dependent upon the title of decree-holder auction purchaser. It is a defeasible title liable to be defeated if the decree is set aside. A person who takes an assignment of the property from such a purchaser is expected to be aware of the defeasibility of the title of his assignor. He has not purchased the property through the Court at all. There is, therefore, no question of the Court extending any protection to him. The doctrine of a bona fide purchaser for value also cannot extend to such an outsider who derives his title through a decree-holder auction purchaser. He is aware or is expected to be aware of the nature of the title derived by his seller who is a decree-holder auction purchaser.

16. The High Courts of Patna, Madras and Kerala, however, appear to have taken a different view. They have equated an assignee from a decree holder auction purchaser with a stranger auction purchaser on the basis that an assignee from a decree-holder auction purchaser has to be considered as a bona fide purchaser for value who should not be allowed to suffer on account of the mistakes or irregularities committed in a Court of law. It is difficult to see how an assignee from a decree-holder auction purchaser can be equated with a bona fide purchaser for value without notice. He is aware of the nature of the title of his seller or assignor. He is also aware that the title of his assignor or seller is subject to the doctrine of restitution if the decree is ultimately set aside particularly in a case where the decree is an ex parte decree and there is a greater possibility of such a decree being set aside. The reasons which prompt the Courts to protect strangers who purchase at court auction sales also do not apply to assignees or purchasers from a decree holder auction purchaser. They purchase outside the Court system and cannot expect any protection from the Court. Their title is liable to be defeated if the title of their seller or assignor is defeated. The view, therefore, expressed by the Patna High Court in the case of Gopi Lal v. Jamuna Prasad, AIR 1954 Patna 36, the Madras High

Court in *S. Chokalingam Asari v. N. S. Krishna Iyer* (AIR 1964 Madras 404) and the cases cited therein as also by the Kerala High Court in the case of *Parameswaran Pillai Kumara Pillai v. Chinna Lakshmi*, (1970 Ker LJ 458, is not the correct view. The High Court, therefore, was not right in protecting the lease created in favour of the respondent by Mohd. Haji who was a decree-holder auction purchaser at the sale in execution of the ex parte decree which was subsequently set aside.

17. The respondent, however, contends that although he was evicted in restitution proceedings, he can nevertheless maintain a suit on title because as a lessee he enjoyed certain protection under the land reform legislation in Kerala. The Kerala Land Reforms Act, 1964 was in operation at the time when he was evicted on 5-4-1966. Since the suit of the appellant was based on his title on the date when he was evicted, we need to examine the land reform legislation which applied to the tenants in 1966. It is, however, urged by the respondent that in 1966 when he was evicted, his rights under Section 48 of the Malabar Tenancy Act were protected. Section 43 provides that a cultivating tenant shall be entitled to continue on the holding although the rights of his immediate landlord or of any superior landlord have been extinguished, whether by eviction or by redemption of a mortgage or otherwise. This section envisages the creation of a tenancy by the owner of the land. Thereafter, although the rights of the landlord may be extinguished, the tenant can continue. It does not envisage a situation where the person creating the initial tenancy had only a defeasible right to the land of another, not only to his own knowledge but also to the knowledge of his "tenant". Such persons are not protected under Section 43. This is also clearly brought out by the Kerala Land Reforms Act, 1964 which replaced the Malabar Tenancy Act and was the law in force at the relevant time. Under Section 2 (57), a tenant is defined to mean :

"2 (57) any person who has paid or agreed to pay rent or other consideration for his being allowed to possess and enjoy any land by a person entitled to lease that land, and includes....."

(j) A person who is deemed to be a tenant under ....Section 7. Section 7A....."

18. This definition of a tenant clearly refers only to persons who claim from a lessor who is entitled to lease the land. A person who has obtained a lease from somebody who does not have any title to the land will not be a tenant. The respondent, however, placed reliance upon Section 7. This section provides as follows :

"7 : Notwithstanding anything to the contrary contained in Section 52 or any provision of the Transfer of Property Act, 1882, or any other law, or in any contract, custom, or usage, or in any judgment, decree or order of Court, any person in occupation at the commencement of the Kerala Land Reforms (Amendment) Act, 1969 of the land of another situate in Malabar shall be deemed to be a tenant if he or his predecessor-in-interest was continuously in occupation of such land honestly believing himself to be a tenant for not less than two years within a period of twelve years immediately preceding the 11th day of April of 1967."

19. This section applies only to those who are in occupation believing themselves to be tenants. When a person obtains a lease from a lessor whose title is defeasible to his knowledge, he cannot claim that he believed himself to be a tenant. He will be a tenant only so long as the lessor has title to the land. Once the lessor's title is defeated the tenants' rights also disappear. Section 7 is not intended to confer legal immunity to trespassers. A tenant under a person not having title cannot come under the protection of this section nor can the phrase "bona fide believing himself to be a

tenant" save a person encroaching or trespassing on another's land. Reliance was sought to be placed on Section 7B of the Act which was introduced by amending Act 39 of 1969 with effect from 1-1-1970 under which protection is granted to certain persons occupying lands under leases granted by incompetent persons. This section, however, was not on the statute book in 1966 and the respondent cannot avail of it assuming that it grants him any protection.

20. In the premises, the respondent who lost possession as a result of an order being passed in restitution application and was dispossessed pursuant to the order in the restitution application cannot maintain a suit based on his title since he had no title to the land. The High Court, therefore, was not right in upholding the decree of the trial Court. The trial Court found that the Tarwad had obtained possession pursuant to the restitution application. It, however, went on to hold that the respondent had established his title and could recover the property. These findings cannot be sustained in view of what we have said above. The appeal, therefore, is allowed. The decree of the trial Court is set aside and the suit of the respondent is dismissed with costs.

Appeal allowed.