

reversing the decree of the Court below and direct that the suit be dismissed with costs throughout.

Plaintiff is to pay the Court fees to Government.

PARVATI-
BAYAMMA
v.
RAMAKRISHNA
RAU.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar, and Mr. Justice Best.

KRISHNASAMI AYYAR (PETITIONER), APPELLANT,

v.

JANAKIAMMAL AND OTHERS (COUNTER-PETITIONERS AND THEIR REPRESENTATIVES), RESPONDENTS.*

1893.
November 15.
1894.
May 1.

Execution—Sale in execution of decree of mortgaged land—Purchase of equity of redemption by decree-holder under section 294 of the Code of Civil Procedure—Execution of decree in respect of balance—Nature of price paid by purchaser on the purchase of the equity of redemption.

A mortgaged certain land to B, but remained in possession thereof. Subsequently A sold a portion of the said land to C in consideration of her paying off the mortgage debt due to B. C entered into possession, but was unable to satisfy the debt. C died, and A sued C's daughter and legal representative, for damages sustained by him from the non-payment of the purchase money by C. A obtained a decree and, the money not being paid as therein decreed, applied for execution and brought to sale the equity of redemption vested in C by virtue of the sale. By leave of the Court A bid at the Court-sale and bought the right of redemption and recovered back possession of the land sold to C. Subsequently he again applied for execution of the decree in respect of the balance by attachment of certain movable property, and contended that he was bound to give the defendant credit only for the price which he actually paid at the Court-sale for the equity of redemption. The defendant contended that A was bound to give credit for the full value of the land under mortgage:

Held, that having obtained leave of the Court to bid under section 294 of the Code of Civil Procedure, A's position was that of an independent purchaser, and that the price, which an independent purchaser must be taken to pay when he buys property under mortgage for a cash payment made to the mortgagor on account of his equity of redemption, is the cash payment for the equity of redemption *plus* the debt, *i.e.*, the amount undertaken to be paid to the mortgagee, and that for these amounts A was bound to give credit.

APPEAL against the order of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, dated 26th November 1891, passed in

* Appeal against order No. 67 of 1892.

KRISHNASAMI
 AYYAR
 v.
 JANAKIAMMAL. civil miscellaneous petition No. 696 of 1891 in original suit No. 23 of 1888.

The facts of this case appear sufficiently for the purposes of this report from the following judgment of the High Court.

Sundara Ayyar for appellant.

Pattabhirama Ayyar, Subramanya Ayyar, Tyagaraja Ayyar and *Rajaratna Mudaliar* for respondents.

JUDGMENT.—This is an appeal from an order made by the Subordinate Judge at Kumbakonam in execution of the decree passed in favour of appellant, Krishnaswami Aiyar, against the second respondent in original suit No. 23 of 1888 on the file of the Subordinate Court. Appellant owns landed property in the district of Tanjore and mortgaged a portion in 1884 to one Naranappier without possession for Rs. 25,000, which he agreed to repay with interest at 9 per cent. per annum on its security. In order to pay off this mortgage, he sold outright part of the mortgaged property to second respondent's wife, Subbalakshmi (since deceased), on 1st March 1886 in consideration of her undertaking to pay Rs. 25,000 to Naranappier in satisfaction of the mortgage. The purchaser, second respondent's wife, since deceased, was the daughter of a late District Court Vakil named Subbaramanya Aiyar, who gave her by his last will and testament Rs. 25,000 and directed the executor of his will to invest the amount in land, so that the annual income thereof might be enjoyed by her during her life and the corpus might devolve upon her death on her male issue. But the legacy was never paid to Subbalakshmi till her death, nor was she otherwise able to satisfy the mortgage, though she was at once placed in possession of her purchase. By virtue of the purchase, she became the owner of the property subject to the prior mortgage. Subsequent to her death appellant instituted original suit No. 23 of 1888 and claimed Rs. 31,000 as damages sustained by him from non-payment of the purchase money from first respondent, Subbalakshmi's daughter and legal representative, and her father and guardian, second respondent. The decree now under execution was then passed for Rs. 29,353-8-0 with costs and subsequent interest at 9 per cent. per annum against second respondent, and contained the direction that second respondent do pay into Court the decree amount within three months, that the properties mentioned in schedule A referred to herein, and the assets in the hands of respondents 1 to 4 be

liable for the same; that the amount so paid into Court or so realized from the said properties and assets be kept in deposit for three months after such payment or realization, so that second respondent might take action within that time in the District Court to have the property declared free from encumbrance under section 57 of the Transfer of Property Act, and that in default the same be paid to plaintiff (appellant); that interest accruing due during the three months at the above-mentioned rate be also collected from second defendant (respondent) and from the properties and assets above-mentioned, &c.

KRISHNASAMI
 v.
 AYYAR
 v.
 JANAKIAMMAL

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The decree amount not being paid as directed appellant applied for execution and brought to sale the equity of redemption vesting in Subbalakshmi's representative under the sale-deed of March 1886. With the leave of the Court, appellant bid at the Court-sale and bought the right of redemption for the sum of Rs. 2,995, and recovered back by process of Court possession of the land sold to first respondent's mother. On 25th March 1891 he again applied for execution of the decree in respect of the balance by attachment of the legacy of Rs. 25,000 and interest thereon at 6 per cent. per annum from the 15th November 1884 and by the attachment of Subbalakshmi's movables in the hands of the fourth defendant (fourth respondent) her mother Janakiammal. The executor of the will of Subbaramanya Aiyar, his brother, Dandayudapani Aiyar, was also made a party to the execution proceedings. So far as the sixth respondent, the executor, and the fourth respondent, Janakiammal, are concerned, the Subordinate Judge refused execution against them, and from that portion of the order, no appeal has been preferred. One of the matters in controversy in the Court below between appellant and second respondent was the amount for which appellant was entitled to claim further execution or which he was bound to credit in part satisfaction of the decree by reason of the Court-sale. On this point appellant's case was that he was only bound to give respondents 1 to 3 credit for the price which he actually paid at the Court-sale for the purchase of the right of redemption. On the other hand, it was contended for respondents that the amount was the full value of the land under mortgage. The Subordinate Judge upheld this contention and credited the estimated value Rs. 24,578-11-3 to the decree and allowed further execution for

KRISHNASAMI
 AYYAR
 v.
 JANAKIAMMAL.

the balance. Hence this appeal. It is urged on appellant's behalf that no more than his bid at the Court-sale in the previous execution ought to have been credited towards the decree. We do not consider that this contention can be maintained. What appellant bought at the Court-sale and intended to buy was the equity of redemption as it vested in Subbalakshmi under the sale-deed of 10th March 1886. It is an undisputed fact that the mortgagee, Naranappier, never had possession of the property under mortgage; that the appellant first continued to remain in possession; that it passed to Subbalakshmi when the property was sold to her subject to the mortgage debt; and that possession was delivered back to appellant by process of Court by reason of his purchase at the Court-sale.

It is also conceded that he bought after obtaining the leave of the Court to bid under section 294, Code of Civil Procedure, and that his possession is that of an independent purchaser.

In support of the order appealed against, reliance is placed on four decisions, *Hart v. Tara Prasanna Mukherji*(1), *Sheonath Doss v. Janaki Prosad Singh*(2), *Mahabir Pershad Singh v. Macnaghten*(3), and *Gunga Pershad v. Jawahir Singh*(4). In the first case the point determined was that when a mortgagee sells a portion of the mortgaged property under his decree and purchases it himself, he is bound before he can proceed further and claim rateable distribution under section 295 to prove that there is a balance still due to him and that the property sold and purchased by him realized a fair price. The ground of decision is that the mere fact that the property was purchased at auction for a certain sum of money is not alone sufficient to prove its real value and it "would be manifestly inequitable to allow a mortgagee to buy in the mortgaged property at auction for a sum far below its real value and then to go on against other property of the mortgagor to the injury of other creditors."

In the present case the question arises not between the holder of a money decree and the holder of a mortgage decree, but between the mortgagor and the mortgagee who has also become purchaser of the equity of redemption with leave of the Court previously obtained.

(1) I.L.R., 11 Calc., 718.

(3) I.L.R., 16 Calc., 682, 692.

(2) I.L.R., 16 Calc., 132.

(4) I.L.R., 19 Calc., 4.

The second case, *Sheonath Doss v. Janki Prosad Singh*(1), decided that a mortgagee, who buys the mortgaged property after obtaining leave of the Court, does not stand in a fiduciary position towards the mortgagor, and he is entitled to further execution after deducting the price actually paid by him at the Court-sale. Again in *Mahabir Pershad Singh v. Macnaughten*(2), the Privy Council referring to the case of *Kamini Debi v. Ramlochan Sirkar*(3) observed that the mortgagee must be taken to have purchased as trustee only when he purchases without leave of the Court and that if he obtains leave of the Court and then buys the right of redemption at a judicial sale, the leave puts an end to his prior disability and puts him in the position of an independent purchaser. In the fourth case of *Gunga Pershad v. Jawahir Singh*(4), it was decided that the mortgagee, who bought the mortgaged property at a judicial sale after previously obtaining leave of the Court to bid, was in the same position as an independent purchaser and bound to give credit to the mortgagor *not* for what the mortgaged premises were worth, but for the actual amount of his bid. These three cases proceed on the principle that the position of a mortgagee who would naturally desire to buy the equity of redemption as cheaply as possible is incompatible with the position of a purchaser at a judicial sale who has to pay a fair price, and that unless he obtains the leave of the Court the mortgagee's position must be taken to be fiduciary and carry with it the obligation to account for what the property is really worth. It is true that a decree-holder is in the same position, and section 294 of the Code of Civil Procedure is framed on the above principle; but in the present case it is an admitted fact that appellant had obtained leave of the Court to bid. The decisions cited are not on all fours with the present case and do not support the Subordinate Judge's order. Our decision must depend on the question of what is to be considered the price which an independent purchaser must be taken to pay when he buys property under mortgage for cash payment made to the mortgagor on account of his right of redemption. Taking the case of a purchaser at a voluntary sale of the mortgaged property by the mortgagor, what is actually paid is not the price of the mortgaged property, but that of the right of redemption, the price of the mortgaged property being the price which he pays

KRISHNASAMI
 AYYAR
 v.
 JANAKIAMMAL.

(1) I.L.R., 16 Cal., 132.

(2) I.L.R., 16 Cal., 682, 692.

(3) 5 B.L.R., 450.

(4) I.L.R., 19 Cal., 4.

KRISHNASAMI
 AYYAR
 v.
 JANAKIAMMAL.

for the right of redemption *plus* the amount undertaken to be paid to the mortgagor's creditor, the prior mortgagee. In the case before us appellant stands in the position of one who buys property under mortgage partly for cash paid to the vendor and partly for an undertaking to pay a debt due by him. The price in that case is the *cash payment plus the debt*, since it makes no difference in principle whether the whole price is paid in cash to the vendor or partly to the vendor and partly to the vendor's creditor. So far as the vendor is concerned, he parts with the whole property, and as between him and the purchaser the price of the property consists not in the value of the mere equity of redemption, but in that *plus* the value of the mortgage right. It will be seen from White and Tudor's Notes to the leading case of *Howard v. Harris*(1) that the person entitled to the equity of redemption is to be regarded as the owner of the land and he may deal with it as land. It is on this view that appellant obtained possession by process of Court, and the price for which he is bound to give credit to his vendor ought to be computed as the sum paid by him on account of the naked equity of redemption *plus* the amount of the mortgaged debt which he undertook to pay. This amount, however, exceeds the amount for which the Subordinate Judge held that credit should be given, and there is no appeal from the other side. On this ground we confirm the order of the Subordinate Judge and dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

GOPAL REDDI (PLAINTIFF), APPELLANT,

v.

CHENNA REDDI AND ANOTHER (DEFENDANTS NOS. 1 AND 3),
 RESPONDENTS.*

1894.
 February 12.
 March 7.
 November
 12.

Riparian owners—Effect of an embankment erected by a superior riparian owner on the cultivation of lands lower down the stream—Cause of action.

The defendants, being owners of land on the banks of a jungle stream, raised embankments which prevented their lands from being flooded, but caused the stream

(1) II White & Tudor, p. 1042. * Second Appeals Nos. 390 and 1670 of 1893.