

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Bakewell.

MEDA CHINNA SUBBAMMA (PETITIONER), APPELLANT,

1917,
October 10.

v.

PAPIREDDIGARI CHENNAYYA, MINOR BY HIS GUARDIAN *ad litem* NAGA PEDDAYYA (LEGAL REPRESENTATIVE OF THE RESPONDENT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), ss. 144 and 151 and Order XXI, r. 90—Restitution—Order refusing to set aside sale—Order reversed on appeal—Auction-purchaser, not a party to proceedings or appeal—Application by judgment-debtor for restitution against auction-purchaser, whether maintainable—Auction-purchaser, whether a representative of decree-holder.

Where an order passed under Order XXI, rule 90, of the Civil Procedure Code refusing to set aside a sale held in execution of a decree, was reversed on appeal but the auction-purchaser was not made a party to the proceedings for setting aside the sale or to the appeal therefrom and the judgment-debtor subsequently applied for restitution against the auction-purchaser :

Held : (1), that section 144 of the Civil Procedure Code did not in terms apply, as no decree was varied or reversed but only an order under Order XXI, rule 90, was reversed on appeal ;

(2) that, assuming that section 151 allowed an order for restitution in appropriate cases not falling under section 144, such an order could not be made unless the auction-purchaser was a party before the Appellate Court which set aside the sale ; and

(3) that a Court auction-purchaser was not a representative of the decree-holder.

Manicka Udayan v. Rajagopala Pillai (1907) I.L.R., 30 Mad., 507 ; and *Nadamuni Narayana Iyengar v. Veerabhadra Pillai* (1911) I.L.R., 34 Mad., 417, referred to.

APPEAL against the order of G. GANGADHARA SOMAYAJULU, the Temporary Subordinate Judge of Cuddapah, in Appeal No. 71 of 1916, preferred against the order of T. A. NARASIMHACHARIYAR, the District Munsif of Nandalur, in Civil Miscellaneous Petition No. 183 of 1913, in Original Suit No. 168 of 1905.

The respondent purchased the lands in dispute in an auction sale held in execution of a decree passed against the appellant and another in favour of a third party in Original Suit No. 168 of 1905 on the file of the District Munsif of Nandalur. The

* Appeal Against Appellate Order No. 71 of 1916,

SUBBAMMA
v.
CHENNAYYA.

appellant applied under Order XXI, rule 90, of the Civil Procedure Code to set aside the sale; the petition was dismissed; the appellant preferred an appeal from the order refusing to set aside the sale; the Appellate Court reversed the order and set aside the sale. The respondent, who was the auction-purchaser, was not made a party to the proceedings taken to set aside the sale or to the appeal in which the sale was set aside. The appellant, who was the second defendant, filed an application in the District Munsif's Court for restitution against the auction-purchaser (respondent) by delivery of possession of the lands which had been purchased by him and put in his possession and also claimed to recover mesne profits from him. Both the lower Courts dismissed the petition as incompetent; the second defendant preferred this civil miscellaneous second appeal.

V. Ramesam for the appellant.

N. Chandrasekara Ayyar for the respondent.

The judgment of the Court was delivered by

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—Section 144 of the Code of Civil Procedure cannot, in terms apply as no *decree* was varied or reversed but only an *order* under Order XXI, rule 90, refusing to set aside a sale in execution, was reversed by the Appellate Court.

Assuming that section 151 of the Code of Civil Procedure allows an order for restitution in appropriate cases even though it does not fall under section 144 of the Code of Civil Procedure, such an order cannot be made on the analogy of section 144 unless the auction-purchaser was a party before the Appellate Court which set aside the sale in the proceedings instituted for setting it aside.

The mere fact that the decree-holder was a party to those proceedings will not suffice as the Court auction-purchaser is not the representative of the decree-holder. *Manicka Udayan v. Rajagopala Pillai*(1) which held otherwise has been disapproved of in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai*(2) to both of which decisions the present learned CHIEF JUSTICE was a party.

The Munsif says, that the 'auction-purchaser need not at all be a party to any proceedings for confirmation of or setting aside the sale.' The petition for restitution does not expressly

(1) (1907) I.L.B., 30 Mad., 507.

(2) (1911) I.L.B., 34 Mad., 417.

state that the Court auction-purchaser was a party to the proceedings taken to have the auction sale set aside. No records have been produced before us to establish that fact. We therefore cannot hold that section 151 empowers the Court to pass an order for restitution against a person not shown to be a party to and so bound by the order of the Appellate Court setting aside the sale.

SUBBAMMA
v.
CHENNAYYA.
—
SADASIVA
AYYAR, J.

The appeal is dismissed with costs.

K.R.

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling
and Mr. Justice Kumaraswami Sastriyar.*

PALAKKUNNATH ILLATH GOVINDAN NUMBUDIRI
(PLAINTIFF),

1917,
October 11.

v.

OTTATHAYIL MOIDIN (DEFENDANT).*

Stamp Act (II of 1899), sec. 25—Marupat—Counterpart of lease—Document giving a charge on improvements for arrears of rent—Stamp duty, whether payable both as counterpart and as mortgage.

Where a tenant executed a *marupat* in favour of a landlord, agreeing therein that the arrears of rent, if any, should be a charge on the improvements that might be made by him :

Held, that a *marupat* is the counterpart of a lease or a deed executed by a tenant promising to pay a certain rent, and that the document in question must be stamped both as a counterpart and as a mortgage.

CASE stated under section 60 of Stamp Act (II of 1899) by H. D. C. REILLY, the acting District Judge of North Malabar, in Original Suit No. 675 of 1915, on the file of S. V. PADMANABHA AYYANGAR, the District Munsif of Taliparamba.

This is a reference made to the High Court by the District Munsif of Taliparamba through the District Judge of North Malabar under section 60 of the Indian Stamp Act (II of 1899) in respect of a document sued on by the landlord to recover rent in Original Suit No. 675 of 1915 on the file of the District Munsif's Court.

The document sued on was a *marupat* or counterpart of a lease, executed by the tenant ; it contained a provision charging

* Referred Case No. 7 of 1916.