APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Moore.

SABAPATHI PILLAY, APPELLANT (FIRST DEFENDANT)

v.

THANDAVAROYA ODAYAR, RESPONDENT (PLAINTIFF*)

1919, August 14.

Execution sale—Purchase in Court sale of specific properties when judgment-debtor an undivided member—Subsequent decree for partition—Allotment to judgment-debtor of some items purchased and other properties—Right of execution purchaser for compensation by way of substitution.

A purchaser bought in Court auction specific items of properties said to belong to a member of a joint Hindu family. Subsequently there was a partition decree and only some of these items fell to the share of the judgment-debtor.

Held, that the purchaser was entitled to only such of the items as are common to the sale-certificate and the share of the judgment-debtor under the decree, and that he could not compel the judgment-debtor to give him other properties in substitution for the remaining properties comprised in the sale certificate.

SECOND APPEAL against the decree of E. H. WALLACE, District Judge of Tanjore, in Appeal No. 400 of 1917 preferred against the decree of K. S. GOPALARATNAM AYYAR, the District Munsif of Tiruvadi, in Original Suit No. 192 of 1916.

The facts are given in the judgment. The first defendant against whom a decree was given by both the lower Courts preferred this second appeal.

A. V. Viswanatha Sastri for *S. Muttayya Mudaliyar* for appellant.

T. M. Krishnaswami Ayyar for respondent.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The plaintiff's vendor purchased certain properties in execution of a money decree against the first defendant and obtained a certificate of sale—Exhibit A. At the time of the attachment, a partition suit between the first defendant and his co-parceners was pending. The decree in the partition suit allotted certain properties to the first defendant. On comparing the sale certificate, Exhibit A, with the list of the properties which the first defendant obtained under the partition decree, it is found that the sale certificate included items which did not correspond to the items in the partition decree.

* Second Appeal No. 467 of 1918.

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Plaintiff obtained 2·83 cents under the sale certificate. His suit was for the allotment of this extent from the items given under the partition decree. Some of the items being common to both, there will be no difficulty in decreeing them to the plaintiff. As regards those which are not found in the partition decree, the question is whether the plaintiff is entitled to have their equivalent from out of the properties which fell to the first defendant's share in the partition.

It was first argued that whatever may be the plaintiff's rights, he is not entitled to claim that the exact extent, minus the extent of the items which are common, should be carved out of the other items. There is much to be said for this argument, because the properties that were allotted at the partition might be more valuable than the properties purchased at the auction. The latter might be unproductive punja lands. But the point was not put in issue in the Courts below or even here specifically. The consideration of the question would necessitate the taking of evidence; we have therefore refused to hear the question argued.

The more important question is, has the plaintiff any right or equity against the first defendant to compel him to give properties in substitution of those which were purchased at the Court auction. It was contended by Mr. A. V. Viswanatha Sastri that as there is no warranty in a Court sale, as the principle of *caveat emptor* applies to it, and as the plaintiff has chosen to bid for and purchase specific properties, he is not entitled to claim their equivalent from other properties of his judgment-debtor. There is no direct authority on the question. *Thakur Barmha* v. *Jiban Ram Marwari*(1), only lays down that there is no warranty in a judicial sale.

Mr. T. M. Krishnaswami Ayyar drew our attention to the decision of the Judicial Committee in *Byjnath Lall* v. *Ramoodeen Chowdry*(2). That was a case of a mortgage of specific properties belonging to an undivided family. The case arose before the Transfer of Property Act came into force. Their Lordships say :—

"It is therefore clear that the mortgagor had power to pledge his own undivided share in these villages : but it is also clear that

(1) (1914) I.L.R., 41 Calc., 590 (P.C.) (2) (1874) 1 I.A. 106.

he could not, by so doing, affect the interest of the other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty."

This principle was apparently enunciated as arising from first principles of jurisprudence, and was not based upon any statutory recognition of warranty. No doubt, by the Transfer of Property Act, the legislature has provided for a warranty in favour of the mortgagor (vide Section 65), but the decision above quoted was wholly independent of legislative warranties. In *Manjaya* v. *Shanmuga*(1), SANKARAN NAYAR, J., applied this principle to a case of private sales of specific properties by a co-parcener. Mr. A. V. Viswanatha Sastri contended that this decision is opposed to principle, and to the judgment of BHASHYAM AYYANGAR, J., in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(2). In this latter case what the learned Judge decided was, that where a sale is made of specific items before partition, the proper remedy of the purchaser is to sue for partition and to claim the allotment to his vendor of the specific items sold to him. It was also held, that if this cannot conveniently be done, the right to compensation for selling properties without title can be enforced against the vendor. This does not affect either SANKARAN NAYAR, J's., dictum in *Manjaya* v. *Shanmuga*(1) or the present case. Further, SANKARAN NAYAR, J.'s, dictum has been accepted as correct by OLDFIELD and SADASIVA AYYAR, JJ., in their Order of Reference in *Rangayya Reddy* v. *Subramania Ayyar*(3).

The further question is, whether these rulings are applicable to adjustment of rights dependent upon Court sales. The point was thrice argued, as we had doubts on the question and as it is *res integra*. The learned vakils on both sides have placed all the available authorities before us—but none of them really touches the question we have to decide. There are some general principles on which alone we can rest our decision :—(1) There is no warranty in a Court sale ; see *Thakur Barmha* v. *Jiban Ram Marwari*(4). (2) There is no privity of contract between an auction purchaser and a judgment-debtor. Under the old

(1) (1915) I.L.R., 38 Mad., 684.
(2) (1902) I.L.R., 25 Mad., 690 (F.B.).
(3) (1917) I.L.R., 40 Mad., 865 (F.B.).
(4) (1914) I.L.R., 41 Calc., 590 (P.C.).

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Code of Civil Procedure if the purchaser had reason to believe that there was no saleable interest at all in the property sold, he had a right of action against the decree holder for refund of money. The new Code has taken away that remedy, and limits the purchaser's rights to an application for refund. There is no indication in the Code that the purchaser has any remedy against the judgment-debtor. (3) It must be remembered that it is the decree holder that brings the property to sale; he prepares the proclamation and to the best of his knowledge places before the public all the available information in respect of the property to be sold. Although the judgment-debtor is expected to assist the Court in settling the proclamation, and although his failure to do so may entail some serious consequences, there is no provision of law which brings him into contact with the bidders at a sale. These persons are bound by the principle of *caveat emptor*. They take the risk of the property corresponding to the description given. If that fails, they can have no remedy against the judgment-debtor, because there was no act, or representation, by him which has contributed to the result.

Having regard to the principles above indicated, it seems to us that there is no justification for extending the theory of substitution, which has been enunciated in respect of persons standing in the relation of promisor and promisee, to persons who are strangers to each other. In this view, we must hold that the plaintiff is not entitled to any property, against the defendant, other than those which his vendor purchased in the Court sale. As the parties cannot agree in this Court, regarding the identity of properties, we must reverse the decree of both the Courts below, and remand the suit to the Court of first instance for ascertaining what the properties are, in the possession of the defendant, which are identifiable with the items purchased at the Court auction.

Plaintiff is entitled to a decree to the share of the judgment-debtor which his vendor purchased at the Court auction. There will be a preliminary decree as above indicated, and the Court of first instance will pass the final decree in the usual course. Each party must bear his own costs hitherto incurred. Further costs will be provided for in the revised decree.

N.R.