

## APPELLATE CIVIL.

*Before Mr. Justice Devadoss and Mr. Justice Wallace.*

T. S. RAMASWAMI AYYANGAR, OFFICIAL  
RECEIVER, MADURA  
(PETITIONER—FIRST DEFENDANT), APPELLANT,

1925,  
January 15.

v.

CHETTIAPPA CHETTY AND SIX OTHERS (RESPONDENTS  
1, 2 AND 4 TO 8) RE-SPONDENTS.\*

*Court Sale—Purchase not by decree-holder but by a party to the suit—Subsequent reversal of decree, effect of, on Court sale.*

It is only *bona fide* purchases made in Court auction by persons who are not parties either to the suit or to the decree that are saved on a subsequent reversal of the decree under which the sale was held. A purchase made in Court auction by one who though not the decree-holder is yet a party to the suit or decree is liable to be set aside if the decree under which the sale was held is eventually reversed on appeal.

*Narandra Chandra v. Jogendra Narain* (1914) 20 C.L.J., 469, followed. *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* (1888) 1 L.R., 10 All., 166 (P.C.), explained.

APPEAL against the decree of R. A KRISHNASWAMI AYYAR, Subordinate Judge of Dindigul, in Appeal No. 34 of 1921, preferred against the order of L. NARAYANA AYYAR, District Munsif of Periyakulam, in E.A. No. 1170 of 1919 in O.S. No. 1142 of 1917.

The facts and arguments sufficiently appear from the judgments.

*B. Sitarama Rao and S. R. Muthuswami Ayyar* for appellant.

*T. M. Krishnaswami Ayyar and N. Ramachandra Ayyar* for respondents.

DEVADOSS, J.—The appellant was the first defendant in Original Suit No. 1412 of 1917. The suit was by a

\* Appeal against Appellate Order No. 104 of 1922.

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mortgagee against the mortgagor (first defendant) and the purchaser was impleaded as second defendant as he had a mortgage subsequent to that of the plaintiff. The appellant was ex parte in the District Munsif's Court. A decree was passed in favour of the plaintiff and the hypotheca was sold and was purchased by the second defendant. The ex parte decree was reversed on appeal and the first defendant applied to have the sale set aside. The first defendant having been adjudicated an insolvent, the Official Receiver continued the proceedings before the District Munsif. The District Munsif held that the second defendant was not a decree-holder and therefore the sale was not liable to be set aside. On appeal by the Official Receiver the Subordinate Judge held that the order of the District Munsif was right and dismissed the appeal. The Official Receiver has preferred this appeal.

The contention of the appellant is that the purchase by the second defendant is liable to be set aside as the decree in execution of which he purchased the property was set aside on appeal. It is well settled that, if a decree-holder purchases the property of the judgment-debtor in execution of his decree which is afterwards set aside, his purchase is liable to be set aside at the instance of the judgment-debtor. The contention for the respondent is that the second defendant is not a decree-holder and therefore his purchase is good against the judgment-debtor. In *Zain-ul-Abidin Khan v. Muhammad Asghar Ali Khan* (1), it was held that a sale to a bona fide purchaser in execution of a decree was not liable to be set aside if the decree was afterwards reversed on appeal. Their Lordships observed at page 172 :

"It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased

under their own decree which was afterwards reversed on appeal, and the bona fide purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order."

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The question is whether the protection given to bona fide purchasers extends to persons who are parties to the suit in which the decree is passed, but who are not given any relief under the decree. In order that a purchaser may have the benefit of the sale under a decree which is afterwards set aside, he must be a bona fide purchaser. If he is not a bona fide purchaser then the purchase by him is liable to be set aside. A stranger to the decree is not bound to enquire into the merits of the plaintiff's claim or into the validity of the decree; but a party to the suit is in a different position, and it is his duty to enquire into the nature of the plaintiff's claim and the validity of the decree passed in plaintiff's favour. Supposing the plaintiff asked for relief in the alternative against two defendants, if the second defendant satisfies the trial Court that the first defendant alone is liable and on the strength of that, a decree is passed and his property is brought to sale, and if on appeal the decree is set aside and the second defendant is held liable, can it be said that the second defendant is entitled to keep the property of the first defendant purchased by him in Court auction notwithstanding the reversal of the decree? Supposing a defendant contests the plaintiff's suit on the merits and a decree is passed not against him but against another defendant and if the property of the defendant against whom the decree is passed is brought to sale and if the defendant who put forward the contention that the plaintiff's claim is a fraudulent one purchases the property and if the decree is afterwards set aside can the defendant who purchased the other defendant's property be entitled to

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say that his purchase is good notwithstanding the fact that he was aware of the fraudulent nature of the plaintiff's claim. It may be said in such a case that he is not a bona fide purchaser. The decision in *Zain-ul-Abd in Khan v. Muhammad Asghar Ali Khan*(1) applies only to a bona fide purchaser. In that case, the purchasers, whose purchase was upheld by the Privy Council, were strangers to the decree. It does not appear from the report whether they were, or were not, strangers to the suit. It cannot be assumed that the decision has no application to purchasers who are parties to the suit, but in whose favour no decree has been passed, from the mere fact that Sir Barnes Peacock uses the expression, "bona fide purchasers who are no parties to the decree." A party to a suit cannot be said not to be a party to the decree if he gets no relief under it. If a party to a suit is on record, the decree is bound to make mention of him; and the principle of *res judicata* or of estoppel may apply to him whether he gets, or not, any relief under the decree. The decision, therefore, in my opinion covers the case of a party in whose favour no relief is given under the decree.

The contention of Mr. Krishnaswami Ayyar is that the principle of restitution is applicable only to decree-holders who purchase the property of the judgment-debtor in execution of, or who get some benefit under, their decree, and persons, in whose favour a decree is not passed, are not bound to make restitution of what they have got by purchase in a Court auction. The cases relied upon by him do not support the contention that the defendant, in whose favour there is no decree, is entitled to keep the property which he purchased in execution of the decree against another defendant

(1) (1888) I.L.R., 10 All., 166 (P.O.)

even if the decree be upset either in appeal or in any subsequent proceeding. In *Syed Nathadn Sahib v. Nattu Mudaly*(1) it was held that, where property is purchased at a sale in execution of a decree, the purchase is subject to the final result of the litigation between him and the judgment-debtor. In *Moitheensa Rowthen v. Apsa Bivi*(2), the purchaser was a stranger to the decree. In *Raghavachari v. Pakkiri Mahomed Rowther*(3), the purchaser was not a party to the suit. As observed in *Dorasami Ayyar v. Annasami Ayyar*(4) at page 310,

“the principle of the doctrine of restitution is that on the reversal of a judgment the law raises an obligation in the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost.”

It is contended for the respondent that this must be ~~limited~~ to the decree-holder who gets benefit by reason of his decree. But I am unable to accept this view. In this case, if the hypotheca had fetched a very large price and if a balance remained after satisfying the plaintiff, the balance would go to satisfy the second defendant who is a puisne mortgagee. Even though a defendant may not have a decree in his favour, in many cases, he may get ultimately a benefit under the decree. In such cases it cannot be said that he is a stranger to the decree. The decision in *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan*(5) does not seem to have been brought to the notice of the learned Judges who decided *Doraisami Ayyar v. Annasami Ayyar*(4). The American decision in *Quan Wo Chung Co. v. Laumeister*(6) in laying down,

“all that the one has gained and all that the other has lost is due to the agency of the Court and therefore no injustice is

(1) (1904) I.L.R., 27 Mad., 98.

(2) (1913) I.L.R., 36 Mad., 194.

(3) (1910) 30 M.L.J., 497.

(4) (1900) I.L.R., 28 Mad., 806.

(5) (1888) I.L.R., 10 All., 166.

(6) (1890) 17 American State Reports, 261.

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done in restoring the party wrongfully dispossessed without stopping to investigate the rights of the party who has thereby gained the possession: ”

has stated the principle too broadly. I think the correct principle is that a bona fide purchaser who is not a party to the suit or proceeding in which the auction sale is held, is entitled to hold the property even though the decree or order in execution of which the auction sale is held is subsequently reversed or set aside.

In *Yellappa v. Ramachandra*(1), FARRAN, C.J., observes :

“ The Privy Council in a case very analogous to the present has decided that where a person, a stranger to the proceedings, purchases property bona fide at an auction sale held in execution of a decree, his sale cannot be set aside on the ground that the existence of a cross decree rendered the sale in execution improper ”

If the contention of the respondent is good, then a defendant, in whose favour there is no decree, would be entitled to keep the property which he purchased in Court auction, even though he knew that there was a cross-decree in favour of the defendant whose property was sold in execution. I think the principle of the decisions in *Rewa Mahton v. Ram Kishen Singh*(2), and in *Yellappa v. Ramachandra*(1) is against the contention of the respondent.

This point was specifically raised and decided by a Bench of the Calcutta High Court in *Narendra Chandra v. Jogendra Narain*(3). In that case MOOKERJEE, J., after an exhaustive examination of English and American cases, observed :

“ An examination of these cases shows that protection is afforded to the purchaser only when he is a stranger to the suit ”

This principle is not only consonant with equity, but it also saves the Court the trouble of enquiring whether

(1) (1887) I.L.R., 21 Bom., 463. (2) (1887) I.L.R., 14 Calc., 18 (P.C.).

(3) (1914) 20 Calc. L.J., 469.

the defendant, in whose favour there is no decree at the time of the sale, would be entitled to some benefit after the sale. I think the protection which is given to a bona fide purchaser should not be extended to a defendant or a party to the suit even though he gets no benefit directly under the decree; in other words, it is only a bona fide purchaser, who is not a party to the suit or proceeding that is entitled to keep the property purchased by him. In all other cases the purchase is liable to be defeated on the reversal of the decree in execution of which the sale is effected.

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In the result the appeal is allowed and the sale to WALLACE, J the second defendant is set aside with costs throughout.

WALLACE, J.—I have had the advantage of perusing the judgment of my learned brother and I am not prepared to differ from his opinion in the case. I was at first inclined to hold that in such a case the principle of restitution, that the restoration to his *status quo ante* of a person wrongfully dispossessed by the agency of the Court, should be enforced only against the party at whose instance the decree has been enforced, but on further consideration I think, as at present advised, that this salutary principle of restitution should be enforced as the rule, and that exceptions to that rule should be allowed only so far as authority by which we are bound has allowed them. The Privy Council in *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* (1) has laid down that a bona fide purchaser not a party to the decree forms an exception to the rule, and we are not referred to any case which has definitely extended the exception to auction purchasers who are parties to the suit or decree, but who had not themselves enforced the decree and brought about the auction sale.

I therefore agree in the order proposed by my learned brother.

N.B.