

1946 Present : Wijewardene S.P.J. and Jayatileke J.

WIJEYERATNE, Appellant, and MENDIS APPU *et al.*,  
Respondents.

273—D. C. Kalutara, 22,902.

*Sale—Purchase of property by decree holder at execution sale—Subsequent transfer by him to a bona fide purchaser—Validity of the bona fide purchaser's title if the decree is subsequently set aside.*

Where at a sale in execution of a decree the decree holder purchases property which he thereafter sells to a *bona fide* purchaser the title of the latter is not affected if, subsequent to the sale in his favour, the decree under which the property was sold to the decree holder is set aside by Court.

**A** PPEAL from a judgment of the District Judge of Kalutara.

*N. E. Weerasooria, K.C.* (with him *U. A. Jayasundere* and *Vernon Wijetunge*), for the plaintiff, appellant.

*E. B. Wikramanayake*, for the defendants, respondents.

August 26, 1946. WIJYEWARDENE S.P.J.—

The plaintiff was in 1932 the owner of the land forming the subject-matter of this action. By P 3 of 1932 the plaintiff leased the land to the first and the third defendants for a term of twelve years commencing from November 11, 1932, for a sum of Rs. 420 paid to the plaintiff at its execution. It was further provided by P 3 that, if the lessees put up a boutique on the leased land, they should pay to the plaintiff additional rent at Rs. 60 a year during the last six years of the lease.

The second defendant, an uncle of the plaintiff, sued the plaintiff in C. R. Kalutara 8,995 and obtained judgment by default in November, 1935. In execution of that decree the land in question was sold in July, 1946, for Rs. 105. The second defendant became the purchaser at that sale, obtained Fiscal's conveyance D 2 of November 4, 1936, and conveyed his interest in the land to the first defendant by D 3 of November 17, 1936, for Rs. 200.

The plaintiff sued the first and the third defendants in C. R. Kalutara 10,181 in June, 1941, for the recovery of Rs. 25 which he said was due to him as rent for five months under P 3 in respect of a boutique constructed by them in January, 1941. The first defendant filed answer in August, 1941, denying the plaintiff's right to recover any rent and claiming the property by virtue of D 3. That action was dismissed in February, 1942, as the plaintiff was absent on the date of trial.

In September, 1941, the plaintiff applied in C. R. Kalutara 8,995 for the vacation of the decree of 1935 entered against him. Notice of that application was served on the second defendant and as he did not show cause the decree was set aside and the plaintiff was allowed to file answer in that case. As the second defendant failed to appear on the trial date, decree was entered on December 11, 1941, dismissing the case.

The plaintiff, thereupon, filed the present action against the first defendant on November 6, 1942, alleging that the first defendant was wrongfully claiming to be the owner of the land. The first defendant filed answer claiming the land under D 3. The second and the third defendants were subsequently added as parties on the application of the plaintiff's Proctor. The present appeal is by the plaintiff against the decree of the District Court dismissing his action.

I wish to observe that the issues framed at the trial of this case are of the most unsatisfactory nature. Some dealt with matters about which there was no dispute while the others were of too general a nature. Though, no doubt, it is usual for the practitioners to suggest issues, the duty rests on the trial Judge to see that the case proceeds to trial on proper issues which set out precisely the questions to be determined by him.

The only point that was argued at the hearing of the appeal was whether the first defendant lost his title on D 3 of 1936 by reason of the reversal of the original decree in C. R. Kalutara 8,995 and the dismissal of that action in 1941. That point had not been raised specifically in the issues framed at the trial.

There is no evidence placed before us as to the grounds on which the original decree in C. R. Kalutara 8,995 was set aside. The law has been clearly established in a series of cases that where the decree holder

himself is the purchaser at the sale in execution, the sale may be set aside if the decree is subsequently reversed. It was sought to be deduced from this that the first defendant who got his conveyance D 3 from the decree holder—the purchaser at the Fiscal's sale—obtained also a title which was liable to be set aside on the reversal of the decree. We informed Counsel at the argument that we were unable to assent to that proposition. Nothing has been proved or even alleged against the *bona fides* of the first defendant. He gave evidence at the trial that he informed the plaintiff in 1936 that the land was going to be sold by the Fiscal and that he bought it later for Rs. 200 from the decree holder as he was interested in the property which he had taken under a lease. All that evidence stands uncontradicted. On the other hand there is a suggestion made by the first defendant in his evidence that the plaintiff and the second defendant, plaintiff's uncle, acted in collusion in getting the original decree in C. R. Kalutara 8,995 vacated. The evidence of the plaintiff throws no light on the proceedings in that case.

I find that the view expressed by us at the argument is in consonance with the decisions of the High Court of Madras in *Marimuthu Udaiyan et al. v. Subbaraya Pillai et al*<sup>1</sup> and in *Sheik Ismal Rowther et al. v. Rajab Rowther*<sup>2</sup>. In the latter case the appellants were *bona fide* purchasers from the first defendant who had purchased a property in execution of a decree obtained by him against the plaintiff. Subsequent to the purchase by the appellants the decree was set aside on the ground that it had been obtained by fraud. Holding that the title of the appellants was not affected by the reversal of the decree Subrahmania Ayyar J. and Benson J. held :—

“ Assuming that the first defendant in obtaining the decree had been guilty of misrepresentation or fraud, the proceedings were only voidable, and a *bona fide* purchaser from him is entitled to rely on his title as such. The plaintiff had only an equity to set aside the proceedings which were the result of fraud or misrepresentation, and that equity cannot be allowed to prevail against persons in the position of the appellants.”

“ It is by no means clear that it was the duty of the appellants when aware that their vendor's title was under a Court sale, to refer to the decree on which the sale was held ; but, assuming that it was, we are unable to agree to the argument urged for the plaintiff that a reference to the decree as it stood before it was set aside would have shown any flaw in the title of the first defendant so as to fix the appellants with notice of the first defendant's fraud.”

I am aware that a contrary view has been taken in *Satis Chandra Ghose v. Rameswari Dasi et al*<sup>3</sup>. The High Court of Calcutta based its decision on the following passage in the judgment of the Privy Council in *Zain-ul-Abdin Khan v. Asghar Ali Khan*<sup>4</sup>.

“ Some of the defendants were the decree-holders, and some were persons who came in under them ; but all the defendants who are in

<sup>1</sup> (1903) 13 *Madras Law Journal* 231.

<sup>2</sup> (1906) 30 *Indian Law Reports (Madras Series)* 295.

<sup>3</sup> (1915) *All India Reporter* 42 *Calcutta* 363.

<sup>4</sup> (1888) 10 *Allahabad* 166.

that position may for the purpose of this judgment be classed under the head of the decree-holders. Others of the defendants were not decree-holders, but merely purchasers under the execution and strangers to the decree upon which the execution issued."

The High Court of Calcutta appears to have inferred from the above passage that the Privy Council enunciated therein a principle that the purchasers from the decree holders were in the same position as the decree holders themselves with regard to the validity of their claims to property sold in execution of a decree subsequently reversed. That inference, I would say with respect, is erroneous as may be seen from an examination of the Privy Council decision. The facts in *Zain-ul-Abdin Khan v. Asghar Ali Khan* (*supra*) were briefly as follows:—An *ex-parte* decree was entered in 1874 directing A, *inter alia*, to pay a sum exceeding Rs. 100,000 to X, Y and Z. That decree was set aside by the Privy Council about 1879 and at the subsequent hearing of the suit before the High Court of Allahabad a decree was entered in 1880 reducing the amount payable by A to X, Y and Z to Rs. 3,746 and costs taxed at Rs. 4,908. Meanwhile, X, Y and Z executed the decree of 1874 and several properties of A were sold in execution on various occasions. The first sale was on November 17, 1874, to B for Rs. 5,050 and the sales on subsequent occasions in 1874, 1875 and 1876 were to X, Y and Z and also to C, D and E who were not parties to the action. After 1880, A filed an action against (i.) B, (ii.) X, Y and Z, and (iii.) purchasers from X, Y and Z to set aside the sales in execution. A, however, stated in his plaint that the sale to B "might stand good as satisfying what was due under the decree of 188". C, D and E were subsequently added as parties to an order of Court. The Subordinate Judge who heard the case set aside the sales of (i.) the property claimed by B, (ii.) the properties claimed by C, D and E, and (iii.) the properties claimed by X, Y and Z and the purchasers from X, Y and Z. An appeal was preferred to the High Court against that judgment by B, C, D and E *alone* and the High Court reversed the judgment of the Subordinate Judge against the appellants on the ground that the sales to them were not rendered invalid by the modification of the *ex-parte* decree of 1874. The High Court decreed that the "plaintiff's (A's) action will stand dismissed". On an appeal against the judgment of the High Court, the Privy Council affirmed the decision of the High Court but observed that the decrees of the High Court were liable to be misunderstood as a dismissal of A's action not only against B, C, D and E but also against X, Y and Z and the purchasers from them. The Privy Council, therefore, made it clear that the decrees of the High Court "must be construed as applicable only to the defendants who had appealed and whose appeals were decreed, and not to the defendants who had not appealed, and who were not before the Court and had not objected to the decision of the Subordinate Judge." It will thus be seen that the Privy Council was adjudicating on the rights of B, C, D and E alone and not on the rights of X, Y and Z or the purchasers from them. For convenience of reference, X, Y and Z and the purchasers from them were grouped together by the Privy Council as "decree holders" in contradistinction to B, C, D and E with whose rights alone the Privy Council was concerned. I have no doubt the Privy Council was thinking only of this

convenience of reference when it spoke of " the purpose of this judgment " for which the " decree holders " and " the persons who came in under them " might be " classed under the head of decree holders ". The interpretation placed by the High Court of Calcutta on the above passage in the judgment of the Privy Council appears to me to be entirely irreconcilable with the clear indication given by the Privy Council that the decree passed by it applied only to the defendants who had appealed to it.

For the reasons given by me I would dismiss the appeal with costs.

JAYETILLEKE J.—I agree.

*Appeal dismissed.*

