
(1939) 05 MAD CK 0004
In the Madras High Court

Alapati Bulli Venkanna

APPELLANT

Vs

Kantamani Ramanna and Others

RESPONDENT

Date of Decision : 02-05-1939

Acts Referred:

Citation : AIR 1940 Mad 776 : (1940) 52 LW 120 : (1940) 2 MLJ 27

Hon'ble Judges : Pandrang Row, J

Bench : Division Bench

Judgement

Pandrang Row, J.—This appeal raises a question of marshalling. The appellant is the purchaser of one of several items mortgaged" in favour

of the plaintiff in the suit, namely item 3, under the suit mortgage, Ex. A, dated 24th August, 1921. This item was purchased by the eighth

defendant in 1925 for a sum of Rs. 13,000. The appellant wanted that his property, namely, item 3, should be sold last after exhausting all the

properties covered not only by the suit mortgage, Ex. A, but also the suit mortgage Ex. B of April, 1926, and even the properties in another

District namely, Vizag mortgaged under Ex. C in 1930. This claim Was disallowed by the Court below and the eighth defendant appeals.

2. So far as the properties covered by Ex. C are concerned, the appellant's property, item 3 of A Schedule, is not included in it, and it is

conceded before us that the appellant will not be entitled u/s 56 of the Transfer of Property Act to claim the right of marshalling as against Ex. C

properties. This concession was obviously unavoidable because the words of the section themselves are very clear that the right of marshalling can

be claimed only where ""the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another

person"". So far as the Ex. C properties are concerned, it is obvious that this condition is not satisfied. It is satisfied only so far as Ex. A properties are concerned. It follows therefore that the appellant is not entitled to ask that Ex. C properties should be sold before the item in which he has an interest, namely, item 3 of A Schedule, is sold.

3. Some argument was addressed to us with a view to make out a case apart, from Section 56 as if there was some other rule of law or equity, which entitled the appellant to marshal as against Ex. C properties even when the section defining the right of marshalling does not recognise such a right. He relied on the words ""sufficient part"" found in Order 34, Rules 4 and 5, Code of Civil Procedure, which give the Court the power to order the sale of the whole of the mortgaged property or a sufficient part thereof, as conferring upon the Court a power, apart from rules of law relating to marshalling contained in the Transfer of Property Act, to give relief in respect of marshalling to a wider extent than is recognised by the substantive law. Even assuming that this contention is right, without deciding it, it does not follow that the Court would be justified in using that power unless some recognised principle of law or equity justified the exercise of the power in favour of the appellant. It is not shown that there is any special equity in favour of the appellant so far as the Ex. C Schedule properties are concerned. The resort made to the provisions of Order 34, Rules 4 and 5 in certain decisions that were quoted to us was necessitated by the fact that those cases had to be decided under the old Act, before it was amended in 1929, which did not in so many words declare that the right of marshalling to the same extent as the doctrine of equity did, and it was therefore open to the Court in exercising its powers under the provision of Order 34, Rule 4 and 5 to exercise its discretionary power so as to give effect to the full right of marshalling as recognised by equity.

4. At present the position is different in the sense that the right of marshalling in equity and in law is co-extensive and there is no justification, in our opinion, to extend the legal rights of marshalling by relying on the provisions of Order 34, Rule 4 and 5 in a way which cannot be justified by any well established principle.

5. The appellant's claim, therefore, so far as Ex. C properties are concerned, must be negatived. As regards the other properties covered by Ex.

A the right of marshalling obviously exists u/s 56 of the Transfer of Property Act, and in ordering these properties to be sold in execution of the mortgage decree, the Court is bound to give protection to the appellant in such a way so as not to prejudice the rights of the mortgagee. It follows from this principle that the properties covered by Ex. A have to be sold in the following order, item one of course not being liable to sale as found by the Court below as it has been exonerated from the mortgage. The order in which the items are to be sold will be as follows: item 4, item 2, items 5 to 7 subject to the prior mortgage in favour of Alapati Gurayva, item 3 and item 8. To this extent the decree of the Court below will be modified. In the circumstances, the appellant will bear his own costs and pay half the costs of the plaintiff-respondent in the appeal.