

(1926) 02 MAD CK 0014
In the Madras High Court

Chinnappa Tharakan (Purchaser)	APPELLANT
Vs	
Kanoor Puthen Veettil Ittichi Amma and Others	RESPONDENT

Date of Decision : 03-02-1926

Acts Referred:

Citation : AIR 1926 Mad 765 : (1926) 23 LW 720 : (1926) 50 MLJ 580

Judgement

1. A mortgage decree was passed in O.S. No. 17 of 1920 against the karnavan, anandravans and other members of a Malabar tarwad. It was

found that only a portion of the mortgage amount was binding on the tarwad and the rest was payable by the karnavan alone. A direction was

given in the judgment in the following terms:

In case of sale items 1 to 21 will be liable only to the extent of Rs. 3,309-9-2 and three-eighths of the subsequent interest and costs and the

balance of the decree amount will be realised from items 22 to 29.

2. In the decree it was worded as follows:

If such payment is not made on or before the said 14th day of December, 1921, items 1 to 21 of the mortgaged property described below be sold

for the realisation of Rs. 3,855-11-3 and subsequent interest thereon.

3. Items 1 to 21 were brought to sale and were purchased by the appellant. The anandravans deposited Rs. 5,300 in Court and applied under

0.21, Rule 89 to have the same set aside. The Subordinate judge held that the amount paid covered more than the amount charged on the items

and set aside the sale. The auction purchaser has appealed against his order.

4. The contention of Mr. Ramachandra Aiyar for the appellant is that the decree was for Rs. 11,000 odd and the whole amount of the decree

should be paid before the sale could be set aside under Order 21, Rule 89. From the judgment and decree it is clear that the liability of the tarwad was only to the extent of Rs. 3,309-9-2 and subsequent interest and costs. The argument of the appellant is that in the proclamation of sale the amount of Rs. 11,000 odd was mentioned and therefore that should be taken as the amount of the decree for the satisfaction of which the property was sold. In the preamble of the proclamation the amount of Rs. 11,000 odd was mentioned, but in the remarks column it was specifically mentioned that items 1 to 21 should be sold for the amount of Rs. 3,885-11-3 and interest as directed by the decree. When there is a specific mention in the proclamation of sale that a certain amount only is realisable from the sale of certain items, it cannot be reasonably contended that in order to redeem them the whole of the decree amount should be paid. Supposing in this case the respondents paid the amount mentioned in the remarks column before the sale could the mortgage decree-holder have insisted upon their sale for the satisfaction of his decree. The burden on items 1 to 21 was specifically mentioned in the proclamation of sale and any one interested in redeeming the items could not be asked to pay anything more than the amount of the burden imposed upon them. The wording of Clause (b) of Rule 89 (1) of Order 21 is:

The amount specified in the proclamation of sale as that for the recovery of which the sale was ordered.

5. This expression could only mean the amount mentioned in the proclamation of sale as that which is to be realised by the sale of the property.

The amount mentioned in the preamble cannot be held to control the clear statement in the remarks column that items 1 to 21 should be sold only for so much.

6. The Subordinate Judge treated the decree as two decrees one against the tarwad and the other against the karnavan personally. Though the mortgage decree was one, the relief was against two sets of persons, one the tarwad as represented by the anandravans and others, and the other the karnavan in his individual capacity. When a decree is passed against two different persons separately, each person is only liable to the extent of the decree against him and if his property is sold to satisfy the decree he can have the sale set aside by paying the amount due from him alone. In

this case, the liability of the tarwad was only to the extent charged on items 1 to 21, and the tarwad was entitled to redeem the property on

payment of the amount before sale, and after sale it cannot be said that it was not entitled to have it set aside on payment of the amount charged on

it together with 5 per cent, of the purchase money. The contention of the appellant, if pushed to its logical conclusion, would mean that the

mortgagee decree-holder was entitled to sell the properties for the full amount of his decree. This is against the clear terms of the decree and the

specific direction in the proclamation of the sale.

7. Mr. Ramachandra Aiyar relies upon *Karunakara v. Krishna* 28 M L J 262 and contends that Rule 89 ought to receive a strict interpretation and

that the amount specified in the proclamation should be taken as Rs. 11,000 odd. That case does not help the appellant. The facts were: A certain

amount was paid into Court by one of the defendants. Another defendant whose property was sold applied to have the sale set aside under Rule

89 without paying the full amount. He contended that the amount paid by another judgment-debtor which was in Court should be added to the

amount paid by him. The learned Judges held that that could not be done. Under Rule 89 credit could be given to the defendant for any money

received by the decree-holder. So long as the decree-holder had not received any portion of the decree amount the defendant is not entitled to be

given credit for any amount which may be in Court in order to make up the amount payable under the

8. decree when he applies for setting aside the sale under Rule 89. If the amount was paid by him to the credit of the decree-holder that would be

different, but where a portion of the decree amount was paid into Court by another judgment-debtor and when that amount was not received by

the decree-holder, a person who pays an amount less than the decree amount is not entitled to have credit for the amount in Court so as to make

up the deficit. Reliance is also placed upon *Subramania Pillai v. Corera* (1924) 48 M L J 121. In that case the decree directed the sale of items in

the first schedule to a limit of Rs. 20,090 and the sale of items in the second schedule up to a limit of Rs. 10,000. A sum of Rs. 10,000 was paid

into Court, and one of the defendants wanted the "amount to be allocated between the two sums of Rs. 20,000 and Rs. 10,000 recoverable by

sale of two different sets of properties. The learned Judges (Ramesam and Jackson, JJ.) held that that could not be done. When certain properties are made liable for a certain amount, a decree-holder is entitled to have the decree executed against them to the extent of the amount recoverable by their sale, and a judgment-debtor is not entitled to have any amount paid into Court by another to be allocated towards the different sums charged on different properties. If the mortgagor is the only defendant in the case, there would be no difficulty, for, his property could only be sold for the amount due to the mortgagee after deducting the amount paid by him, but where different persons have interest in different items and when the decree directs that certain items are liable to a certain extent, the persons interested in those items are not entitled to insist that any amount paid by the mortgagor should go towards reducing the amount charged on the items belonging to them or in which they have an interest. That case also has no application to the present case. We are clearly of opinion that in this case the proclamation of sale specified the amount due on items 1 to 21 as that for the recovery of which their sale was ordered, and the respondents therefore were not bound to pay the whole of the decree amount but only that for which the items were sold together with 5 per cent, in order to get the sale set aside under Rule 89, of Order 21. The judgment of the Subordinate Judge is right, and we dismiss the appeal with costs.