
(2005) 02 MAD CK 0139
In the Madras High Court
Case No : C.R.P. (NPD) No. 2075 of 2001

D. Loganathan

APPELLANT

Vs

Venkatachalapathy Metal Works and Others

RESPONDENT

Date of Decision : 18-02-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 16, Order 34 Rule 6, 39

Citation : AIR 2005 Mad 260 : (2005) 2 MLJ 103

Hon'ble Judges : S. Sardar Zackria Hussain, J

Bench : Single Bench

Advocate : D. Shivakumaran, for the Appellant; K. Chandrakumar and P. Valliappan for Sarvabhauman Associates, for the Respondent

Final Decision : Dismissed

Judgement

S. Sardar Zackria Hussain, J.—The revision petitioner is the Assignee Decree-Holder and the revision is directed against the dismissal of R.E.A. No. 114 of 1999 in Sub Court, Salem O.S. No. 139 of 1976, on the file of the Sub Court, Nammakkal as per order dated 25-10-2000.

2. The petition R.E.A. No. 114 of 1999 was filed to recognise the petitioner as assignee of the decree in the above suit and transfer the decree to the Sub Court Sankari u/s 39 and Order 21 Rule 16, C.P.C.

3. The petition is filed as follows:- The Sub Court, Salem passed preliminary decree on 28-11 -1978 in O. S. No. 139 of 1976, as per which the suit in respect of the "A" schedule immovable property and the claim against the second defendant and also passing personal decree against the defendants 1 and 2 to 5 was dismissed. In the appeal filed by the plaintiff, this Court modified the decree of the trial Court in A. S. No. 402 of 1982 dated 26-6-1992 as to one of mortgage decree in respect of "A" and "D" schedules. The suit as well Appeal in this Court were filed by the Indian Bank, Sevapet Branch, Salem-2, who assigned the decree in favour of the revision petitioner, who is the son of the second

defendant, N. Dureisami and after such assignment, the revision petitioner filed the said application for transfer of the decree to Sub Court, Sankari so as to take out execution proceedings personally against the third defendant/ third judgment-debtor.

4. The said application was opposed by filing separate counters by the defendants 3 and 4 stating that as per the preliminary decree modified by this Court in A. S. No. 402 of 1982 as per judgment dated 26-6-1992 no personal decree was passed, that only after proceeding against the mortgaged properties, then only personal decree against the third defendant/third judgment-debtor, can be executed.

5. The Executing Court, accepting the case of the defendants 3 and 4/ judgment debtors 3 and 4, who alone contested the said application and in view of the judgment of this Court as per which the decree of the trial Court was modified in A. S. No. 402 of 1982 as set out above and that in personal decree was passed against the third defendant accordingly refused to consider the prayer in respect of the transfer of the decree to Sub Court, Sankari for executing the personal decree against the third defendant/ third judgment-debtor. Further, while filing the petition for transfer the Decree to the Sub Court, Sankari for execution against the third defendant /third judgment-debtor practising advocate at Salem as claimed by the Assignee Decree-Holder. Therefore, the Executing Court dismissed the application. The order is under challenge in this revision.

6. The learned counsel for the revision petitioner submitted that the revision petitioner/assignee decree-holder is entitled to execute the personal decree against the third defendant Inasmuch as this Court passed a composite decree in A. S. No. 402 of 1982. In support of such contention, the learned counsel for the revision petitioner has relied on the Full Bench decision of the Supreme Court in State Bank of India Vs. Messrs. Indexport Registered and others, Para-10) in which, the Apex Court in paragraph 9 has stated that the subject matter of the said appeal is a money decree against all the defendants and a mortgage decree only against the second defendant so far as the shop is concerned and it is held :-

"The decree does not put fetter on the right of the decree-holder to execute it against any party, whether as a money decree or as a mortgage decree. The execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree holder. The question arises whether a decree which is framed as a composite decree, as a matter of law, must be executed against the mortgage property first or can a money decree, which covers whole or part of decretal amount covering mortgage decree be executed earlier. There is nothing in law which provides such a composite decree to be first executed only against the property. It will be noticed that there is no preliminary mortgage decree either. It is a final mortgage decree for sale of shop after three months.

7. The learned counsel for the respondents 3 to 5 by referring the Order 34 Rule

6 C. P. C, argued that if the decree amount is not realised by the sale of the mortgaged property, then only personal decree for balance decree amount is executable and as such, the revision petitioner is not entitled to proceed personally against the third defendant/third judgment-debtor by transfer/ ring the decree to Sub Court, Sankari. The learned counsel also pointed out that the assignee Decree-Holder is the son of the second defendant /second judgment-debtor.

8. This Court as per Judgment dated 26-6-1992 in A. S. No. 402 of 1982 filed against the preliminary decree in O.S. No. 139 of 1976, modified the decree of the trial Court. As per clause 4 of the decree in A. S. No. 402 of 1982 the plaintiff is to apply for final decree for sale of mortgage properties, viz., "A" and "D" schedules or sufficient part thereof. As per clause 6 of the decree, it is further ordered and decreed that if the money realised by such sale shall not be sufficient for the payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty to apply for a personal decree against the defendants 1 to 5 for the amount of the balance.

9. Therefore, it is clear from the decree as modified by this Court that only if the amount realised by sale of the mortgaged properties is not sufficient to satisfy the decree in its entirety, then only liberty has to be given to the plaintiff to proceed personally against the defendants 1 to 5 for the balance amount. Therefore, in view of the decree of the trial Court as modified by this Court, it is not open to the assignee decree-holder, who is the son of the second defendant/ second judgment-debtor to proceed personally against the defendants 1 to 5 and it is open to him to proceed personally against the defendants 1 to 5 only if the amount realised by sale of mortgaged properties is not sufficient to satisfy the entire amount decreed as per final decree. The trial Court considering all these aspects has rightly refused to transfer the decree to Sub Court, Sankari for the purpose of executing the decree personally against the third defendant and accordingly dismissed the said application. There is no reason to interfere with the said order.

10. In view of the discussions made above, this Civil Revision Petition is dismissed. No costs. The order and decretal order dated 25-10-2000 in R. E. A. No. 114 of 1999 in Sub Court, Salem O. S. No. 139 of 1976, on the file of the Sub Court, Napaalptal are confirmed.