

(1930) 12 MAD CK 0016
In the Madras High Court

Gorti Brahmayya		APPELLANT
	Vs	
Perumalla Subbarayudu and Others		RESPONDENT

Date of Decision : 17-12-1930

Acts Referred:

Citation : 131 Ind. Cas. 152

Hon'ble Judges : Madhavan Nair, J

Bench : Single Bench

Judgement

Madhavan Nair, J.—The 6th defendant is the appellant. The 1st defendant was the owner of two items of property. The first item was

mortgaged to one Moseh Afterwards the 1st defendant and his sons mortgaged the same item and the second item to the plaintiff under Ex. A

dated 3rd March 1915. The 1st defendant then became an insolvent and the Official Receiver brought these two items to sale. The 6th defendant

purchased the first item subject to the prior mortgage of Moseh and the plaintiff purchased the second item. The Official Receiver has executed a

sale-deed to the 6th defendant but no sale-deed has been executed to the plaintiff.

2. The suit out of which this second appeal arises was instituted by the plaintiff to recover the sum of money due upon the mortgage executed by

the 1st defendant in his favour. The contesting defendant is the 6th defendant. His main contention was that by the purchase of item No. 2 by the

plaintiff his mortgage became extinguished both in law and in fact and that item No. 1 is not liable for plaintiff's mortgage. His plea was accepted

by the first Court but in appeal the District Judge held that there was no valid sale of item No. 2 to the plaintiff. He also held that there was no

estoppel against the plaintiff, one of the other pleas urged by the 6th defendant. In the result, the plaintiff was given a decree for sale. Item No. 2

was ordered to be sold first and for the balance item No. 1 was to be sold.

3. In second appeal by the 6th defendant Mr. Krishnaswami Ayyar does not argue, as was contended for in the first Court, that they the purchase

of item No. 2 by the plaintiff his mortgage became totally extinguished; but he contends that there was a partial merger and that the principle in

Bisheshur Dial v. Ram Sarup 22 A. 284 : (1900) A.W.N. 69 approved by this Court in Ponnambala Filial v. Annamalai Chettiar 55 Ind. Cas. 666

: 43 M. 372 : 38 M.L.J. 239 : (1920) M.W.N. 235 : 11 L.W. 429 (F.B.) should be applied to this case. In Bisheshur Dial v. Ram Sarup 22 A.

284 : (1900) A.W.N. 69 it was held that ""when a mortgagee buys at auction the equity of redemption in a part of the mortgage property, such

purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the

property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the

property purchased bears to the value of the whole property comprised in the mortgage," It appears to me that this is the proper principle

applicable to the facts of this case, provided it is proved that there was a valid sale of item No. 2 in favour of the plaintiff. So the question to be

considered is whether item No. 2 has been validly sold to the plaintiff. On this point the finding of the lower Court is against the appellant. This

finding is attacked by the learned Counsel for the appellant.

4. It is admitted that there was no sale-deed executed by the Official Receiver in favour of the plaintiff. The equity of redemption was purchased by

the plaintiff for Rs. 11. It is argued in the first place that the value being below Rs. 100 a sale-deed is not necessary to effect a valid sale and that

even if it is necessary to execute a sale deed the doctrine of part performance can be relied on by the 8th defendant in order to prove that the

plaintiff has a valid title to the property; but for the acceptance of either of these arguments, assuming that they can be, accepted, it is necessary

that there should have been ""delivery"" of the property to the plaintiff in consequence of the sale. The learned District Judge has distinctly found that

there was no such delivery and so there was no valid sale. If this finding

is"upheld, then, the second appeal must fail. Mr. Krishnaswami Ayyar argues that this is a perverse finding. The question is considered by the learned District Judge in para. 3 of his judgment. No doubt the plaintiff says in his evidence that he got delivery of property; but the document showing it has not been filed. As pointed out by the learned Judge the plaintiff does not say that he is in possession of the land. Though the plaintiff says he got delivery of the property the crops were taken away by the 1st defendant and others. The plaintiff had to file a criminal complaint and his complaint was dismissed. The learned Judge points out that the plaintiff is not in possession of the property but that somebody else is in possession. From these circumstances the learned Judge has concluded that though the plaintiff says that he got delivery, as a matter of fact, it cannot be held that he got actual delivery and so he came to the conclusion that there was no delivery of property to the plaintiff and so there was no valid sale. Having regard to the evidence in the case I cannot say that the finding of the learned Judge is perverse. I must accept this finding. Since there has been no delivery it must be held that there was no valid sale of item No. 2 to the plaintiff and so the further question how far the principle of the decision in Bisheshur Dial v. Ram Sarup 22 A. 284 : A.W.N. (1900) 69 applies to this case does not arise. This second appeal is dismissed with costs.