

(1930) 12 MAD CK 0006
In the Madras High Court

(Gorti) Brahmayya

APPELLANT

Vs

Perumalla Subbarayudu

RESPONDENT

Date of Decision : 17-12-1930

Acts Referred:

Citation : AIR 1931 Mad 552 : (1931) 34 LW 125

Hon'ble Judges : Madhavan Nair, J

Bench : Division Bench

Judgement

Madhavan Nair, J.—Defendant 6 is the appellant. Defendant 1 was the owner of two items of property. Item 1 was mortgaged to one

Moseh. Afterwards defendant 1 and his sons mortgaged the same item and item 2 to the plaintiff under Ex. A dated 3rd March 1915. Defendant 1

then became an insolvent and the Official Receiver brought these two items to sale. Defendant 6 purchased item 1 subject to the prior mortgage of

Moseh and the plaintiff purchased item 2. The Official Receiver has executed a sale-deed to defendant 6 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

defendant 1 in his favour. The contesting defendant is defendant 6. His main contention, was that by the purchase of item 2 by the plaintiff his

mortgage became extinguished both in law and in fact and that item 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 2 to the plaintiff. He also held that there was no estoppel against the

plaintiff, one of the other pleas urged by defendant 6. In the result, the plaintiff

was given a decree for sale. Item 2 was ordered to be sold first and for the balance item 1 was to be sold.

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

2 by the plaintiff his mortgage became totally extinguished; but he contends that there was a practical merger and that the principle in *Bisheshur Dial*

v. *Ram Sarup* [1900] 22 All. 284, approved by this Court in *Ponnambala Pillai v. Annamalai Chettiar* [1920] 43 Mad. 372 should be applied to

this case. In *Bisheshur Dial v. Ram Sarup* [1900] 22 All. 284 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.

4. 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 2 in

favour of the plaintiff. So the question to be considered is whether item 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.

5. 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 defendant 6 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 defendant 1 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 2 to the plaintiff and so the further question how far the principle of the decision in Bisheshur Dial v. Ram Sarup applies to this case does not arise. This second appeal is dismissed with costs.