(1942) 07 MAD CK 0007

In the Madras High Court

Case No : Appeal Against Order No. 80 of 1941

Govindarajam Pillai and Another — APPELLANT

Vs

Alagappa Chettiar by agent Veeraraghava Ayyangar and Others — RESPONDENT

Date of Decision : 28-07-1942

Acts Referred:

Madras Revenue Recovery Act, 1864 — Section 2
Transfer of Property Act, 1882 — Section 99
Trusts Act, 1882 — Section 90

Citation : (1942) 07 MAD CK 0007

Hon'ble Judges : Kunhi Raman, J;Krishnaswami Ayyangar, J

Bench : Division Bench

Advocate : S. Panchapagesa Sastri, for K. Venhkatramani, for the Appellant; S. Jagadisa Ayyar, for the Respondent

Final Decision : Dismissed

Judgement

Krishnaswami Ayyangar, J.—This appeal arises out of an order passed by the Subordinate Judge,. Cuddalore, in an execution petition filed

by the first Respondent for the execution of a mortgage decree. The second Respondent was the first Defendant in Original Suit No. 6 of 1932 in

which the mortgage decree was passed. The mortgage on which the suit was instituted was one executed by him on 27th June 1916 on behalf of

himself and his two sons, Respondents 3 and 4 (Defendants 2 and 3). The fifth Respondent (fourth Defendant) was born after the execution of the

mortgage. For the purpose of discharging the mortgage, the mortgagor sold part of the mortgaged properties, viz., those in schedule B, to the sixth

Respondent (fifth Defendant) who undertook to pay off the mortgagee out of the consideration amount. Having thus made the provision for the discharge of the mortgage, the mortgagor proceeded to sell other portions of the mortgaged property to the Appellants (Defendants 6 and 7).

between the years 1927 and 1929. The sixth Respondent failed to perform his obligation by paying the mortgage money due to the first

Respondent, with the result that the latter had to institute a suit on his mortgage. It is the decree obtained in this suit that is now under execution.

Due obviously to the default on the part of the sixth Respondent in the payment of the mortgage money, the decree contained a direction that the

properties in schedule B purchased by him as aforesaid should first be sold for the satisfaction of the decree and then, if necessary, those in

schedule C purchased by the Appellants.

2. The execution petition in which the order under appeal has been made, is the fourth of its kind. The first was Execution Petition No. 105 of

1935 filed on 22nd April 1935 for the sale of the properties in schedule B referred to above. These properties were actually brought to sale on

15th March 1936, but as there were no bidders the proceeding became infructuous and was dismissed. The second attempt was made by

Execution Petition No. 116 of 1936 filed on 16th August 1936. The decree-holder again prayed for the sale of properties in schedule B in the: first

instance, but if the proceeds should be found insufficient then for sale of the properties of the Appellants in schedule C. There were several orders

of return made on this execution petition. The last one was on 1st October 1936 with a requisition to be complied with within a week. The

importance of this date will be apparent from the fact that on this identical date the decree-holder purchased all the properties in schedule B except

one item, viz., 51, at a revenue auction held by Government for the realization of arrears of revenue. This purchase notwithstanding, the decree-

holder (first Respondent) continued the execution proceeding till 22nd March 1937 when he allowed the petition to lapse by non-payment of batta

and it was thereupon dismissed. The continuance of the execution petition, even after the decree-holder had purchased the property, must have

been due to a deliberate intention on his part to keep the Court, the Appellants and the other Respondents in the dark as to what had happened--

conduct which was undoubtedly reprehensible. The property was knocked down for the paltry sum of Rs. 430, and the sale was, as is the case with all revenue sales, free of all encumbrances. The properties were worth considerably more. According to the Appellants, they were worth Rs.

17,000 or thereabouts--an estimate which cannot be far wrong in view of the extent of the property sold. The balance of the decretal amount due

to the first Respondent was roughly about Rs. 8,500. The third execution petition was filed on 13th October 1939. It was returned and it was only

re-presented along with the present execution petition.

3. In this execution petition (Execution Petition No. 24 of 1940) the decree-holder is seeking to proceed against the one item of property in

schedule B still remaining unsold and also- against the properties of the Appellants in schedule C. Even in this execution petition filed as late as 4th

January 1940, the decree-holder has not chosen to disclose the fact that he had himself become the purchaser of the property; he merely mentions

that B schedule properties had been sold away in a revenue auction. There can be no doubt that the decree-holder has cleverly managed to obtain

substantial properties almost for a song, and the extent of his profit is the, measure of the loss likely to be sustained by the Appellants if their

properties are held liable for the decree.

4. The Appellants raised the contention in the Court below that the decree-holder''s purchase was the result of fraud and collusion. But of this,

there is no evidence on the record. Mr. Panchapagesa Sastri, the learned Advocate for the Appellants, who has argued the case with great ability

and learning, contends that, though there may be no actual proof of fraud, the circumstances of the case are of such a character that fraud must

necessarily be imputed to the decree holder. The loss to the Appellants, it was argued, has been the direct result of the unlawful gain made by the

first Respondent, and that he secured it by resort to devious methods with the definite object of getting round the restrictions placed on him by the

decree. It is true that it was not open to him under the terms of the decree to have the C schedule properties sold in execution, until he had

proceeded against the properties in schedule B. It may also be that he wanted to evade the restriction by purchasing at the revenue sale. But the

question still remains whether the sale can be ignored and the transaction merely treated as one by which he paid the Government revenue and can

only claim credit for that amount. For reasons which will be explained presently, an affirmative answer to the question does not appear to be

warranted. For, reprehensible as his conduct might have been from a strictly moral standpoint, in no sense can the first Respondent be held to have

owed a legal duty to the Appellants which stood in the way of his acquiring the property for himself in the way he did. But in considering this

question we must rule out fraud altogether, as there is no evidence direct or indirect to prove it.

5. The only limitations which fetter the power of a mortgagee to purchase the mortgaged property are those contained in (i) Order XXXIV, Rule

14, of the Code of Civil Procedure, corresponding to Section 99 of the Transfer of Property Act, 1882, and (ii) Section 90 of the Indian Trusts

Act, 1882. The former statutory provision aims at affording to the mortgagor a measure of protection against the mortgaged property being sold at

a disadvantage, while the latter is much wider in scope preventing, as it does, persons standing in a special relationship to certain others, from

taking advantage of their position to secure a benefit to them-selves in derogation of the rights of those others.

6. Section 99 of the Transfer of Property Act, since repealed and replaced by Order XXXIV, Rule 14, precluded the mortgagee from bringing the

mortgaged property to sale in execution of a money decree otherwise than by instituting a mortgage suit, irrespective of the question whether the

claims arose out of the mortgage or not. Order XXXIV, Rule 14, is however narrower in its scope, as it confines the prohibition to cases where a

mortgagee obtains a personal decree on the mortgage debt and then seeks to execute it by attachment and sale without bringing a regular mortgage

suit under rules 4 and 5. The Appellants'' Advocate concedes that he cannot bring himself within the language of the rule, but argues that there is

some wider rule of equity, some rule of good conscience, which prevents a mortgagee purchasing the mortgaged property except through the

medium of a sale in execution of a decree on the mortgage. The rule of English law on the point may be taken to be that laid down by Vice

Chancellor Kindersley in Faulkner v. The Equitable ''Reversionary Interest Society (1859) 28 L.J. Ch. 132, 137 and extracted in S.M. Kamini

Debi v. Ramlochan Sirkar (1870) 5 Beng. L.R. 450. The rule is thus stated:

A mortgagee has his rights; he has a beneficial interest, and that interest is the realizing of his security; in other words, getting paid his mortgage

money, principal, interest, and any costs he may incur, that is his right; but this Court will not allow him to exercise that right, without a due

consideration of the interest of the mortgagor, and undoubtedly the interest of the mortgagor to which, in my opinion, the mortgagee is bound to

attend, requires that the sale shall take place as beneficially to the mortgagor, as if the mortgagor were himself selling the property.

But these observations were made with reference to the limitations which govern a sale by a mortgagee when he sells under a power of sale

contained in the deed itself. The decision of Lord Justice Knight Bruce on the identical subject in Shaw v. Bunny (1864) 33 Beav. 494 : 65 E.R.

460, if carefully read, leaves no room for doubt that the principle in question is the same as that now embodied in Section 90 of the Indian Trusts

Act. In S.M. Kamini Debi v. Ramlochan Sirkar (1870) 5 Beng. L.R. 450 Macpherson J. declined to rule that an equity of redemption can never

be seized and sold by the mortgagee, but only decided that he cannot properly in execution of a simple money decree for a sum of money, the

repayment of which is secured by a mortgage, attach and sell the mortgagor''s equity of redemption in the property mortgaged, and that a

mortgagee, who attaches and sells his mortgagor''s equity of redemption and purchases it (directly or indirectly) himself, without having obtained

leave of the Court, is a trustee for the mortgagor and cannot acquire an irredeemable title against him. After referring to Shaw v. Bunny (1864) 33

Beav. 494 : 55 E.R. 460 and stating that a second mortgagee can obtain an irredeemable title by purchasing the mortgaged property at a sale by

the first mortgagee selling under a power of sale, he proceeded to explain the legal position thus:

But the case of a second mortgagee ""buying from a first mortgagee who sells under a power is quite different from the present case. A second

mortgagee has no connection with the first mortgagee and, when he purchases, is a stranger, so far as that mortgage is concerned. But in the

present case, the mortgagee purchased at a sale brought about by himself, in order to realise the debt for which the property was under mortgage

to him. It is one thing to buy at a sale held by a third party in satisfaction of a prior mortgage; it is another thing to buy at a sale held at the suit of the purchaser himself, in execution of a ,decree which he has obtained for money as security for which the property sold is under mortgage to him .

7. It is thus clear that S. M. Kamini Debi v. Ramlochan Sirkar (1870) 5 Beng. L.R. 450 affords no support to the argument of the Appellant''s

Advocate. On the contrary, it shews the limits of the doctrine and unequivocally indicates the extent of the disability. When the English rule was

sought to be given statutory recognition in this country when the Transfer of Property Act, 1882, came to be enacted, it was made more extensive

in its operation, probably with the idea of suiting it to the conditions prevailing here. -The narrower rule now enacted by Order XXXIV, Rule 14 of

the Code of Civil Procedure, by which alone this case falls to be decided, appears to be more in consonance with the English rule, and not only

does not support the Appellants, but shows clearly enough the limitation subject to which the doctrine is now to be understood and, applied. The

Courts in this country are not entitled to travel beyond the express terms of the statute in search of some general principle outside the enactment

and inconsistent with its language.

8. Neither can the Appellants derive any assistance from Section 90 of the Indian Trusts Act. Though there is no express reference to it, it is clear

that the relationships enumerated in the section are all of them of such a character that they may give rise to a conflict of duty and interest in certain

circumstances; in other words, a fiduciary relationship is implicit in the section, and is the basic ground on which relief is to be afforded, provided of

course the conditions laid down are satisfied. Before the benefit of the section can be demanded, it must be shown that (i) the party against whom

relief is sought availed himself of his position, (ii) he gained an advantage by so doing, and (iii) the advantage was gained in derogation of the rights

of the person interested in the property. It is perfectly plain to our mind that the first Respondent was in no sense in a fiduciary position in so far as

the Appellants are concerned. It is equally plain that, in purchasing the property at the revenue sale, he cannot be deemed to have availed himself

of any special position he held. If, as we hold, these two conditions are not satisfied, the fact that he has gained an advantage to the prejudice of

the Appellants cannot afford them any ground of relief. When the Government brought the property to sale, any stranger could have purchased it and obtained a clear title incapable of being assailed by anybody. We cannot see why a mortgagee should be held to be in a worse position, so

long as the sale was not due to any wrongful conduct on his part.

9. Reference may now be made to two decisions on which the Appellants'' learned Advocate strongly relied. Deo Nandan Prashad v. Janki Singh

ILR (1916) 44 Cal. 573 (P.C.) is, in our opinion, a decision which merely furnishes an illustration of the principle embodied in Section 90 of the

Trusts Act in so far as co-owners are concerned, though there is no express reference to the section to be found in the judgment. There it was

found that the mortgagee from one of several co-sharers intentionally allowed the revenue payable on the mortgaged interest to fall into arrears,

with a view to the property being put up for sale and bought on his behalf, though the other co-sharers had duly paid their quota. The default in the

payment of the revenue and the purchase at the revenue sale were made by the agent of the mortgagor who was himself only a minor. Their

Lordships observed as follows:

If this be the true view, as their Lordships hold, then, however free from personal blame the minor may have been, he cannot profit by his agents''

deliberate default committed in breach of the terms of the mortgage. As against his mortgagor, therefore, the mortgagee cannot be allowed to hold

for himself the advantage gained by the default for which his agents were responsible. Nor, in their Lordships'' opinion, can he be permitted to hold

for himself this advantage to the prejudice of the co-owners. For this purpose the mortgagor and mortgagee may be identified; they together

represented the three annas share, and theirs was the obligation to pay then-quota of the revenue. Equally in relation to the co-owners was the

default designed with a view to a subsequent sale and to a purchase on the minor''s behalf, and the advantage gained by this scheme must, in like

manner, be held for the benefit of the co-owners, who are not shown to have been aware of the default or sale, or to have disentitled themselves to

this equitable relief. They had contributed their proper quota to this September instalment, and it cannot be supposed that had they known of the

default or the peril to their interests they would have allowed a valuable property, worth, it is said, not less than 8,000 rupees, to be sold away for

the failure to pay 2 rupees 10 annas.

That the ground of decision was the fiduciary position subsisting between co-sharers is made plain by a later passage'' in the judgment, wherein

their Lordships dissented from the view laid down in Doorga Singh v. Sheo Pershad Singh I.L.R (1889) Cal. 194 that there was no such

relationship, and observed that that decision failed to pay due regard to the relative position of co-sharers in respect of the payment of revenue and

to the need of demanding from each such measure of candid dealing and good faith as would ensure that a sharer would not be tempted to make a

deliberate default with a view to ousting his co-sharers and appropriating to himself the common property. The same principle was applied in

Akshaykumar Nath Talukdar v. Ahmad All Howladar ILR (1931) Cal. 180 to a case where the purchaser co-sharer was not himself a defaulter in

the payment of revenue but, acting in collusion with another co-sharer, had schemed to procure a default and then purchased the property. Rankin

C.J. obviously had in mind the principle of Section 90 when he said:

If the eo-sharer, although not liable to pay the revenue on this particular joint account, goes and arranges with another and procures with him that

there shall be a default in order that the co-sharer may ultimately purchase, that seems to be conduct inconsistent with any relation of mutual

confidence between co-sharers and, if so, equity can give a remedy.

10. But he added the significant rider which is of great importance to the present case:

Of course, if Defendant No. 1 had not intentionally procured the default which resulted in the revenue sale, he would have been entitled to

purchase the Plaintiffs'' estate for himself. I cast no doubt upon that at all. But that is not this case.

11. There is no ground in the present case to consider that the first Respondent was under a duty to pay the revenue due on the property in

schedule B, nor did he scheme to bring about a default in its payment. His position is not different from that of a second mortgagee who purchases

the mortgaged property at a sale by the first mortgagee in exercise of a power of sale. The Government, in respect of the revenue payable on the

land, is in the position of a first mortgagee and has a first charge given to it u/s 2 of the Madras Revenue Recovery Act, and a sale for arrears of

revenue conveys the property to the purchaser free of all encumbrances by force of Section 42. It is not denied that, if a mortgagee purchases at a

sale in execution of a decree, whether mortgage decree or money decree obtained by a third person, he gets an irredeemable title and the equity of

redemption is extinguished. If that is so, it is difficult to see on what legal ground the position of the first Respondent is to be held to be different.

12. We are clearly of opinion that to accede to the contentions of the Appellants is to depart from the letter and spirit of the two statutory

provisions referred to above, and engraft on them an addition for which we can find no legal warrant. The law that we are charged to administer

does not, subject to certain well known exceptions, prevent the wary and the diligent from taking advantage of the less fortunate fellowmen, if the

latter do not exhibit that degree of alertness which is necessary for the protection of their interests.

13. The appeal fails and must be dismissed. We can only mark our sense of disapprobation of the first Respondent''s conduct by depriving him of

his costs here and in the Court below.