

(1927) 02 MAD CK 0075
In the Madras High Court

Govindasamy Koundan and Others

APPELLANT

Vs

Bapatla Venkoba Row and Others

RESPONDENT

Date of Decision : 03-02-1927

Acts Referred:

Citation : AIR 1927 Mad 779

Hon'ble Judges : Odgers, J;Curgenven, J

Bench : Full Bench

Judgement

Odgers, J.—In this case the assignee decree-holder has applied under Order 34, Rule 6, Civil P. C., for a decree that a mortgagor be directed to pay the difference between the amount realized by the sale of the hypotheca and the amount due to the plaintiff on his mortgage. The request has been refused by the District Munsif and allowed on appeal by the Subordinate Judge, and it is against this allowance of the personal remedy that the appeal has come to us here.

2. The mortgage was one of 1905 and the suit on it was brought in 1912. The plaint in the mortgage suit is printed as Ex. A, and it asks for sale of the mortgaged property, and:

directing that if there be still any balance even after the auction sale, defendant 1 personally and the family properties of defendants 1, 2 and 3 be held responsible therefor.

3. The argument of the learned vakil for the appellants is that the plaintiff having asked for that personal relief, and the decree which appears as Ex. 1 being silent on the point, we must assume from the judgment (which is not forthcoming) that the Judge has decided this relief (c) in the plaint against the plaintiff and therefore the matter is either actually res judicata or is in the nature of an implied res judicata u/s 11, Expl. 5, Civil P. C. The whole argument is based on the fact that the decree directs: (1) that the defendants pay into Court a certain sum before a certain date, and. if they do so the property should be transferred; (2) that if the payment is not so made, the mortgaged property or a sufficient

part be sold: and (3) that defendant 1 is personally liable only for the plaintiff's costs. It is said that that reference to personal liability only for costs is a certain indication that an adjudication must have taken place by the Court on the relief (c) asked for in the plaint. The District Munsif held that the personal remedy must be taken to have been refused. The Subordinate Judge, however, holds that there is no ground for inferring any such refusal of the personal remedy in the decree. There is no issue about it and there was no adjudication thereon. The question is whether sufficient ground has been shown by the appellant to enable one to say that the finding of the Subordinate Judge cannot stand. In my opinion there is none. The form of the decree given in the old Code, No. 128 of the forms, does not contain any reference to the personal remedy though the plaint form (No. 109) does under the new Code.

4. Form No. 45 of Appendix A is the form of the plaint in which the last clause asks for the personal remedy if the proceeds of the sale are found to be insufficient, and in the form of the decree given in Appendix D, No. 7, that proviso is attached to the decree in the shape of liberty being reserved to the plaintiff to apply, if necessary, for the personal remedy. The question shortly is: Is the fact that the personal remedy is asked for in the plaint and that nothing appears about it in the decree, enough to say that the plaintiff is for ever after barred from asking for it? If there has been no adjudication, as I hold, then it seems to me that the answer is clearly in the negative. In this view I am supported by the authority of the case in *Maliaperumal v. Nachiappa* [1895] 5 M. L. J. 291 (under the old Code) where Best, J., decided that it is not necessary that the original decree in the suit should give any remedy beyond the property mortgaged and ordered to be sold, and the same remark was made by Bakewell, J., in a case in *Thirumalai Kadiravelusami Naicker v. The Eastern Development Company* [1918] M. W. N. 4 It seems on principle that it would ordinarily be impossible for a Court to make any adjudication in the preliminary decree and the preliminary judgment on this matter. It would depend upon whether the mortgagor paid the amount within the time allowed; if he did not, whether when the property was brought to sale the proceeds were or were not sufficient to discharge the mortgage debt. This is a matter of some complication because the expenses of sale and various other matters can be added to the mortgage amount by the mortgagee and debited against the mortgagor. So that it is by no means an easy or simple matter or a matter as to which the Court would be in possession of sufficient facts in an ordinary case to decide on a preliminary decree, or very often in the case of a final decree also. It therefore seems to me that the fact that nothing is said in the preliminary decree about this matter is not one of *res judicata* so as to bind the plaintiff. It seems to me that, if one were to hold that it is to be, grave injustice might very often be done, as I dare say it may be done in this case, if the plaintiff is denied his personal remedy. After all the defendants have got no merits because they owe the money, and there is no reason to my mind why the plaintiff should not invoke the aid of the law to get himself paid, provided his methods are legal and just. This seems to

me to be a highly technical point, and I, for one speaking personally, do not see why technicalities should be set up and emphasized in favour of a defaulting judgment-debtor. We have been taken through various decisions on the assumption that there has been an adjudication. But as I hold that there has not been one, it is quite necessary to go into these cases. It is said that this is a matter of costs, namely that defendant 1 should be personally liable for costs, and he must show that there was an adjudication as to this personal liability. It is impossible to tell without seeing the judgment why costs were awarded in this way instead of being added to the mortgage amount as is usual. It may be some personal default on the part of defendant 1 which induced the trial Judge to say that the costs personally be payable by him and executable on him immediately. To my mind it does not throw any light on the question that we have got to answer. In my view the appeal must be dismissed with costs.

Curgenven, J.

5. In reversing the District Munsif's order the learned Subordinate Judge has recorded findings upon three points: (1) that it was not competent to the Court in the course of the suit to pass a personal decree in the first instance; (2) that it did not so adjudicate in respect of the subsequent application under Order 34, Rule 6; and (3) that in point of fact the Court in this instance did not adjudicate or refuse the personal remedy by, its decree. It may be doubtful whether propositions (1) and (2) can be supported, but they do not arise unless, upon proposition (3), we dissent from the finding of the lower appellate Court. Upon this point, it is quite true that the plaint asks for personal remedy, viz.

that if there still remains a balance even after the auction sale the defendant 1 personally and the family properties of defendants 1, 2 and 3, be held responsible,

and that the written statement contends that the personal remedy is barred. On the other hand, no issue was framed upon this point and it is undoubtedly the case that the Code does not contemplate in Order 34 that in framing a preliminary decree there should be an adjudication upon this question. The only support which can be given to the argument is afforded by that portion of the preliminary decree which provides that defendant 1 should be personally liable for the plaintiff's, costs. As my learned brother has said in the absence of the judgment, it is not possible for us to ascertain in what circumstances that order was passed or whether it can be justified. I have only to repeat with the learned Subordinate Judge that it does not by any means follow that the Court intended to adjudicate upon the admissibility of the personal remedy.

6. It has then been argued, as I understand the argument, that the Court failing so to adjudicate, the matter has become constructive *res judicata* by force of Expl. 5, Section 11, Civil P. C. No doubt that section would not apply in terms to a subsequent portion of the same suit, but let it be granted that the general principle of *res judicata* might be applicable in these circumstances. I think, even

then, inasmuch as the Court, if it is to follow the procedure laid down, is not to adjudicate upon this question until a later stage, the omission to do so cannot be considered in any way to prejudice the rights of the parties to raise the matter subsequently; and it is a matter of interest to notice that according to the forms under the Code of 1882, whereas the plaint form (form No. 109 of Appendix to Sch. 4) contains a prayer which is substantially identical with the prayer for relief (c) in the present plaint, the preliminary decree for sale, form No. 128 contains no passage in accordance with it. The only inference I" can draw from that circumstance is that, if the principle expressed in Expl. 5, Section 11 had been applied to suits framed and decreed in such circumstances, no subsequent application would have lain u/s 90, Transfer of Property Act, on the ground that the principle of res judicata would have precluded it.

7. The only other point which has been raised is that the absence of any reservation in the preliminary decree of liberty to the decree-holder to apply for a personal decree disables him from doing so. Here again, as I have already said, the form of the decree under the former Code contained no such provision; yet it has not been shown to us that it was ever questioned that the liberty so to apply was thereby withheld. The decision in *Markandaya Sastri v. Subhanandra Charyulu* [1917] 6 M. L. W. 692 goes no further than to say that the decree which was then under reference should be brought into conformity with the form prescribed by the Civil P. C. On the other hand, *Bakewell, J. in Thirumalai Kadiravelusami Naicker v. The Eastern Development Corporation Ltd.* [1918] M. W. N. 4 has held if any authority be required, that the absence of the proviso does not affect the right to apply. The form, in fact, I think, merely draws attention to the provision in Rule 6, Order 34, that application may be made if the sale of the hypotheca has not afforded sufficient to satisfy the decree. I think, accordingly that there is no substance in this objection. I agree with my learned brother that the Civil Miscellaneous application must be dismissed with costs. P. R. S. Appeal dismissed.