

(1927) 02 MAD CK 0045
In the Madras High Court

Govindaswami Koundan and Others

APPELLANT

Vs

Kandaswami Koundan and Another

RESPONDENT

Date of Decision : 03-02-1927

Acts Referred:

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

Citation : (1927) 53 MLJ 489

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 of the CPC for a decree that the mortgagor be

directed to pay the difference between the amount realised 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, the 1st defendant 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.

I 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, Explanation V of the Civil Procedure Code. 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 retransferred, (2) that if the payment is not so made, the mortgaged property or a sufficient part be sold, and (3) the 1st defendant 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 the plaintiff's costs. It is said that that reference to 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. ¶ 1/2 There is no issue about it and there was no adjudication thereon. The question is whether sufficient ground has been shown by the appellants to enable one to say that that 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. 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 a 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 Iyengar and Another Vs. Nachiappa Chetty*, (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 *Tirumalai Kandama Kondala Nagayya Ramakrishna Kadirvelusami Naicker, minor by his Mother and Guardian, Veluthayammal Vs. The Eastern Development Corporation Ltd.*, .

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. That 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 this is so, 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 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 unnecessary to go into these cases. It is said that this is a matter of costs, namely that the 1st defendant 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 the 1st defendant which induced the trial Judge to say that the costs should be personally liable 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 point : (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 if it did so adjudicate upon the personal remedy, that would not be res judicata 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 so 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 a personal remedy, viz., that if there still remains a balance even after the auction sale the 1st defendant 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 the 1st defendant 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 urged, as I understand the argument, that the Court failing so to adjudicate, the matter has become constructive res judicata by force of Explanation V to Section 11, Civil Procedure Code. 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 so that 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 be noticed that

according to the forms under the Code of 1882, whereas the plaint form (Form No. 109 of Appendix of the 4th Schedule) 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 can draw from that circumstance is that, if the principle expressed in Expl. V of Section 11 had been

applied to suits framed and decreed in such circumstances, no subsequent application would have lain u/s 90 of the 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 Markandeya Sastri v. Sobhanadhracharyulu (1917) 6 LW 692 goes no further than to say that the decree which was there under

reference should be brought into conformity with the form prescribed by the Civil Procedure Code. On the other hand, Bakewell, J., in Tirumalai

Kandama Kondala Nagayya Ramakrishna Kadirvelusami Naicker, minor by his Mother and Guardian, Veluthayammal Vs. The Eastern

Development Corporation Ltd., 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 of 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 Appeal must be dismissed with costs.