
(1890) 11 MAD CK 0014
In the Madras High Court

Gurusami

APPELLANT

Vs

Venkatasami and Others

RESPONDENT

Date of Decision : 13-11-1890

Acts Referred:

Citation : (1891) ILR (Mad) 277

Hon'ble Judges : Muttusami Ayyar, J; Best, J

Bench : Division Bench

Judgement

Best, J.—The appellant (who was the third defendant in the Court of First Instance) is the holder of the decree in Original Suit No. 57 of

1880 on the file of the Subordinate Court of Madura (West). He is a minor under the guardianship of his mother Lingammal.

2. The property of the judgment-debtors was attached and about to be sold in execution of the decree, when they put in a petition (No. 636 of

1886), asking for postponement of the sale and a certificate u/s 305 of the Code of Civil Procedure, and, on 11th December 1886, they were

granted the certificate (Exhibit E) authorizing them to raise the balance of the decree amount by private sale, mortgage, &c, of the properties under

attachment within the 20th December 1886. On the 22nd December 1886, the first defendant was granted a second certificate (Exhibit D) in the

same words, but extending the time to ""within two months from this date.

3. Exhibit B is the petition of first defendant (dated 22nd December 1886) in compliance with the request contained in which the second certificate

was granted. From B it is seen that Rs. 4,000 were then produced as obtained from the present third and fourth respondents (plaintiffs in the

Courts of First Instance) with whom, it is stated, ""a contract has been

negotiated requiring them to pay the balance and satisfy the decree in full.

Hence the certificate E.

4. The time allowed by this certificate expired on 22nd February 1887, but no further payment was made into Court till 7th September 1887,

when the petition (Exhibit A) was filed by the pleader of the third and fourth respondents, stating that the judgment-debtors had executed to the

plaintiffs a document mortgaging the attached property for a sum of Rs. 5,000 (including the Rs. 4,000 already paid) and tendering the balance Rs.

1,000 with a prayer for an order that this sum of Rs. 1,000 be received and the mortgage-deed accepted and for stay of the sale, which was fixed

for the 26th of that month.

5. On the same day that A (dated 3rd September 1887) was filed by the plaintiffs, the petition C (dated 6th idem) was also filed by defendant No.

1 (judgment-debtor) objecting that the mortgage bond had been obtained by the plaintiffs fraudulently--the Rs. 4,000 first paid being, in fact, the

money of the judgment-debtors themselves and not of the alleged mortgagees, and praying that the bond be not accepted.

6. These two petitions were disposed of by the order at the foot of Exhibit A, rejecting the mortgage for the reasons (1) that the judgment-debtors

objected to it as having been fraudulently obtained, (2) because ""the petitioners have not complied with the provisions of Section 305,"" and (3) ""as

neither the balance nor the deed itself was produced within the time limited by the certificate.

7. Hence the suit out of which this second appeal has arisen, (a) for cancellation of the order last referred to, and (b) for a declaration that the

mortgage (filed as Exhibit F) executed by defendant No. 1 (who is also the guardian of defendant No. 2, a minor) is true and valid. Both the

Lower Courts have decreed in favour of the plaintiffs.

8. The present appeal is by the third defendant, the decree-holder, who contends (inter alia) that the Lower Appellate Court ""did not sufficiently

distinguish between the case of the first defendant and that of the third defendant.

9. This is, I think, a valid objection to the decree not only of the Lower Appellate Court, but also to that of the Court of First Instance, for, it by no

means follows that because the mortgage is found to be good and valid as

against defendants Nos. 1 and 2, the judgment-debtors, it must therefore be held to be good in toto, also as against the decree-holder, defendant No. 3. I say in toto, because, in the circumstances of this case, the mortgage to plaintiffs must, I think, be upheld even as against defendant No. 3, in so far as it gives the plaintiffs a lien on the property for the Rs. 4,000 found to have been paid by them and which has been accepted as part satisfaction of the decree. To this extent, plaintiffs are, I think, entitled to a declaration that they have a lien upon the property, and that the Rs. 4,000 paid by them in satisfaction of the third defendant's decree is a first charge on the property, But this is, I think, the utmost relief to which the plaintiffs are entitled as against defendant No. 3. Section 305 expressly states that "no mortgage, lease or sale under this section shall become absolute, until it has been confirmed by the Court;" and it is quite dear that the Court could not confirm under the section any mortgage lease or sale, unless it satisfied the decree in full. It is only if there is reason to believe that the "amount of the decree," may be raised by mortgage or lease or private sale that the Court is authorized to give time and grant a certificate u/s 305, and, as a matter of fact, both the certificates granted in this case (D and E) expressly state that it is for paying the "balance of the decree amount" by the sale, mortgage, &c, of the property attached that sanction for a private arrangement is thereby granted. It has been held that in acting u/s 305 of the Code of Civil Procedure, the Court should exercise a reasonable discretion and should not postpone the sale, unless the judgment-debtor can show that the creditor will not suffer--Ram Ruttun Neogy v. Land Mortgage Bank of India 17 W.R. 193 and even then the postponement should be only for a reasonable period--Rednum Atchutaramayya v. Dada Sahib 5 Mad. H.C.R. 272 Three or six months have been held to be reasonable, but a year has been held to be unreasonable--see Fyzooddeen v. Giraudh Singh 2 N.W.P. 1 Such being the case, the arrangement under Exhibit F, by which, after only partly satisfying the judgment-debt, the mortgagees are given the property to possess it for ten years must certainly be held to be far beyond the limits of what is a reasonable time. The District Judge is in error in thinking that defendant No. 3 stood and looked on at all that was being done in the matter of the mortgage." It is seen from the Sub-Judge's order in Exhibit IV that her vakil

strongly opposed"" the application of defendant No. 1 (dated 6th December 1886) on which the certificate E was granted; and by her petition

(Exhibit V), dated 9th April 1887, she prayed that, before any arrangement of the kind was sanctioned, notice should be given to her. I see no

reason for allowing the appellant's contention that the suit brought by plaintiff for a declaration was not maintainable.

10. The issues of fact as against the judgment-debtors (now respondents Nos. 1 and 2) have been found in favour of the plaintiffs (respondents

Nos. 3 and 4) and are neither objected to by them, nor do I think they are open to objection; but the case of the judgment-creditor, the appellant,

is not identical with that of the judgment-debtors. Against the latter, the mortgage bond F may be held to be binding as a whole, but as against the

appellant it can be held to be good only in so far as it makes the Rs. 4,000, paid by plaintiffs in satisfaction of the appellant's own decree, a charge

and a first charge on the land mortgaged. But only to this extent can it be held to affect the appellant's right to proceed against the said property in

execution of her decree.

11. I would, therefore, modify the Lower Court's decrees as above, and direct the respondents Nos. 3 and 4 (plaintiffs) to pay the appellant's

costs throughout. Defendants Nos. 1 and 2 must pay the plaintiffs' costs in the two Lower Courts and bear their own costs in both those Courts

and also in this Court.

Muttusami Ayyar, J.

12. The appellant is the decree-holder and respondents Nos. 1 and 2 are the judgment-debtors in Original Suit No. 57 of 1880, and the question

of law arising for decision upon the facts found by the Courts below is whether the mortgage executed by the latter in favour of respondents Nos.

3 and 4 for Rs. 5,000 on 24th January 1887 can be upheld as against the former. Both the Lower Courts have found that the mortgage was true,

that the consideration money was paid, and that it was a bona fide transaction. Upon those findings, the mortgage would no doubt be valid as

between the mortgagors and the mortgagee, but they are clearly not sufficient to support the transaction as against the appellant who was no party

to it and who was proceeding in execution against the mortgaged property. It must appear further that the mortgage was concluded in strict

conformity to the provisions of Section 305; that the property in question was attached by the appellant in execution of his decree so early as

1881; that the attachment continued in force when the mortgage was concluded, and that the decree debt remained to be paid to the extent of

more than Rs. 10,000, are facts about which there is no dispute. The substantial question for decision was whether the Court authorized the

mortgage which was actually concluded u/s 305, and whether the order of the 7th September 1887 refusing to confirm the mortgage was in

contravention of the authority previously granted by the Court. Section 305 ought to be read together with Section 276 of the Civil Procedure

Code, and, when so read, it is clear that when property is attached in execution, any private alienation of the same is void against any claim

enforceable under the attachment, unless such alienation is specially authorized u/s 305. It must be remembered that u/s 276, the decree-holder has

a lien on the property under attachment in respect of the whole of the decree-debt and not simply of a part of it. It is therefore provided by Section

305 that when there is reason to believe that the amount of the decree may be raised by private alienation of the property advertised for sale, or of

some part thereof, or of any other Immovable property of the judgment-debtor, the Court may postpone the sale of the property comprised in the

order for sale in view to enable the judgment-debtor to raise the amount. In such a case, the section proceeds to direct the Court to grant the

certificate authorizing the judgment-debtor to make the proposed mortgage, and to provide that no such mortgage shall become absolute until it

has been confirmed by the Court.

13. The intention is to prevent the sale of the attached property when the whole decree can be satisfied within a reasonable period by private

alienation, and, at the same time, to protect the lien which the judgment-creditor has u/s 276 by prescribing two conditions, viz., that the mortgage

actually concluded must be previously proposed to, and authorized by, the Court, and that the mortgage must be confirmed after it is concluded.

The real question was whether the facts of this case show that the mortgage concluded was the mortgage proposed to, and authorized by, the

Court u/s 305. The first certificate granted by the Subordinate Court is Exhibit E, dated 11th December 1886. It recites that there is reason to

believe the balance of the decree amount might be raised by private alienation and then purports to authorize the judgment-debtor to make the

proposed alienation within 20th December 1886 to raise the said amount. The second certificate granted on the 22nd December 1886 is Exhibit

D. It is in the same terms as Exhibit E with this difference, viz., that two months' time was granted from that date, the mortgage authorized being

still a mortgage of the attached properties, whereby there was reason to believe that the balance of the decree amount might be raised. Again,

Exhibit B is the petition upon which the certificate D was granted. It was in these terms:--"A contract was entered into with Subba Naik,

Ramasami Naik and Guruvappa Naik, sons of Velappa Naik, residing at Naikkarapatti, to mortgage defendant's Immovable properties mentioned

in the sale notice, in accordance with the certificate granted by the Court, and Rs. 4,000 has now with difficulty been produced through them.

A contract has been negotiated with the said persons requiring them to pay the balance and satisfy the decree in full; and they, consenting to the

same, and making their properties security therefor, have undertaken to make the necessary arrangements.

This defendant intends to mortgage his Immovable properties, after appropriating the produce now raised on the properties under attachment and

the summer produce thereof.

An order is therefore prayed for directing that the Rs. 4,000 now deposited be accepted; that payment be entered in the decree; that a time be

prescribed for paying the balance of the decree amount, and that a certificate be granted giving permission to make private alienations of properties

referred to in the sale notice within the prescribed time.

14. It is clear that the representation made to the Court was that negotiations were in progress whereby the whole balance of the decree debt

would be paid up if time was granted.

15. What was the transaction since concluded and what was its result? The mortgage which the Court was asked to confirm was a mortgage for

Rs. 5,000, which was considerably below the balance due under the decree and no other arrangements were made for satisfying the decree in full,

it being represented on one side that no larger amount could be raised on the properties attached, and on the other that the mortgage was

fraudulent. It appears to me to be open to no doubt that permission to raise money by mortgage was asked for with the representation that the balance of the decree debt would be paid in full either by means of the mortgage or by it and other arrangements in progress and that permission was granted to make the mortgage on the assurance that the whole decree debt would be satisfied.

16. The order therefore refusing to confirm the mortgage is perfectly correct for the simple reason that the condition subject to which the certificate was granted, viz., satisfaction of the decree in full was not complied with either by the mortgage or otherwise as represented to the Court. The question of the validity of the mortgage is not one of bona fides between the mortgagor and mortgagee but one of statutory authority sufficient to take away the prior lien which the appellant had.

17. For these reasons, I am also of opinion that the mortgage cannot be upheld as against the appellant.

18. I am further of opinion that the plaintiffs must be declared to be entitled to have a charge upon the property in dispute or Rs. 4,000 paid into

Court on account of the appellant's decree between the date of their application for a certificate u/s 305 and the order of the 7th September 1887.

This declaration is necessary to restore the parties to their original position, and the appellant can only set aside the mortgage and make the property available for his decree subject to that charge.

19. I agree, therefore, to the decree proposed by my learned colleague.