

(1930) 09 MAD CK 0005
In the Madras High Court

(Haji A.S.) Abdul Muhammad Rowther and Others	APPELLANT
Vs	
Seethalakshmi Ammal and Others	RESPONDENT

Date of Decision : 03-09-1930

Acts Referred:

Transfer of Property Act, 1882 — Section 52

Citation : AIR 1931 Mad 120 : (1931) 33 LW 109

Hon'ble Judges : Madhavan Nair, J

Bench : Division Bench

Judgement

Madhavan Nair, J.—The plaintiff is the appellant. The suit out of which the second appeal arises was for recovery of possession of

properties from defendants 1,4 and 5. The properties originally belonged to the family of. defendants 2 and 3. Defendant 1 sued defendants 2 and

3, the coparceners of her husband in O.S. No. 46 of 1914 for the maintenance due to her and for charging the said maintenance on the properties

included in that suit. That suit was compromised and a razinami decree was passed in favour of the present defendant 1 After the said decree,

defendant 2 sold the suit properties and other properties to the present plaintiff under Ex. A dated 5th July 1917. Subsequently defendant 1

applied for execution of the decree in O.S. No. 46 of 1914 and the suit properties were sold in execution of the decree for recovery of the arrears

of maintenance accrued due subsequent to the date of the decree and defendant 1 herself purchased the properties for Rs. 601 under Ex. 4 and

obtained possession of them through Court. She subsequently sold the properties to defendants 4 and 5. The plaintiff who had purchased the suit

properties under Ex. A, tried to set aside the sale, but having failed in his efforts, he instituted the present suit to recover possession of the

properties from defendants 1, 4 and 5.

2. The District Munsif gave him a decree as prayed for on payment to defendant 5, of Rs. 601, the amount mentioned in defendant 1's sale

certificate, Ex. 4. The lower appellate Court set aside that decree and dismissed the plaintiff's suit.

3. The main question for consideration in the lower Courts was, whether the razinama decree in O.S. No. 46 of 1914 declared a charge on the suit

properties as regards the future maintenance decreed to defendant 1. On this point the District Munsif was of opinion that the future maintenance

awarded to defendant 1 was not made a charge on the suit properties by the decree. The learned Subordinate Judge took: a different view and

held that the decree created a charge on the properties as regards the future maintenance.

4. Mr. Varadachariar on behalf of the appellant argues that on a proper construction of the decree it will be clear that only the past maintenance

due to defendant 1 had been made a charge on the properties but not the future maintenance; and secondly that even if there is such a charge, still

the plaintiff to whom no notice was given of the proceedings in execution or of the sale, is entitled to recover the properties on payment of the

amount for which the properties were purchased by defendant 1.

5. I shall first deal with the question, whether the decree creates a charge on the suit properties with respect to the future maintenance awarded to

defendant 1. The relevant terms of the decree, Ex. 1, are as follows : Para. 1 refers to the arrears of past maintenance due to defendant 1 and

para. 2 refers to the future maintenance. In para. 1 the arrears of past maintenance are specifically made a charge on the suit properties. After

specifying the amounts due to defendant 1, it is stated in the paragraph that ""the same has been made a charge on the property described in the

plaint."" It is further stated that

if the said amount is not paid within the said period, the plaintiff to recover the same with interest at 1 per cent per mensem from the date of default

by executing the decree and selling the plaint-mentioned properties without attachment and by proceeding against the defendants.

6. In para. 2, which refers to the future maintenance and which is the paragraph we have to deal with, the words ""the same has been made a

charge on the property described in the plaint"" do not occur. After specifying the amount of future maintenance. for each year it states that

in default of measuring the paddy on the due date the plaintiff to recover the value thereof at the rate prevailing during that period with interest at 1

per cent per mensem by executing the decree and selling the plaint-mentioned property without attachment and by proceedings against the defendants.

7. It is argued by Mr. Varadachariar that reading the two paragraphs together there can be no doubt that while a charge has been created with

respect to the past maintenance by the words ""the same has been made a charge on the property described in the plaint,"" the absence of such

words creating a charge in para. 2 relating to the future maintenance shows clearly that the parties did not intend to make the future maintenance a

charge on the properties. This contention has considerable force, but I am not inclined to accept it. Even though the words ""the same has been

made a charge on the property described in the plaint"" appearing in para. 1 do not appear in para. 2, still there are words in para 2 which in my

opinion are sufficient to create a charge in favour of defendant 1 in respect of the future maintenance also. The properties are specified, and it is

stated that future maintenance is to be recovered from those properties by selling them without attachment and this method is to be resorted to as

stated in the paragraph, "In default of measuring the paddy on the due date." I think that these words used in the paragraph show that there was a

present intention in the minds of the parties to make the properties specified in the decree a security for the payment of the amount of future

maintenance. The provision in the decree that future maintenance can be recovered by sale without attachment should not be understood as

pointed out by the learned Subordinate Judge as a mere clause dispensing with the rules of procedure. In my opinion this provision shows that it

was put in with the object of creating a present charge with respect to the future maintenance also. No reason is alleged as to why the parties

desired to treat defendant 1's claim to future maintenance differently from her claim to the past maintenance. I agree with the learned Subordinate

Judge's construction of this part of the decree and hold that the razinama decree in O.S. No. 46 of 1911 made the future maintenance due to

defendant 1 a charge on the suit properties.

8. The next question is, that assuming there was a charge, is the present plaintiff entitled to recover possession of the properties on payment of the

amount of the future maintenance for which the properties were sold and purchased by defendant 1. It is true that the plaintiff had no notice of the

sale proceedings, but the question is: when the maintenance is charged on specific properties by the decree, are not subsequent alienations of the

properties affected by that decree; or in other words, does not the principle of *lis pendens* apply to such cases? In support of the contention that

the sale in execution does not affect the plaintiff, the subsequent purchaser, and that he is entitled to recover possession on paying to defendant 1

the amount of maintenance due to her, the learned advocate for the appellant relied on *Bhoje Mahadev Parab v. Gangabai* [1913] 37 Bom. 621

which seems to support him. It may be said that the law is well settled that where a decree makes maintenance a charge on specified properties,

the decree-holder is entitled to realize the maintenance by executing the decree without having recourse to any suit : see *Muttia v. Veerammal*

[1887] 10 Mad. 283, *Minahshi Achi v. Chinnappa Udayan* [1901] 24 Mad. 689 and *Sowbagia Ammal v. Manika Mudaliar* [1917] 42 I.C. 975.

In the case of mortgage suits, subsequent alienations of the suit properties pending the decree are subject to the doctrine of *lis pendens*. In the case

of such suits it has been held that the *lis* continues even :after the decree, i.e. until the actual sale in execution of the decree. The decision in *Bhoje*

Mahadev Parab v. Gangabai [1913] 37 Bom. 621 seems to follow the view for which there is some authority that the *lis* terminates after the

decree. This decision has not been followed in Madras. In *Ramaswami Ayyangar v. Govinda Ayyar* [1916] 38 I.C. 1, *Seshagiri Ayyar, J.*

observes at p. 841.:

The sounder view is to hold that the property continues to be subjected to *lis pendens* until the sale is actually effected.

9. In this connexion attention may be drawn to the amendment to Section 52, T. P. Act, introduced by Act 20 of 1929. By the amendment a new

explanation has now been added to that section, which says that for purposes of this section the pendency of a suit continues

until the suit or proceedings has been disposed of by a final decree or order and

complete satisfaction or discharge of such decree or order has been obtained or...

10. The explanation seems to embody the Madras view. After the amendment, there can be no doubt as to the law on this point. Even before the amendment as I stated, the view in Madras was that the Us in a mortgage suit continues until the" actual sale in execution of the decree. I think the same principle may be applied in respect of maintenance suits in which the decree declares the maintenance claim a charge on the properties. In this view it follows that the alienation in favour of the present plaintiff by defendant 2 is invalid having regard to the charge created by the decree in O.S. No. 46 of 1914 and defendant 1 is entitled to execute the decree without giving any notice to the plaintiff, the subsequent purchaser. I therefore hold that the plaintiff has no right to say that the purchase of the properties by defendant 1 should be set aside on his paying the amount of maintenance claim for which the properties were sold. The second appeal is therefore dismissed with costs.