
(2014) 04 AP CK 0132

In the Andhra Pradesh High Court

Case No : Second Appeal No. 1117 of 2013

Indian Bank

APPELLANT

Vs

Nallam Veera Swamy

RESPONDENT

Date of Decision : 29-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9, Order 21 Rule 21, Order 21 Rule 58, Order 34 Rule 1, Order 34 Rule 34
Transfer of Property Act, 1882 — Section 52, 58, 60, 85, 91

Citation : (2015) 1 ALD 278 : (2014) 5 ALT 631

Hon'ble Judges : Nooty. Ramamohana Rao, J

Bench : Single Bench

Advocate : P. Shiv Kumar, Advocate for the Appellant; P. Durga Prasad, Advocate for the Respondent

Judgement

Nooty Ramamohana Rao, J.—This second appeal is preferred by Indian Bank, the decree holder, aggrieved by the Judgment and Decree passed by the Principal District Judge, Eluru, West Godavari District on 26.02.2007 passed in A.S. No. 133 of 2005, reversing the order and judgment passed by the learned Senior Civil Judge, Kovvur, West Godavari on 09.08.2000 in E.A. No. 441 of 1998 in E.P. No. 71 of 1997 in O.S. No. 102 of 1991.

2. The case of the appellant-bank is that, respondents 3 to 10 have obtained on 10.07.1982 a loan from the appellant-bank by creating an equitable mortgage in respect of several of their properties by depositing its title deed. As they have failed to discharge the loan, the appellant-bank instituted suit O.S. No. 102 of 1991 on 12.08.1991, wherein a preliminary decree was passed on 23.11.1992 granting time for redemption and the final decree for foreclosure was also passed therein on 23.11.1995. In execution thereof, E.P. No. 71 of 1997 has been moved. At that stage, the first respondent in this second appeal filed on 06.08.1998 E.A. No. 441 of 1998 in E.P. No. 71 of 1997, under Rule 58 of Order XXI, Section 47 read with Section 151 C.P.C., setting up a claim over the immovable property in question, described in Item 2 of the E.P. Schedule, on the

basis of a registered sale deed dated 22.04.1991. This claim is resisted by the appellant - Bank on the ground that the sale deed has been collusively brought into existence subsequent to the mortgage of the petition scheduled property to the bank on 10.07.1982 and it is a clear case where the principal borrowers have colluded with the claim petitioner and got the petition filed for avoiding payment of decretal amount. It is not in dispute that the first respondent-claim petitioner has purchased Item 2 of the EP scheduled property by way of a registered sale deed executed by the ninth respondent herein on 22.04.1991.

3. The learned Senior Civil Judge had come to the conclusion that since item 2 of EP schedule property has already been mortgaged to the bank earlier in point of time than the sale was effected in favour of the claimant, the decree holder bank is, therefore, entitled to bring the petition schedule property for sale and hence the claimant has no right to object to the same. It is this order dismissing the claim petition E.A. No. 441 of 1998 which is appealed against in AS No. 131 of 2005 before the Principal District Judge at Eluru. It was contended on behalf of the first respondent-claimant herein that the appellant-bank has failed to implead the claim petitioner also as a party to the suit O.S. No. 102 of 1991 and since the claim petitioner has got a right to redeem the mortgage, the decree passed in O.S. No. 102 of 1991 does not bind him. Based upon the decision rendered by this Court in Areti Maramma Vs. State Bank of India, Secunderabad and Others, , the learned Principal District Judge allowed the appeal and set-aside the order passed in E.A. No. 441 of 1998 in E.P. No. 71 of 1997 in O.S. No. 102 of 1991. Challenging the correctness of this order, the present second appeal has been preferred.

4. Heard Sri B. Kumar, learned counsel deputed for Sri P. Shiva Kumar on behalf of the appellant-bank and Sri P. Durga Prasad, learned counsel for the 1st respondent. Learned counsel for the appellant contends that the order passed by the Appellate Court is not sustainable, inasmuch as, the original title deed to the EP schedule property was deposited with the appellant-bank by the principal borrower and hence clear collusion between the borrowers and the claimant is writ large of the proceedings and the decree passed by the Trial Court in the suit cannot be allowed to be frustrated in the manner in which the first respondent-claimant sought to do. The learned counsel Sri B. Kumar would further contend that no claim petition would lie under Order 21 Rule 58 C.P.C. in a case of sale brought on the foot of a decree in a mortgage suit. He places reliance in this regard on the judgments rendered by the Division Bench of the Madras High Court in Krishnaswamy Gounder Vs. Nagarathnammal, , M.S. Doraisami Iyer Vs. A.R. Arunachalam Chettiar and others, and a Judgment of this Court in T. Nabi Sab Vs. G. Venkatesulu and Another, . The learned counsel Sri Kumar would suggest that the judgment rendered by this Court in Areti Maramma v. State Bank of India's (supra) requires reconsideration as the legal principle has not been correctly decided therein.

5. Per contra, Sri Durga Prasad would contend that the learned District Judge has

rightly followed the ratio laid down by this Court in Areti Maremma's case. Further Areti Maramma was based on a sound principle and needs no reconsideration, particularly when the appellant bank has failed to implead the subsequent purchaser-claimant to the suit, inspite of having knowledge of such a sale.

6. I consider it appropriate to deal in detail, first, the legal principles relating to the rights of the mortgagee and the subsequent purchaser of mortgaged property.

7. A mortgage is a security given by a person for ensuring or facilitating the fulfillment of some obligation undertaken by him. Usually the obligation for which security is offered relates to repayment of a debt. While a simple debt of money confers on the creditor a jus in personam, a right which is enforceable against a determinate individual debtor. Such a simple debt of money is realizable by obtaining a money decree and then bringing the property of the debtor to sale in execution of such a decree. If, in the meantime, the debtor alienates his property, the creditor cannot ordinarily follow such a property as the alienee in the meantime acquires certain other rights in the same property, in which case a creditor can only proceed against the individual debtor and his interests can sometimes be jeopardized inasmuch as, the remaining assets of the debtor could be insufficient to discharge the debt in full. For this reason, creditors require security to be furnished in the shape of a real property, the value of which the creditor can safely rely and in case of necessity, turn the same into money. Most importantly the creditor can follow the property even when it was lying in the hands of some other third parties pursuant to its alienation by the debtor. A mortgage is, thus a security which confers upon the creditor some right in rem. It is a right in re aliena for it exists in regard to property of which the ownership is in another person. The very definition of a mortgage, as per Section 58 of Transfer of Property Act, shows that it is nothing more than a transfer of an interest in a specified immovable property and all that the mortgagee gets is not the legal ownership of the property but merely an interest in immovable property. While a relationship of a debtor and a creditor subsists in case of mortgages, but most importantly, the right to redeem remains with the debtor. The equity of redemption is singularly significant in that a mortgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor can be limited by any contract between the parties.

8. In Shaw vs. Foster (1872) 5 H.L. 321 at 340, Lord Cairns has noted:

It is a well-established rule of equity that a deposit of documents of title without anything more, without writing, without word of mouth, will create in equity a charge upon the property referred to.

9. Thus, any equitable mortgage is created by the debtor by depositing his title deeds with the creditor with intent to create security thereon, for the debt obtained. In Birch vs. Ellames & Gorst 145 ER 1924, dealing with the effect of

such an equitable mortgage, it has been noted as under:

The deposit of title deeds as a security for a debt is now settled to be evidence of an agreement to make a mortgage and that agreement is to be carried into execution by the Court against the mortgagor or any who claim under him, with notice, either actual or constructive of such deposit having been made.

10. Lord Parker observed in *Ram Narain Singh vs. Adhindranath* ILR 44 Calcutta 388 (P.C.):

It must be borne in mind;

1. that a loan prima facie involves personal liability;
2. that such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest;
3. that the nature and terms of such security may negative any personal liability on the part of the borrower.

11. Lord Bramwell in *Salt vs. Marquess of Northampton* (1892) A.C. 1 has observed:

An equity of redemption is a right not given by the terms of the agreement between the parties to it, but contrary to them, to have back securities given by a borrower to a lender on payment a principal and interest at a day after that appointed for payment, when by the terms of the agreement between the parties the securities were to be the absolute property of the creditor. This is now a legal right of the debtor.....

12. Thus, the mortgagors right to redeem the mortgage even after the specified time lapsed subsists and still the mortgagor can claim to redeem the property. Hence, this right of the mortgagor has come to be known as "Equity of Redemption". The rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor be limited by any contract between the parties. The principle behind the rule was explained in *Santley v. Wilde* (1899) 2 Ch. 474 by Lindley M.R. in these words:

The principle is this a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that "once a mortgage always a mortgage".

13. Lord Davey in *Noakes & Company vs. Rice* (1902) A.C. 24 has observed "that

a mortgage cannot be made irredeemable and that a provision to that effect is void."

14. Hence, the doctrine of equity of redemption came to be expressed in the maxim "Once a mortgage, always a mortgage". And this principle has taken now a firm footing in the form of Section 60 of the Transfer of Property Act. So long as the mortgagor had a right to redeem the mortgage, he can always pay off the debt together with interest to the mortgagee and get back possession of the mortgaged property. This position would continue so long as the property is not sold under a final decree of sale brought about in accordance with the provisions of Order XXXIV C.P.C. (See *Mathuralal Vs. Keshar Bai and Another*,).

15. Order XXXIV C.P.C., which dealt with all aspects relating to mortgages of immovable properties, was brought in, duly repealing the provision contained in Section 85 of Transfer of Property Act. Rule 1 thereof required all persons having interest either in the mortgage surety or in the right of redemption shall be joined as parties to any suit relating to mortgage. Significantly, this provision is rendered subject to the other provisions of the code. A Division Bench of the Madras High Court had occasion to consider the question of not impleading all necessary parties to a mortgage suit in (*Chinta*) *Chandramma and Another Vs. Gunna Seethan Naidu*, . Defendants 3 and 5, in that case, were coparceners in a joint family, Defendant 3 being the elder. In 1908, Defendant No. 3 executed a simple mortgage in favour of one Joganna for Rs. 100/- the date for payment being 06.06.1909. In 1909, Defendant 5 sued Defendant 3 for partition and got a decree for a half share of their property, including half share of the property mortgaged to Joganna. He also got a decree against Defendant 3 for costs. His decree for costs, he assigned to Defendant 2, who, in execution of it brought Defendant 3's half-share of the mortgaged property to sale in 1912. Afterwards, Defendant 5 sold the remaining half-share which he had got by his partition decree to Defendant 1. In 1914, Joganna sued for sale on his mortgage, making defendant 3 and no one else a party to that suit. He got a decree for sale and in execution of that decree the plaintiff in the present suit eventually bought the mortgaged property in Court auction in 1924. The Court thus noticed that in effect, defendants 1 and 2 have become transferees of the whole equity of redemption, even assuming that Defendant No. 2 ever had an exclusive right of property mortgaged to Joganna. Neither Defendant 5 nor his transferee, Defendant 1, nor Defendant 2 was a party to Joganna's mortgage suit. The effect of that is that suit did not affect their rights in any way. As they were left out of Joganna's suit, he could, and the present plaintiff after his purchase could have brought another suit against Defendant 1 or Defendant 2 or both for sale on the mortgage. That was the view taken earlier by the Madras High Court in *Venkata Reddy Vs. Kunjappa Goundan and Others*, . Therein the Court ultimately, held the principle in the following words:

.....There we have the proposition clearly laid down that the purchaser of the equity of redemption is in those circumstances in the same position as a puisne

mortgagee. If he is left out of the first mortgagee's suit or the puisne mortgagee's suit he is just as much free of it as the puisne mortgagee would be if he was left out. In *Chinnu Pillai and Others Vs. Venkatasamy Chettiar and Others*, K. Srinivasa Aiyangar, J, said:

In no case can a prior simple mortgagee extinguish the right of the puisne mortgagee by foreclosure. Sufficient attention has not always been paid to this important fact where it is said that the junior mortgagee is bound to redeem or his only right is to redeem or that the senior mortgagee can compel redemption.

We are entitled to substitute "the purchaser of the equity of redemption" for "the puisne mortgagee" or "the junior mortgagee" in those remarks of Srinivasa Aiyangar, J., which, if I may say so with respect, put the position clearly and correctly. In *Entholi Kizhakkikandy Kanaran v. Vallaih Koylil Unnooli* (1907) ILR 30 Mad. 500 : 17 M.L.J. 431 a Bench of this Court decided that in a case such as this the purchaser in execution of a decree in a suit for sale on a mortgage cannot recover possession from the purchaser of the equity of redemption left out of that suit but can only bring a suit for sale against him.....

16. In the same Judgment, Anantakrishna Aiyer, J, agreeing with the view of Reilly, J, has opened up his opinion quoting the following passage found in the authoritative work of Jones on Mortgages, which is to the following effect:

while it is expensive and inconvenient to join all persons interested, in a mortgage suit, it is much more expensive and inconvenient to go on with such a suit omitting any such party.

17. And then the learned Judge proceeded to pass the following comment.

The present case illustrates the wisdom of the observation made by the learned author, if the reported cases are not sufficient to bring home to litigants the importance of having all interested persons as parties to suits, relating to mortgages.

Alas! This wisdom appears to be elusive even now.

18. Justice Anantakrishna Aiyar then proceeded to consider the effect of a decree obtained by a mortgagee in a suit to which the holders of equities of redemption were not made parties and expounded the principle in the following manner:

.....He cannot take advantage of his own wrong, he cannot acquire higher rights by reason of a litigation to which the owners of the equity of redemption were not made parties. That being so, if the puisne mortgagee or the owner of the equity of redemption be entitled to other rights and remedies over and above the right of redemption, such other rights and remedies would not be lost to them, and the plaintiff cannot be heard to say that those remedies were lost to them as a result of the suit to which they were not parties. Now the learned Advocate drew our attention to certain passages from three decisions where it is generally stated that persons in the position of defendants 1 and 2 have got the

right to redeem. Nobody would think it worth while to quarrel, with such a proposition if it means what it states, namely, that they have got the right of redemption; but if it be intended to lay down that they have got only the right of redemption, then, both on principle and by virtue of authorities which are binding on us, that position does not seem to be tenable. In *Chinnu Pillai and Others Vs. Venkatasamy Chettiar and Others*, Courts Trotter, J., as he then was, observed as follows: The principle is that of any number of mortgagees, the later can always redeem the earlier, but cannot be compelled to do so, and the earlier cannot redeem the later except by consent.

21. The matter is put very tersely by K. Srinivasa Aiyangar, J., at p. 85, where it is stated:

In no case can a prior simple mortgagee extinguish the right of the puisne mortgagee by foreclosure. Sufficient attention has not always been paid to this important fact, where it is said that the junior mortgagee is bound to redeem, or his only right is to redeem or that the senior mortgagee can compel redemption.

As has been already mentioned, the right to redeem is a right and not an obligation. If a person has got also other rights to exercise it is not open to a person in the position of the plaintiff to compel such person to exercise any one right rather than any other. It is therefore clear that the present plaintiff would not be entitled to claim any rights higher than the rights of the original mortgagee Joganna and could not derive special rights by virtue of a suit filed by Joganna against persons other than the real owners of the equity of redemption.

19. It will also be profitable to notice that a Division Bench of Patna High Court in *Mt. Waleyatunnissa Begum Vs. Mt. Chalakhi and Others*, dealt with the question of failure to bring on record a party having equity of redemption and as to whether that should result in dismissal of the suit, held as under:

On second appeal to this Court it was held by Dawson-Miller, C.J. and Mullick, J., that the fact of the subsequent mortgagee not being impleaded in the suit within the period of limitation did not operate as a bar to the whole suit and that the suit could proceed in so far as the defendants on the record were concerned. Dawson-Miller, C.J., observed that the combined effect of Order 1, Rule 9, and Order 34, Rule 1, Civil P.C., in so far as mortgages were concerned was that all persons whose rights and interests may be adjudicated upon and determined in the suit ought to be added as parties, but that failure to add one or more of such persons should not have the effect of defeating the suit, if the Court in their absence can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. Whether the Court can do so or not must depend upon whether the presence of those not added is essential to enable the Court to adjudicate on the rights and interests of those actually before it. His Lordship then proceeded to consider cases where a suit could not proceed and those where a suit could proceed in the absence of some of the parties and observed as follows:

But if a decree can be passed and given effect to in so far as the rights of the parties actually before the Court are concerned without interfering with the interests of others there seems to me no reason why the suit should not proceed.

7. The difference between proper parties and necessary parties to a suit was then considered, and it was held that a subsequent mortgagee was a proper party but not a necessary party, and that suit could not fail in the absence of a subsequent mortgagee. The principles laid down in this decision are, if I may be permitted to say so, sound principles which would apply to the circumstances of each case. In the present case, if a decree can be made and given effect to as against the parties who are actually before the Court there is no reason why the suit should fail as a whole.....

20. Wort, J, speaking for a Division Bench of the same Patna High Court in *Rai Satyadeva Narayan Sinha and Others Vs. Tirbeni Prasad*, summarized the point in the following terms:-

.....It is now the unanimous opinion that failure to make a person interested in the equity of redemption a party to the mortgage suit is not fatal, as the Court may exercise its powers of joining parties under Order 1.....

21. Meredith J, speaking for a Division Bench of the Patna High court in *Ramcharitar Sao and Another Vs. Bawan Prasad Singh and Others*, has laid down the following tests, as necessary and applicable, while dealing with a question of not impleading all necessary parties to a mortgage suit, as under:

.....It will be apparent that two tests have been laid down as to whether the suit can proceed in the absence of certain proper parties: (1) can the rights of the parties on the record be fully determined in their absence, and (2) can that determination be made necessarily affecting the rights of those absent.....

22. In fact, confronted with the situation arising out of not impleading all necessary parties to a mortgage suit, the Madras High Court in *Periakaruppa Pillai Vs. Satyanarayanamoorthi*, has taken the following view:

It is in this connexion that the second contention of Mr. Bhashyam Iyengar becomes relevant. No doubt u/s 91, T.P. Act, he is entitled to institute a suit for redemption of the entire mortgaged property; but Under Order 34, Rule 1, Civil P.C., he is bound to make all persons interested in the equity of redemption parties. The section is imperative though no doubt subject to the other provisions in the Code, one of such provisions being Order 1, Rule 9. The object of Order 34, Rule 1 is to prevent multiplicity of actions and to adjust the equities of all parties interested in the equity of redemption. So normally speaking, if the plaintiff desires to have redemption of the entire mortgage, he ought to have made the representative of Krishna Iyengar parties. The observations of L.J. Lindley in *Hall v. Heward* (1886) 32 Ch. D. 430 seem clearly to indicate that if a person interested in the equity of redemption is known he ought to be made a party in order to safeguard his rights. But if he is not known or it was not

possible to have made him a party, due provisions may be made in the decree for safeguarding his rights. Order 34, Rule 1, I think, in my opinion, makes it obligatory to make the persons interested in the equity of redemption if they are known as parties to the suit because it may be they may validly object to the plaintiff redeeming the whole or there may be equities shown which will prevent the plaintiff redeeming the whole. In this case the plaintiff not only deliberately omitted to make the representatives of Krishna Iyengar parties to the suit but opposed the application made by the defendant. The question again is the plaintiff precluded from getting any relief? Order 1, Rule 9 says:

No suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Therefore even though the plaintiff has omitted to make representatives of Krishna Iyengar parties to the suit, his suit cannot be defeated if relief otherwise can be granted to him vide *Shahasaheb Sabduralli Vs. Sadashiv Supde*, and *Umesh Chandra Mondal Vs. Hemanga Chandra Maity*, . The plaintiff is interested only in a portion of item 3 in the mortgaged property and he can be given relief by allowing him to redeem that part on payment of a proportionate amount.

23. The Division Bench of the High Court of Andhra Pradesh in *Devathi Subbarayudu and Others Vs. Puvvadi Chinna Venkatasubbiah*, has held as under:

21. Before we deal with these decisions, it would be useful to refer to the relevant portion of Order XXXIV, Rule 1, C.P.C. which is as follows:

Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

x x x

This rule enjoins that all persons interested either in the mortgage security or in the equity of redemption are to be joined as parties to any suit on the mortgage. The object of doing so is not merely to avoid multiplicity of suits, but also to enable the interested parties to raise necessary defences open to them in law, so that the same may be taken into consideration in dealing with the claim under the mortgage and in passing the preliminary decree thereon.

That this is imperative is also inferable from the fact that Order XXXIV. Rule 4, C.P.C. provides for the passing of a preliminary decree fixing a time for payment into court of the amount for which the preliminary decree had been made, and in default whereof giving of a right to the plaintiff therein, to apply for a final decree directing that the mortgage property or sufficient part thereof be sold and the proceeds of sale paid into Court and applied in payment of what has been found due under the preliminary decree. This is an opportunity which is given to all persons interested in the equity of redemption who are in the position of the present plaintiffs", and since the plaintiffs had not been made parties to the suit,

O.S. No. 235 of 1943, the decree passed therein does not bind them.

24. A Division Bench of the Bombay High Court in Bank of Poona, now merged into Sangli Bank Ltd. Vs. Navrajasthan Co-operative Housing Society Ltd. and Others, , took the view that:

(10) The provisions of Order 34, rule 1 cannot be ignored. It requires that in a mortgage suit every one interested in the mortgage security must be made a party. Now this Court has held that is rule, is subject to the other provisions of the Code of Civil Procedure, with the result that merely because a necessary party is not added, the suit of the mortgagee cannot fail. It is on this principle that in Shahasaheb Sabduralli Vs. Sadashiv Supde, this Court held that a decree for sale can be passed only in respect of the right, title and interest of those co-sharers who are parties to the proceedings. This case was later followed by the Calcutta High Court in Kherodamoyi Dasi Vs. Habib Shaha, . Indeed the effect of the decisions is that in all such cases where necessary party is not joined in such a suit the rights of those who were not joined cannot be affected and such person is entitled to enforce such of his rights as are available to him.

25. It is wholly appropriate to notice the judgment rendered by the Supreme Court in Nagubai Ammal and Others Vs. B. Shama Rao and Others, , in which the binding nature and effect of a mortgage decree, in the absence of a party, who had the equity of redemption, was considered. The question was answered in the following passages:

24. 3. It was finally contended that the purchase by Devamma in execution of the decree in O.S. No. 100 of 1919-20 was void and conferred no title on her, because the Official Receiver in whom the estate of Keshavananda, the mortgagor, had vested on his adjudication as insolvent on 19-2-1926 had not been made a party to those proceedings, and that, in consequence, the title of Dr. Nanjunda Rao and his successors under the sale deed dated 30-1-1920 continued to subsist, notwithstanding the court auction sale on 2-8-1928. The obvious answer to this contention is that the properties which were sold on 2-8-1928 did not vest in the Official Receiver on the making of the order of adjudication on 19-2-1926, as they had been transferred by the mortgagor, long prior to the presentation of Insolvency Case No. 4 of 1925-26 under the very sale deed dated 30-1-1920, which forms the root of the appellants' title. That sale was no doubt pendente lite, but the effect of section 52 is not to wipe it out altogether but to subordinate it to the rights based on the decree in the suit. As between the parties to the transaction, however, it was perfectly valid, and operated to vest the title of the transferor in the transferee.....

26. But assuming that Keshavananda had still some interest in the properties left even after he had sold them on 30-1-1920 and that it would vest in the Official Receiver on the making of the order of adjudication on 19-2-1926, what is its effect on the title of Devamma as purchaser in court auction in execution of her charge decree? It has been held by the Privy Council in Kala Chand Banerjee v.

Jagannath Marwari, that when in execution of a mortgage decree properties are sold without notice to the Official Receiver in whom the equity of redemption had vested prior to the sale, such sale would not be binding on him.....

.....We should accordingly hold that even assuming that the equity of redemption in the suit properties vested in the Official Receiver on the adjudication of Keshavananda, his non-joinder in the execution proceedings did not render the purchase by Devamma a nullity, and that under the sale she acquired a good and impeccable title, subject to any right which the Official Receiver might elect to exercise, and it is not open to attack by the transferee pendente lite under the deed dated 30-1-1920 and his representatives, the present appellants.

26. In view of the principle enunciated so very well, it is absolutely imperative to consider that the right of redemption having been acquired by one of the parties namely the subsequent purchaser, the first respondent herein, who has not been impleaded by the appellant, the decree obtained by the plaintiff behind his back will not affect his rights at all, as the same is not binding on him.

27. In this very context, Ramesam J., speaking for the Division Bench of Madras High Court in Krishnaswamy Gounder Vs. Nagarathnammal, , crisply put the related issue in the following words:

1. This is an appeal from an order of our brother Waller, J., dismissing a claim petition. The respondent obtained a sale decree in C.S. No. 510 of 1924 on a mortgage deed executed in 1914 by the defendant in that suit. The present appellant then filed a claim petition claiming the property basing his claim on a sale deed executed in 1904. The learned Judge dismissed the claim. The appeal is against that order.

2. The learned advocate for the respondent draws our attention to an objection that a claim petition does not lie in the case of a sale decree. It is true, this objection was not taken before Waller, J. but all the same it is an objection which must be given effect to; see Deefholts v. Peters [1887] 14 Claus 631 Bismillah Begam Vs. Sanwal Das, and (1905) ILR 27 700 . The remedies of the appellant are as indicated in the decision in Bismillah Begam Vs. Sanwal Das, either to file a suit for recovery or to resist delivery proceedings if he is really in possession.

28. In one of the earliest cases, where the question fell for consideration was whether a claim under Order XXI Rule 58 can be laid in execution of a mortgage decree, Lancelot Sanderson C.J., in Mahabir Prashad Singh Vs. Nogendra Nath Mandal, , took the following view:

2. In my judgment, however, we are bound to discharge this Bale on the authority of the case, Deefkolts v. Peters 14 C. 681 : 7 Ind. Dec. (N.S.) 418. There the proceedings be way of claim were taken u/s 278 of the CPC which was then in force and which corresponded to Order XXI, Rule 58 of the present Code of Civil Procedure. There the learned Judges distinctly tell that the procedure

under that section was not applicable to a mortgage decree which contained a provision that the property in question should be sold. In this case there is no doubt that the decree was what is called a mortgage decree, and contained a provision that this property should be sold. Consequently, it was not open to the Execution Court to entertain and adjudicate upon a claim, which was preferred by the petitioner under Order XXI, Rule 58. The learned Judges in that case said as follows: "We think that proceedings by way of claim are not applicable to a case of this kind. Proceedings by way of claim are applicable only in cases of money-decrees where property of the judgment-debtor has been attached that is, where some property of the judgment-debtor is attested for the purpose of satisfying any general money claim. In that kind of claim it is clear that there should be some speedy remedy for the purpose of ascertaining whether the property claimed is the property of the judgment-debtor at all; but in a case like this, where the property has been dealt with to a solemn way by the decree of the Court, and has been declared liable to sale under the mortgage, that remedy would not be applicable." Then they proceeded to point out that the petitioner would have other remedies. On the authority of that case, which, to my mind, covers this case, we have no option but to direct that this Rule should be discharged with costs--hearing fee, one gold mohur.

29. The Madras High Court in *M.S. Doraisami Iyer Vs. A.R. Arunachalam Chettiar and others*, and the Andhra Pradesh High Court in *T. Nabi Sab Vs. G. Venkatesulu and Another*, held that a claim petition under Order 21 Rule 58 is not maintainable in execution proceedings taken out in a mortgage decree.

M.S. Doraisami Iyer vs. A.R. Arunachalam Chettiar

7. The application is one under Order 21, Rule 58, C.P.C. No such application can be maintained in a proceeding in execution of a mortgage decree. Rule 58 of Order 21, C.P.C. can come into play only when there is an attachment. In the case of mortgage there is no question of attachment and in this case, there was no attachment as such. Consequently, the application was not maintainable.

T. Nabi Sab Vs. G. Venkatesulu and another

3.The impugned orders of the Courts below do not call for any interference as the decree obtained by the 1st respondent against 2nd respondent was mortgage decree and the provisions of Order 21 Rule 58 C.P.C. are not attracted.

4. Order 21 Rule 58 C.P.C. states as follows:

Adjudication of claims to, or objections to attachment of property - (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained.

The above provision discloses that the said provision is attracted only where the claim is preferred, or objection is made to the attachment of any property which was attached in execution of a decree.

30. When a mortgage decree is passed, there is adjudication on the footing that the property in question belongs to the mortgagor. Since no attachment is required for bringing to sale the mortgaged property, no claim petition under Rule 58 of Order XXI C.P.C. would lie, though, in general terms the other provisions contained in Order XXI C.P.C. would be applicable in execution of a mortgage decree, excepting Rules 58, 83 and 89 thereof. In execution of a mortgage decree, only the incorporeal right is brought to sale and not the physical property. In juxtaposition to this, in execution of a money decree the physical or the real property is brought to sale.

31. On a reference made to Full Bench because of conflicting decisions rendered by two different Division Benches of the Madras High Court in (1883) ILR 7 255 and Kumaratta Servaigaran alias Chinnasami Servaigaran, by his adoptive mother and guardian Seerai Ammal Vs. P.L.S.A.R. Sabapathy Chettiar, Alfred Henry Lionel Leach, C.J. speaking for the Court Hamidgani Ammal (one of the L.Rs. of the deceased first respondent) Vs. Ammasahib Ammal (died) and Others, had considered as to who can impeach a decree by raising an objection u/s 47 of the C.P.C. The Full Bench has considered various judgments rendered earlier by the Madras High Court and brought out the correct principle in the following manner:

6. Dissent from (1883) ILR 7 255 , was also expressed in Zamindar of Karvetnagar v. Trustee of Tirumalai Tirupati etc., Devasthanams (1909) 19 M.L.J. 401 : ILR Mad. 429 which was decided by White, C.J., and Abdur Rahim, J. There a mortgage decree was passed against the holder of an impartible estate. On the death of the mortgagor his son sought to set up in execution proceedings a contention that the mortgage was not binding upon him. It was held that this course was not open to him. After stating that there was abundant authority to support the proposition that the decree in a mortgage suit directing sale could not be impeached in execution proceedings the Court observed:

The case of (1883) ILR 7 255 no doubt supports the contention that the rights of the judgment-creditors who have obtained mortgage decrees can be determined in execution proceedings, but as Mr. Sundara Aiyar pointed in that case the Court would seem to have overlooked the fact that the decree itself contained a direction for sale and that notwithstanding the decree for sale the properties had been attached as if the proceedings had been in execution of a money decree. Apparently all the cases in which (1883) ILR 7 255 is cited with approval are cases in which the decree sought to be executed was a simple money decree or, at any rate was not a mortgage decree and the - question we have to determine did not arise.

7. The decision in (1883) ILR 7 255 was criticised by Ayling and Seshagiri Aiyar,

JJ., in 38 Ind. Cas. 360 . On the other hand it receives support from the judgments given by Madhavan Nair and Stodart, JJ., in Chinnathayee alias Kondammal Vs. Lakshmi Achi (deceased) and Others, , by Cornish, J., in V.K.K. Peer Bathummam Beevi Vs. Nagur Meerammam Beevi, , and by Ramesam and Jackson, JJ., in Govindarajulu Naidu Vs. Chinnathambi Padayachi and Others, . It is, however, significant, that in these cases no reference was made to the decisions in Kumaratta Servaigaran alias Chinnasami Servaigaran, by his adoptive mother and guardian Seerai Ammal Vs. P.L.S.A.R. Sabapathy Chettiar, , Zamindar of Karvetnagar v. Trustee of Tirumalai Tirupati etc., Devasthanams (1909) 19 M.L.J. 401 : ILR Mad. 429 and 38 Ind. Cas. 360 . Cornish, J., did refer to certain other decisions, but the decisions related to proceedings in execution of money decrees, where the considerations are not the same as they are here or in proceedings in enforcement of a mortgage decree. The latest decision of this Court was given by Venkataramana Rao and Abdur Rahman, JJ., in Lakshmadu Vs. Ramudu and Others and their judgment supports the judgments which dissent from (1883) ILR 7 255 .

8. We are firmly of the opinion that (1883) ILR 7 255 was wrongly decided and that the law on the question now before the Court is correctly expressed in Kumaratta Servaigaran alias Chinnasami Servaigaran, by his adoptive mother and guardian Seerai Ammal Vs. P.L.S.A.R. Sabapathy Chettiar, , Zamindar of Karvetnagar v. Trustees of Tirumalai Tirupati etc., Devasthanams (1909) 19 M.L.J. 401 : ILR Mad. 429; 38 Ind. Cas. 360 and Lakshmadu Vs. Ramudu and Others . When a person comes into Court in execution proceedings as the legal representative of a deceased party he cannot question the decree which has been passed. If the decree concerns property in which he claims an interest, the decree will not be binding upon him unless he was a party to the suit. If he was not a party to the suit or, as in this case, he had been dismissed from the suit, his rights will be entirely unaffected and he will be in a position to enforce them in a suit instituted by him for that purpose.

9. Section 47 of the CPC only requires to be decided in execution proceedings those questions which arise between parties to the suit in which the decree has been passed or their representatives and which relate to the execution, discharge or satisfaction of the decree. Where a stranger to the suit claims as his, immovable property which has been the subject-matter of a decree, that claim cannot in law be regarded as being a question relating to the execution, discharge or satisfaction of the decree. There are decisions of this Court to the effect that in execution proceedings arising out of money decrees questions relating to the property attached must be decided in execution proceedings and not by a separate suit, but this is an entirely different matter because the correctness of the decree is not called into question. Therefore the correctness of such decisions does not arise. We are here dealing with a case where it is said that a person who is not a party to the suit, but is brought into Court in execution proceedings as the legal representative of a deceased party, can in those proceedings be allowed to challenge the decree and if he fails to do so he

has for ever lost the right claimed by him in the suit property. Obviously the answer must be that he cannot in execution say the decree is wrong, and he has his remedy by suit.

32. When a question arose as to what extent the Andhra High Court is bound by the decisions of the Madras High Court delivered before 05.07.1954, a Full Bench speaking through Subba Rao, C.J. (as the learned Chief Justice of India then was) in *M. Subbarayudu and Others Vs. The State*, has considered the relevant principle in paragraph Nos. 7, 8, 9 and 20 in the following manner and accordingly held as under:

7. It will therefore be seen that, in effect and substance, the territorial jurisdiction of the composite Madras High Court was split up from 5.7.1954 and the Madras and the Andhra High Courts have the same jurisdiction subject to some exceptions with which we are not concerned now, over the area comprised in the two different States. The composite High Court, which was His Majesty's Court, before the Constitution, became one governed by the Constitution. For a short period, the same High Court exercised jurisdiction over the two States. After 5.7.1954, two different Courts came into existence. The same procedure governing the Madras High Court continued to govern the Andhra High Court till it was modified in accordance with law. The splitting up of territorial jurisdiction had not the effect of changing the law obtaining in the respective territories. The Andhra High Court is therefore, in a real sense an offshoot of the Madras High Court exercising the same jurisdiction and administering the same laws, which the Madras High Court had exercised before 5.7.1954 in the territories included in the Andhra State. To use a convenient terminology, the Andhra High Court may be treated as one succeeding to the High Court of Madras and exercising all the powers and administering the same law which the Madras High Court exercised in the territories comprised in the Andhra State.

8. It may be convenient at this state to notice the case law and the passage from the text-books cited at the bar on the Law of Precedent. The English Law on the subject has been succinctly summarised in 18 Halsbury's Laws of England page 210, para. 535:

It may be laid down as a general rule that part alone of a decision of a Court of Law is binding upon Courts of co-ordinate jurisdiction and inferior Courts which consists of the enunciation of the reason or principle upon which the question before the Court has really been determined.

The principle, underlying the aforesaid proposition, has been clearly stated by Odgers in his Book "In the Common Law", 3rd Edition, Vol. I, pages 64-65 as follows:

There is no statute or common law rule by which one Court is bound to abide by the decision of another of equal rank; it does so simply from what may be called the comity among Judges. In the same way, there is no common law or a statutory rule to oblige a court to bow to its own decisions; it does so on the

ground of judicial comity. This so-called comity has, however, been formulated into rules which, though unwritten, are habitually followed by our Courts.

9. The scope of the rule was elucidated by the Court of Appeal in--"Young v. Bristol Aeroplane Co., 1944 2 All. ER 293 (C). The question there was whether the Court of Appeal was not bound by its own earlier decisions. Lord Greene, M.R., exhaustively considered the question and came to the following conclusion:

On a careful examination of the whole matter, we have come to the clear conclusion that this Court is bound to follow previous decisions of its own as well as those of Courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise (i) The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow, (ii) The Court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords, (iii) The Court is not bound to follow a decision of its own if it is satisfied that decision was given per incuriam.

The statement of law is clear but the decision does not define what are Courts of co-ordinate jurisdiction. The question whether the Rangoon High Court in exercise of its ordinary original and appellate jurisdiction was not bound by the reports of decisions of the Chief Court of Lower Burma was raised and decided by the Full Bench of the Rangoon High Court in - "Ma Mya v. Ma Them", AIR 1927 Rang 4 (D). The Full Bench Cunliffe J. dissenting, held that the High Court was not bound by the said reports. The decision turned upon the question whether the Chief Court of Lower Burma, which was replaced by the High Court, which had territorial jurisdiction not only in respect of lower Burma but also upper Burma, was a Court of co-ordinate jurisdiction. Rutledge C.J. held that

to decide whether the decisions of the late Chief Court are binding upon this Court, we must decide whether it is a Court of co-ordinate jurisdiction.

20. There is no reason why the aforesaid salutary principle should not be followed in the case of decisions delivered by the Madras High Court when the Andhra area was under its jurisdiction. During that period, titles were settled transactions took place, settlements made, agreements entered into, wills executed and expectations raised on the basis of the decisions of the Madras High Court. If the Andhra High Court is now free to start from scratch, it would be introducing confusion in the law of the land and disturbing titles acquired. It would also become a fruitful source of litigation. Further the Madras High Court has had long and well-established traditions and was presided over by some of the Distinguished Judges of our land. This High Court would do well in its own interests and that of the Public to continue the great and abiding traditions laid down by the Madras High Court for generation and to be inspired by its noble examples.

33. After formation of the Andhra Pradesh High Court, once again a Full Bench of

this Court was called upon in *Siddiah Vs. Kamath*, to consider the binding nature of the judgments rendered by the Madras High Court. The Full Bench speaking through Justice Krishna Rao has subscribed to the views expressed by the Full Bench of the Andhra High Court in "*M. Subbarayudu and others v. The State*" (referred to *supra*).

34. The Supreme Court in *Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others*, , dealing with the nature of an objection which can be taken to the validity of a decree in execution proceedings has laid down the principle in the following words:

When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who Was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.

35. It is also apt to notice that the Supreme Court in *Bhavan Vaja and Others Vs. Solanki Hanuji Khodaji Mansang and Another*, observed as under:

It is true that an executing Court cannot go behind the decree under execution. But that does not mean that it has no duty to find out the true effect of that decree. For "construing a decree it can and in appropriate cases, it ought to take into consideration the pleadings as well as the proceedings leading up to the decree. In order to find out the meaning of the words employed in a decree the Court often has to ascertain the circumstances under which those words came to be used. That is the plain duty of the execution Court and if that Court fails to discharge that duty it has plainly failed to exercise the jurisdiction vested in it.

36. The Madras High Court in *Ganapathi and Another Vs. Balasubramania Gounder*, was called upon to decide as to whether the Executing Court was right in rejecting an objection raised u/s 47 of C.P.C. that the mortgage decree being not binding on a party, who was not impleaded thereto held as under:

But if the case of defendants 4 and 5 and of the legal representatives of Thanikachalarm was that any of the properties which became part of the final decree were not liable to be sold, the remedy was to challenge the final decree. Even so far as defendants 4 and 5 are concerned, though the suit had been dismissed against them, that dismissal was only in respect of their personal liability. But if the preliminary decree also specified the properties that were to be sold, if defendant 2 failed to pay the amount by the date prescribed by the

preliminary decree and if defendants 4 and 5 had interest in the property which was expressly included in the schedule to the decree to the extent of those properties or any one of them was directed to be sold, defendants 4 and 5 had clearly a remedy by way of an appeal against the preliminary decree. Clause 4 of the preliminary decree clearly directed that "in default of payment as per Cl. 1 supra the plaintiff (appellant herein) may apply to the Court for a final decree for the sale of the mortgaged property described in detail in the schedule to the decree to the lower Court and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold.

12-A. Mr. R.S. Venkatachari has relied on a Pull Bench decision of this Court in Mohan Ram and Others Vs. T.L. Sundararamier and Others, , in which the Full Bench of this Court has held that though the executing Court cannot go behind the decree, there are certain well recognized exceptions to this rule. These exceptions, according to the Full Bench, were that where alienation of certain property is prohibited on grounds of public policy, either under the general law or by statute, the executing Court can refuse to execute a decree which directs such a sale. The contention raised in the present proceedings by the original defendants 4 and 5 and heirs of Thanikachalam is with regard to the correctness of the decree which specifically directs 57 items of the properties to be sold in execution of the mortgage decree. There is no dispute with regard to the identity of the property. The dispute is whether the decree in respect of some of the properties, is a valid decree. Such a question cannot be said to relate to the construction of the decree.

37. The Kerala High Court in Thankamma v. Mamachan KERLT-1986-0-487 held as under:

In Hamidgani Ammal (one of the L.Rs. of the deceased first respondent) Vs. Ammasahib Ammal (died) and Others, a Full bench of the Madras High Court considered the identical question and after referring to the various decisions of the Madras High Court upheld the view that in execution of mortgage decree legal representatives cannot set up their independent title. After considering the authorities brought to my notice by the counsel on both sides, I feel it safe to fall in line with the orthodox view that in execution of a mortgage decree a plea of an independent right set up by the legal representatives cannot be entertained because that would be going behind the decree and that such a plea would not arise in execution, discharge and satisfaction of the decree. To permit such a plea to be raised would render the decree ineffective since the legal representatives can protract the proceedings and deny the decree-holder of the fruits of the decree by setting up at each stage independent rights in them. The well-accepted principle that the executing court cannot go behind the decree should be respected when such a plea is put forward. As already indicated above, in execution, a clear distinction between a mortgage decree and a money decree has to be borne in mind. In a mortgage decree, there is a final adjudication about the rights of the judgment-debtor.

38. Now, turning to the judgment rendered by this Court in Areti Maremma's case, the learned Judge had concluded the issue in paragraph 21 as under:

21. A glance at the authorities referred to above would indicate that the decree in a mortgage suit is not binding on a person who has interest in the mortgage property either by way of a sale subsequent to the mortgage or otherwise but not made party to the suit.

39. No exception can be taken thereto, as the learned Judge has correctly stated the principle. Therefore, the question of reconsideration of this Judgment would not arise at all. However, there was no occasion for the Court in that case to consider as to whether a claim petition either u/s 47 or under Rule 58 of Order XXI is maintainable at all and hence, the said judgment cannot be understood as laying down a principle that a claim petition u/s 47 or under Rule 58 of Order XXI is maintainable to resist execution of a mortgage decree. As was noticed supra, the legal principle enunciated in clear terms in this regard makes the position abundantly clear that no claim petition u/s 47 or under Order XXI Rule 58 C.P.C. would lie and be maintainable in an execution taken out in a suit raised on a mortgage. In view of the clear principle that has emerged in this regard, as noticed supra, I have no hesitation to hold that EA No. 441 of 1998 filed by the first respondent herein under Order XXI Rule 58 and Section 47 read with Section 151 C.P.C. is not maintainable. Therefore, the order and decree passed by the learned Principal and Sessions Judge, Elur, West Godavari District in A.S. No. 133 of 2005 is set-aside and E.A. No. 441 of 1998 moved by the first respondent stands dismissed. The second appeal is accordingly allowed, but however without costs.

40. I would have much appreciated if a serious attempt has been made by the learned counsel for the appellant, to demonstrate as to how the judgment rendered by this Court in Areti Maramma's case did really call for a fresh look to be given, instead of adopting a casual approach by merely suggesting that the said judgment requires reconsideration. Perhaps, that could have saved lot of energy and time of mine.