

(1955) 07 KL CK 0011

In the High Court Of Kerala

Case No : Second Appeal No. 768 of 1952 in A.S. No. 22 of 1952

Ittiathi Gopalan

APPELLANT

Vs

Nani Amma Ammukutty Amma and Others

RESPONDENT

Date of Decision : 15-07-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 89(1)

Citation : (1955) 07 KL CK 0011

Hon'ble Judges : Nandana Menon, J; Kumara Pillai, J

Bench : Division Bench

Advocate : D. Narayanan Potti, for the Appellant; C.K. Sivasankara Panicker and P. Govindan Nair for Respondent No. 1, for the Respondent

Judgement

Kumara Pillai, J.—This second appeal relates to a matter in execution. Respondent 2 is the assignee of a decree obtained by a subscriber in a chitty for paid up subscriptions due from the foreman. Under the decree, the decree amount is recoverable from the Defendant (i.e., the foreman) and the decree schedule properties. The Defendant died after the , decree, and his son, Respondent 3, was impleaded in execution as his legal representative. Respondent 3 also has died after the institution of this appeal, and his legal representatives are additional Respondents 4 to 10. There are twentyfour items of properties in the decree schedule. Decree schedule items 5 and 13 were sold in execution on . 11-12-1950 each for Rs. 100, and part of decree schedule item 22 was sold in execution on 11-1-1951 for Rs. 1250 which was the balance decree debt subsisting after the sale of items 5 and 13. On 10-2-1951 Respondent 1, whose deceased husband .had, even before the court sale, purchased the property sold on 11-1-1951, applied under Order 21 Rule 89 CPC for setting aside the court sale of 11-1-1951, depositing in court five per cent) of the purchase money for payment to the auction-purchaser and also the whole of the balance, decree amount subsisting after the sale "of Items 5 and 13 for payment to the decree-holder . The execution court allowed this application and set aside the sale on 3-7-1951. Subsequent-lyr on account of applications for

rateable distribution made by certain persons who claimed that they were also subscribers in the same chitty and had obtained decrees which were also charged on the decree schedule properties in this case, the execution court rateably distributed the amount which Respondent 1 had deposited under Order 21 Rule 89 (1) (to) for payment to the decree-holder, and consequently Respondent 2 was not able to receive from court the full amount of the balance decree debt due to him. For recovering the balance due to him after receipt of the amount he got by the rateable distribution he again brought to sale the properties sold on 11-1-1951, and the properties were again purchased by the person who had purchased it at the first court sale on 11-1-1951.

After the second sale Respondent 1 applied on 24-10-1951 for having that sale set aside on the ground that as she had already paid the balance decree debt when she applied to have the first sale set aside under Order 21 Rule 89 the property was not liable to be sold again in execution of the same decree, This application was opposed by the auction-purchaser. But the execution court overruled his objections and set aside the sale. As the appeal which he filed against the execution court's order was also dismissed by the lower appellate court, the auction purchaser has brought this second appeal.

2. Sub Rule (1) of Order 21 Rule 89 CPC reads:

(1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court

(a) for payment to the purchaser, a sum equal to five per cent of the purchase-money, and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that, for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

Since there can be no piecemeal execution of a mortgage decree.

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mentioned in Clause (b) of sub rule (1) of Order 21 Rule 89 would, in the case of a mortgage decree naturally be the balance decree amount subsisting on the date of the sale. As no sale can be set aside under Order 21 Rule 89 without deposit of the two amounts specified in Clauses (a) and (b) of sub Rule (1), it would follow that the liability "Of the property for the balance amount due under the mortgage decree will automatically cease with the order setting aside the sale. That order is passed solely on the basis of the deposit made under Sub-rule (1) of Order 21 Rule 89 and necessarily implies the acceptance of the deposit by

the court. After the deposit of the balance decree amount in court expressly for payment to the decree-holder and its acceptance by the court, it cannot be said that the liability under the mortgage decree survives thereafter. There cannot arise a second liability in respect of the mortgage amount once discharged. In the present case, in the petition filed by Respondent 1 under Order 21 Rule 89 it was specifically stated that she was depositing in court for payment to the auction-purchaser the commission due to him and for payment to the decree-holder the balance decree debt. It was also admitted at the time of hearing in this Court that the amount deposited by her along with that petition was sufficient to make up the five per cent of the purchase money payable to the auction-purchaser and the whole of the balance decree debt due to the decree-holder after the sale of items 5 and 13. The concurrent findings of the courts below are also to that effect. Therefore, after the deposit made by Respondent 1 under Order 21 Rule 89 and with the order setting aside the sale under that Rule made on the basis of that deposit, the liability of the property under the decree has to be taken as extinguished, and it cannot be sold again for realisation of the decree amount a second time.

3. But it is contended by the Appellant that, although Respondent 1 had deposited in court the whole of the balance decree amount due on the date of sale, the decree-holder was not able to get that amount on account of the rateable distribution of the amount between himself and other judgment-creditors of the Defendant, and that, therefore, the decree could be deemed to have been extinguished only to the extent of the amount actually paid to him as per the order for rateable distribution and he was entitled to sell the property once again for realisation of the balance amount due to him after the receipt of his share in the rateable distribution. There is a conflict of authorities as to whether in the case of simple money decrees, the amount deposited under Clause (b) of sub Rule (1) of Order 21 Rule 89 can be rateably distributed between the holder of the decree in execution of which the property has been sold and other decree-holders who have applied for rateable distribution or whether it has to be held solely for the benefit of the holder of the decree in execution of which the property has been sold. It is, however, unnecessary to consider here the reported decisions on that point since the decree in this case is a mortgage decree. Proceedings in pursuance of applications under Order 21 Rule 89 proceed on the footing that the execution sale is not affected by fraud and other vitiating circumstances and is valid and binding on the property. From sub Rule (2) of Order 21 Rule 89 it is clear that an application under Rule 89 can be maintained only if the applicant accepts the sale as a valid and binding one. That sub-Rule provides:

Where a person applies under Rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

With the sale of the mortgaged property in execution of the mortgage decree the

mortgage on it is extinguished, and when a deposit under Order 21 Rule 89 is made and an application under that Rule is allowed what takes place in effect is a transfer of the rights of the auction-purchaser to the applicant. In *Gokul Bihari Das Vs. Kalandi Senda and Others*, it has been observed:

By setting aside of a sale under Order 21 Rule 89, Code of Civil Procedure which strictly speaking is a matter between the auction-purchaser and the judgment-debtor and in which the decree-holder is not concerned the mortgage lien over that property is not revived. The sale is set aside because the amount for which the property was sold has been paid up. When the order of the court for sale has been carried out, the mortgagee is only entitled to money, the sale proceeds. It is immaterial to him whether he is paid out of the actual sale proceeds or out of the money deposited by the judgment-debtor within the time allowed by law. The law has provided for compensation to the auction-purchaser who is deprived of a right which he acquired from bidding at the sale of the property and no compensation to the decree-holder as he is not affected by the setting aside of the sale.

We are in perfect agreement with these observations, and hold that, when a mortgaged property is sold in execution of the mortgage decree and the sale is subsequently set aside under Order 21 Rule 89 CPC the mortgage lien on the property would be extinguished and the property cannot be sold again under the same decree.

4. It may also be pointed out here that the order for rateable distribution was itself wrong and that no additional liability can be cast upon the mortgaged property by the decree-holder's acquiescence in the wrong order for rateable distribution. When the money was deposited, by a person who was not the judgment-debtor for the express purpose of satisfying the decree and extinguishing the mortgage lien and that deposit was accepted and acted upon by the court, the only person entitled to draw it was the decree-holder. The money did not belong to the judgment-debtor and was not an asset of his. It belonged to a person who was not a party to the suit, and since it was deposited by him for the express purpose of extinguishing the mortgage lien, it represented, after the deposit was accepted and acted upon by the court, the mortgage interest. As that interest belonged to the decree-holder alone, he was the only person entitled to draw it from court, and the amount was not liable to be rateably distributed among the creditors of the judgment-debtor. For the order wrongfully distributing the amount rateably among all the creditors of the judgment-debtor Respondent 1 was in no way responsible and the decree-holder has only himself to blame for acquiescing in that wrong order and not taking proper steps for setting it aside. During the course of the hearing in this Court reference was also made to the fact that most, if not all, of the applicants for rateable distribution were holders of decrees charged on this property. But none of them was a party to the decree in this case, and so the rights of such of them as had decrees charged on this property would not have been affected by the

sale of 11-1-1951 and the order setting it aside, under Order 21 Rule 89. There was also no surplus in "" the deposit made under Clause (b) of sub Rule (1) of order 21 Rule 89 after satisfying the charge of the decree-holder in this case. The amount deposited was just sufficient for satisfying his decree and no more. In the circumstances the applicants for rateable distribution were not entitled to share In the amount deposited by Respondent 1 even though some or all of them might have been holders of decrees charged on this property.

5. In the result the orders of the Courts below are confirmed and this second appeal is dismissed with costs.