

(1935) 12 MAD CK 0035
In the Madras High Court

(Jalmana) Veeraraghavalu Naidu

APPELLANT

Vs

Suryanarayana Panda and Others

RESPONDENT

Date of Decision : 13-12-1935

Acts Referred:

Citation : AIR 1936 Mad 338 : (1936) 43 LW 525

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—This is a suit to recover a sum of money due on the footing of a mortgage dated 11th June 1921 executed by defendants 1 to 4 and the minor son of defendant 1 in favour of the plaintiff. Defendant 5 is a son of defendant 2 born subsequent to the execution of the suit mortgage. Defendant 6 is a divided cousin of defendants 1 and 2. Defendants 7 to 13 are alienees of portions of the mortgaged property from defendant 6. The father of defendants 1 and 2, Raghunatha Panda, the father of defendant 6, Lavanya Panda, and another Chandrasekara Panda, were brothers and members of a family who became divided prior to the suit mortgage. So far as defendants 1, 2, 4 and 5 are concerned, they admitted the execution of the suit mortgage. The contesting defendants were defendants 6 to 13. Their defence is that defendant 6's father purchased item 2 from P.W. 2 who himself purchased the property at a Court auction in 1914. In regard to items 1, 3 and 4 the defence is that in or about 25th August 1915 the father of defendants 1 and 2, Raghunatha Panda, and his brother Chandrasekara Panda agreed to sell the suit property to defendant 6 and also put him in possession of the same in pursuance thereof and ever since defendant 6 was in possession upto the dates of the several alienations by him, that on 6th November 1921 the sons of Chandrasekara Panda sold their half share, but defendants 1 and 2 declined to carry out the agreement entered into by their father, but nevertheless he will be entitled to retain possession of the lands on the ground of the doctrine of part performance, and the title of defendants 1 and 2 never passed to the mortgagee, and he is not entitled to claim any relief against the shares of defendants 1 and 2 in the said items. In

regard to this defence three issues were raised in the case being issues 4, 5 and 6 namely:

(4) Whether the mortgagors had any title to the mortgaged properties when the suit bond was executed ? (5) Is the Court sale and also the agreement averred in the written statements of defendants 6 and 12 true ? (6) Are defendants 6 to 13 necessary parties ?

2. In fact the only issues that were seriously pressed in the case were the said issues. The learned District Munsif on the evidence found that defendant 6 was not the exclusive owner of item 2, and that the purchase by defendant 6's father in Court auction was not only for his benefit, but also for the benefit of his brother Chandrasekara Panda and Raghunatha Panda. He found that the agreement was true, but he was not inclined to give effect to it as it was not free from doubt as to how far the doctrine of part performance can be invoked against the plaintiff. In the end he gave a decree as claimed by the plaintiff.

3. On appeal the learned Subordinate Judge held that defendants 6 to 13, having set up a paramount title, were not necessary parties to the suit and were entitled to be exonerated from suit and therefore dismissed the suit against defendants 6 to 13. In second appeal it is contended by Mr. Ramaswami Aiyangar that the learned Judge was wrong in dismissing the suit as the trial Court had gone into the question and given a finding. Ordinarily the title of persons who set up a claim adverse to the mortgagor and mortgagee should not be investigated in a suit upon a mortgage. The joinder of such persons as stated by the Privy Council in *Radha Kunwar v. Reoti Singh* 1916 38 All 488 is irregular and leads to confusion, but it is not an inflexible or invariable rule. Such joinder does not affect the jurisdiction of the Court, though it is always desirable that if a party sets up a paramount title and does not want to redeem the property he may be struck off from the record as he takes the risk of not claiming redemption in case his title is found against in any subsequent litigation. But in each case the Court can exercise its discretion whether it will lead to inconvenience or confusion in trying the issue as to paramount title in the same suit. As observed by Venkatasubba Rao, J., in *Duraisami Iyengar v. Varadarajulu Naidu* 1928 53 MLJ 647 sometimes it may be necessary to do so. The Court is not bound to adjudicate on it, but the fact that the defendant objects to the trial of such an issue would not preclude the Court from trying it if it thinks necessary in the interests of all parties that such a trial should take place : vide *In re O. Ramalakshman* 1914 MWN 623. As pointed out in *Ramasami Pillai v. Marimuthu Goundan* 1928 Mad 764 it is very desirable that before the property is brought to sale all questions of title relating to the mortgaged property should be settled and the Court should as far as possible avoid multiplicity of litigation. The effect of joining persons who claim a title paramount need not necessarily result in a dismissal of the suit. The Court can order a separate trial.

4. In this case for instance it cannot be said that the trial of the issue relating to the title set up by defendant 6 was altogether unnecessary. The claim set up by

defendants 6 to 13 is based on a title derived from the branch of defendants 1 and 2 prior to the mortgage. There is no registered conveyance. If the doctrine of part performance could not be invoked against the plaintiff, they may have a right of redemption. Defendant 6 and his alienees could not be said to be complete strangers who claimed by a title not derived from the parties. In such circumstances I think it is very often desirable that the title to the mortgaged property should be set at rest before the property is brought to sale. In this case no doubt the objection was taken and as pointed out by Mookerjee, J., in *Jaggeswar Dutt v. Bhulan Mohan Metra* (1906) 33 Cal 425 and also as stated by me it is desirable that such a question should not be gone into in the suit. But when such a question has been gone into by the trial Court the appellate Court should not reverse the decision of the trial Court on that ground alone unless the decision has affected the jurisdiction of the Court or caused a prejudice to the parties by the trial on the merits. The learned Judge, though he adverts to this aspect of the case, has not given any definite finding on it and without doing so has reversed the decision of the District Munsif. I think he is not justified in doing so. In the interests of all parties I think it is not desirable that they should be driven to another litigation. In the present case I do not think that any question of jurisdiction has been affected and it is not known if any prejudice has been caused, but the justice of the case will be met by allowing the defendants to adduce any further evidence on the question of title which may have been omitted to be adduced. I therefore reverse the decision of the Subordinate Judge and direct him to dispose of the appeal after allowing an opportunity to the defendants to adduce additional evidence, if any, on the question of title giving the plaintiffs opportunity to rebut the evidence.

5. The property that has been mortgaged is only the share of defendants 1 and 2 in the suit property and any decree that will be passed herein should be confined to the said share. In the result the second appeal is allowed and the appeal is remanded for disposal in the light of the above observations. Costs will abide the result. The appellant is entitled to a refund of court-fee. Leave refused.