

(1924) 01 MAD CK 0025
In the Madras High Court

Kanniappa Mudali and Others

APPELLANT

Vs

P.V. Raju Chettiar and Others

RESPONDENT

Date of Decision : 09-01-1924

Acts Referred:

Citation : AIR 1924 Mad 761 : (1924) ILR (Mad) 605 : 79 Ind. Cas. 850 :
(1924) 20 LW 45 : (1924) 47 MLJ 16

Hon'ble Judges : Ramesam, J

Bench : Division Bench

Judgement

Ramesam, J.—In this case the 9th defendant and the legal representatives of the 10th defendant are the appellants. Respondents 1 to 3 are

the plaintiffs. The suit was brought for recovery of the principal and interest due on a mortgage bond executed by the husband of the second

defendant and defendants 1 and 6. The defence was that the plaintiffs were not entitled to maintain the suit on account of certain proceedings in

Insolvency.

2. The further facts necessary to be stated for understanding this defence are that the sixth defendant became insolvent and his properties were

vested in the Official Receiver, Chittoor. On the 16th August, 1915, the Official Receiver gave a notice to the mortgagees in which he stated that

he proposed to sell the properties of the insolvent by public auction free from their mortgage with the same charge to them on the sale-proceeds as

they might have on the properties, and called upon them to consent to the proposal. He added that, in case they did not intimate to the contrary

before a certain date, he would take it that they had consented to the above proposal. Incidentally it may be mentioned that the original notice is

not exhibited in the case and all that has been exhibited is an office copy. This office copy contains blanks in all important places where dates and amounts have to be mentioned, in particular the date before which a reply was expected is not in the document and is also a blank. This notice was received as appears from the acknowledgment Ex. I(a) on the 26th August, 1915, but there was no reply by the mortgagees to the notice. The Official Receiver proclaimed the sale of the properties and the proclamation is dated the 16th December, 1915. It was signed by the Official Receiver as Official Receiver and was issued from his office. It mentions that the entire right of the insolvent was intended to be sold and also mentions that Appeal No. 51 of 1921 and Memorandum of objections in the said Appeal, put in by Respondents 1-3. the property was to be sold free from encumbrances; and this particular mortgage was intended to be mentioned there but was described incorrectly, but we do not think that very much turns on the incorrectness of the description of the mortgage. The property was then purchased by defendants 9 and 10, who are now represented by the appellants. On the 22nd February, 1916, the mortgagees, applied to the District Judge for cancellation of the sale on the ground that the notice was not served upon them, that the price realised was not adequate, that the sale was held at a time when there was plague prevailing, and the petition also implies that they did not consent to the sale. The matter came up to the High Court and it was held that the petition was out of time and the petition was dismissed on that ground. The mortgagees then brought the present suit.

3. On these facts it is contended by the appellants that the present suit does not lie, that the former sale is binding on the mortgagees. Under the Provincial Insolvency Act III of 1907, only the property of the insolvent vests in the Official Receiver. The Act contains no provisions for selling the whole property free from all encumbrances even with the consent of the mortgagees. Section 16(5) says, that "nothing in the section shall affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed. Section 31 contains some provisions according to which a secured creditor may after realising his security prove for the balance, or he may relinquish his security and prove for the whole of his debt like any other unsecured creditor, or he may

prove for the difference between his debt and the estimated value of the property where the estimated value is less than that of his debt. Here, it cannot be said that the mortgagees have relinquished their security. Therefore none of the provisions of Section 31 applies. It cannot be said that the Official Receiver was a person with certain limited powers and the silence of the mortgagees in not replying to the notice amounted to such a consent as would justify the receiver to sell the properties. Mr. Krishnaswami Iyer, the learned Vakil for the appellants, then argued that, apart from any limited powers under the Act, the Official Receiver at least stands in the position of a mortgagor, and any mortgagor can sell the mortgaged property with the consent of the mortgagees. But it seems to us that a sale by mortgagor without a relinquishment by the mortgagee but merely with the consent of the mortgagee expressed in an unregistered document cannot be valid unless the facts amount to an authorisation of the mortgagor to sell on the mortgagee's behalf or to an agreement by the mortgagee to accept such sum as may be realised in the sale in discharge of his debt. In the present case, it is very difficult to make all these implications on account of the mere silence of the mortgagees, when they received the notice Ex. I. There is no doubt that the Official Receiver and the purchasers thought that the Official Receiver was authorised to sell under the Act and had limited powers of sale. I find it difficult to accept the contention for the appellants that the plaintiffs are estopped by the proceedings in insolvency. Nor can it be said that the plaintiffs chose one remedy, namely of applying to set aside the sale in the insolvency jurisdiction and that, therefore, they are precluded from their legitimate remedy. They chose the wrong remedy and they never got a relief. They never got any relief when they applied in the Insolvency Court.

4. We think that the judgment of the Court below is right and that this appeal must be dismissed with costs of respondents 1 to 3.

5. Now, as regards the memorandum of objections. The learned Subordinate Judge has committed a clerical error in paragraph 22 of his judgment where the figure ought to be Rs. 2,500 instead of Rs. 2,800. The amount due to the plaintiffs will be amended accordingly.

6. With reference to the interest, the judgment is right, but the decree directs that it should be calculated at 6 per cent, from the date of the decree.

This should be altered into ""at the contract rate up to the date fixed for payment and 6 per cent, thereafter.

7. Clause 3 of the decree will also be deleted as the purchasers will be liable for costs personally and for the balance of any unrealised debt the

plaintiffs-respondents can prove in insolvency.

8. The respondents 1 to 3 will be entitled to the costs of the memorandum of objections.