
(1964) 07 AP CK 0021

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 666 of 1961

Kompalli Venkanna and Another

APPELLANT

Vs

Chinna Narayana and Others

RESPONDENT

Date of Decision : 16-07-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 62

Citation : AIR 1965 AP 158

Hon'ble Judges : P. Chandra Reddy, C.J.;Narasimham, J

Bench : Division Bench

Advocate : B.V. Subbarayudu and G.J. appa Rao, for the Appellant;

Judgement

Chandra Reddy, C.J.

(1) This revision petition is referred to a Bench by Justice Venkatesam as he felt that there was conflict of opinion between the Bombay and Calcutta High Courts.

(2) The question we are called upon to answer is whether the property which is subjected to usufructuary mortgage can be attached in execution of a simple money decree and it arises in the following circumstances.

(3) The appellant obtained a decree for I. G. Rs. 1025-2-9 in the Court of the Subordinate Judge, Raichur. After the reorganization of the States, this decree was transferred to the Court of the District Munsif, Gadwal, for execution. The decree-holder in execution attached some lands situate in Basracheru village. The respondent claiming to be a usufructuary mortgagee sought the removal of the attachment contending that property in question could not be attached. The executing Court gave effect to this argument and directed that the attachment should be lifted.

(4) The aggrieved decree-holder carried a revision to this Court and when this came up before Justice Venkatesam, he referred it to the Bench observing :

"On this question, there is a conflict of Judicial opinion. *Kassirav v. Vithaldas* 10

Bom H.C.R. 100 took the view that where the claimant happens to be a usufructuary mortgagee in possession, the attachment ought to be raised. A Bench of the Calcutta High Court in Maharaj Bahadursingh v. Nosharan Bibi, AIR 1925 Cal. 296 has taken the view that even in such a case it can be inferred that the decree-holder's intention was not to attach the property itself and that the attachment may be made to continue on the equity of redemption."

(5) Before we discuss the case law, we will look at the relevant statutory provision which is in the shape of Or. XXI, R. 62, which is as under :

"Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge."

(6) Indisputably, the property in dispute does not fall within the range of this rule, for the reason that it was in the possession of the respondent who is said to be a usufructuary mortgagee. If the property is outside the scope of this rule, is the decree-holder precluded from attaching such a property in execution of his money decree ? In our considered opinion, the property as such cannot be attached, since the mortgagee cannot be said to be in possession of the property as a trustee for the judgment-debtor. But he is not precluded from attaching the interest of the judgment debtor in the property, which is the equity of redemption. The attachment can continue on the equity of redemption, but not on the property which is the subject of usufructuary mortgage.

(7) We will now proceed to refer to the decided cases.

(8) In 10 Bom HCR 100 it was ruled by Justice Sargent that when the judgment debtor is not in possession of the mortgaged properties as trustee for the defendant, the attachment that had been laid upon the mortgaged properties had to be raised.

(9) The Calcutta High Court in Maharaj Bahadur Singh Vs. Nosharan Bibi and Others, had not dissented from this view. On the other hand, they referred to it with approval. But the learned Judges preferred to adopt a course which in their opinion served the interests of justice, viz. , by directing the attachment to continue upon the equity of redemption of the judgment-debtor, having come to the conclusion that the intention of the decree-holder was to attach the right, title and interest of the judgment-debtor in the property whatever it might be.

(10) In the same trend of thought is Radhey Kishan Lal Vs. Rameshwar Prasad, The learned Judge who decided it explained the principle of Biswanath Patra Vs. Lingaraj Patra,) which observed that a mortgagee in possession was not entitled to come to Court and argue that the property was not liable to attachment, as meaning that a mortgagee in possession could not object to the attachment of the mortgagor's interest in the property.

(11) Another single Judge of that High Court Sheo Narain Prasad and Another Vs. Jawahir Lall, Claimant and Others, held that it was not open to a usufructuary

mortgagee to maintain an objection to the attachment of the mortgaged property by way of application under Or. 21, R. 58, though his rights were not affected by the attachment.

(12) A Division Bench of the same High Court Mt. Anrajo Kuer Vs. Ramdayal Singh and Another, adopted the view adumbrated in Maharaj Bahadur Singh Vs. Nosharan Bibi and Others, They came to the determination that in execution of a money decree against the mortgagor, the property which was usufructuarily mortgaged itself could not be attached, but the attachment could be continued on the equity of redemption.

(13) We feel that these decisions, with which we express our respectful assent, are in accord with the relevant provisions of the CPC and there is really no conflict between the Bombay and Calcutta High Courts in this behalf.

(14) In the light of the principle enunciated above, we direct that the attachment be continued upon the equity of redemption, but not upon the property itself.

(15) There will be no order as to costs of this revision petition .

(16) Order accordingly.