(1971) 08 AP CK 0014

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 261 of 1971

Kosuri Koteswara Rao APPELLANT

Vs

Kothu Venkataramana Rao RESPONDENT

Date of Decision : 03-08-1971

Acts Referred:
Transfer of Property Act, 1882 — Section 56

Citation : AIR 1973 AP 46

Hon'ble Judges : Ramachandra Raju, J

Bench : Single Bench

Advocate : Challa Sitaramayya, for the Appellant; G.V. Sitarama Rao, for the Respondent

Judgement

1. The short question that arises for consideration of this Civil Revision Petition is whether in the case of a mortgage debt which was contracted by more than one mortgagor, who own the mortgaged properties separately and not jointly, can a purchaser of the mortgaged properties from one of the mortgagors claim to be entitled to have the mortgage debt satisfied in the first instance by the sale of the property or properties not sold to him and belonging to other mortgagor.

2. The facts of the case may be stated thus:

3. Respondents 2 and 3 herein mortgaged six items of properties to the first respondent The second respondent was the owner of items 1, 2 and 3 and Ac.0-20 cents in item No. 6. The second respondent was declared an insolvent and in the sale by the Officer Receiver the petitioner herein purchased the items of the second respondent mentioned above. Subsequently , the first respondent file a suit for recovery of the mortgage debt. After final decree was passed, he filed an execution petition to sell all the items of the property. In that execution petition, the petitioner herein filed a counter requesting the executing court to sell the mortgaged properties, not sold to him, in the first instance and to sell the properties purchased by him thereafter when the decree amount still remains unsatisfied in full. The lower court by following the decision in S.L.N. Somayajulu

v. N.P. Sidhanthi (1957) 2 AnWR 385, came to the conclusion that the first respondent can proceed against any of the mortgaged properties in the satisfaction of his decree and he cannot be directed to proceed against the mortgaged properties in any particular order and accordingly refused to give direction as prayed for by the petitioner. It is against this view taken by the lower court that this revision petition has been filed.

4. Sri Challa Sitharamaiah, learned counsel for the petitioner has assailed the order of the lower court contending that the order of the lower court contending that on the basis of the provisions made in Section 56 of the Transfer of Properties Act, the petitioner is entitled to have the mortgage debt satisfied out of the mortgaged properties not sold to him in the first instance. It is convenient to read here section 56 of the Transfer of Property Act, which is in the following terms :

" If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties."

5. This section has been substituted by the Amending act of 1929 for the original section, the scope of which was limited to " charges" only. In the original section, the right to the buyer was given specifically only " as against the seller." The words " as against seller" have been dropped in the present new section to show that the right can be enforced against the mortgagee also. Section 56 deals with the right of a subsequent purchaser to claim marshalling. It is similar to section 81 which refers to marshaling by a subsequent mortgagee. Section 81 applies as between mortgagees of the same debtor, the first of whom has got several securities and the second of whom has but some of those securities and advanced loan without notice of the earlier encumbrance. In such a case, the mortgagee is entitled to marshall the securities and to require that the earlier mortgagee shall first proceed against those securities which have not been encumbered in favour of the latter. The marshalling as provided u/s 56 requires that a mortgagee who has the means of satisfying his debt out of several properties shall exercise his right so as not to prejudice the purchaser of one of them. It is the converse of the contribution which requires that if several properties are liable to a mortgage and the mortgagee has been paid out of one, the other shall not escape.

6. A reading of Section 56 would show that marshalling cannot be ordered so as to prejudice the right of the mortgagee or persons claiming under him. But it is not on this ground that the marshalling was refused by the lower court. In the lower court the decree holder has not filed any reply to the counter filed by the petitioner asking for marshalling to oppose it by saying that in such a case his

rights would be prejudiced. Sri Challa Sitaramaiah has argued that if at all any prejudice is caused by ordering marshalling, it is only to the other mortgagor namely the third respondent and he did not file any counter objecting to the marshalling by the petitioner. Under those circumstances, Sri Challa sitharamaiah has urged that the lower court should have ordered marshalling and not refused it.

7. But the question is, objection or no objection, whether section 56 applies to the facts of this case and marshalling prayed for by the petitioner can be ordered under that provision. On a reading of section 56 it appears that where there is one debtor who mortgaged two or more properties and sells one of more of the properties to another person, the buyer is entitled to have the mortgage debt satisfied out of the property or properties not sold to him so far as the same will extend. But the present case is not a case of one debtor. There are two debtors namely respondents 2 and 3. They mortgaged their separate properties and not their joint properties, to think that the debtor is one. It more than one person mortgage the properties which are owned by them jointly even though in that case there will be more than one debtor. It can be said to be a case of a single debtor but not in a case like the present one where though the mortgage is one, the properties mortgaged are owned separately and it is only the mortgagors joined together to contract the debt by mortgaging as provided in Section 56 is intended to apply to cases where there is more than one debtor. The reason seems to be obvious. In the case of more than one debtor, when the properties of one of the debtors are ordered to be sold in the first instance, it will cause prejudice to his rights though he may have a right to contribution against the other debtors. But that would not be the case in the case of a single debtor where the liability to discharge the debt would entirely on him. It is true that in the present case the third respondent namely the other mortgagor did not seem to have raised any objection for the prayer made by the petitioner to sell the properties purchased by him last. But that is besides the point. The question is whether Section 56 is intended to provide for cases when there is more than one debtor. On a plain reading of the section, it is clear to me that the provision contained in it is intended to apply only to cases of a common debtor, and not to cases or more than one debtor mortgaging their separate properties jointly for contracting a debt and one of the mortgagors selling his properties subsequently. The same view has been taken in some of the decided cases.

8. In (Manchiraju) Venkayya Vs. (Vadalamudy) Venkataramayya and Others, the facts are: A and B holding separate interests together mortagaged their properties to " C". "B" subsequently mortgaged his interest to "D" who had no notice of the previous mortgage. "A" sold his interest to "P". "C" brought a suit upon his mortgage. "D" required the properties sold to "P" to be first sold and a direction was given accordingly in the decree. The question arise whether such a direction could be given. The court held that a subsequent mortgagee could not be allowed to require the properties of any but his own debtor to be first sold either by way of marshalling u/s 81 or by way of exercise of discretionary power

to control execution sales given under Order 34, Rule 4 of the Code of Civil Procedure.

9. In the decision reported in D.C. Johar and Sons Ltd. Vs. Mathew, Mathew and Kuruvilla mortgaged their separate properties to South India Bank Ltd. Both were equally liable under the mortgage. Mathew alone subsequently created a second mortgage of his properties in favour of Palai central Bank. The Palai central Bank contended that the south Indian Bank Limited should proceed against Kuruvalli''s properties in the first instance. On this point, the Kerala High Court said that this is not a case to which Section 81 of the Transfer of Property Act would apply as a right to claim marshalling is subject to the condition that there must be a common debtor. Mathew alone is the mortgagor in the transaction on which the Palai Central Bank has sued and section 81 cannot therefore apply to the case and the Palai Central Bank who took the later mortgage has no special equity to justify the prayer that Kuruvilla''s properties should be sold first.

10. It is true, the above two cases have arisen u/s 81 of the Transfer of Property act. But Section 56 and Section 81 are expressed in the same terms and the principle involved and the object to be achieved are the same. It is clear to my mind that the principle of marshalling as envisaged u/s 56 applies only to cases where there is a common debtor. The purchaser has no right to require the property of any but his own vendor to be first sold. He has no right to ask the properties of some other debtor and not his own vendor to be sold first, Section 56 cannot have application to cases of a vendor who requires properties of any but his own vendor to be first sold. Under these circumstances, I have no doubt that the petitioner has no right to require the properties of the third respondent who is not in his vendor to be sold first.

11. Sri Challa Sitharamaiah has placed reliance on a number of decisions which have no relevancy to the facts of obtaining here. He has relied on ST. MR. Veerappa Chettiar Vs. Chandramouliswara Ayyar, by maternal uncle and guardian Gunnu Ayyar, ; Sheo Narain Sah and Others Vs. Mt. Deolochan Kuer and Others, ; Ayyappan Raman and Others Vs. Kunju Vakki Ithappiri and Others, and Bhekdhari v. Baijnath AIR 1940 Pat 533. He has also placed reliance on the decision in Pencil v. Vajiram Chetti (1969) 82 MLW 201 and Brahm Parkash Vs. Manbir Singh and Others, . These two last cases are cases of marshalling by subsequent purchaser. But there the debtor was a common debtor and the properties required to be sold first belonged to the vendor of the subsequent purchaser seeking marshalling. Sri Challa Sitaramaiah has not been able to bring to my notice any case where there was more than one debtor and the purchaser from one debtor was allowed to require the properties of the other debtor to be sold first.

12. In the result, there are no merits in the Civil Revision petition and accordingly it is dismissed with costs.

13. Revision dismissed.

