
(1926) 08 MAD CK 0064
In the Madras High Court

M. A. Ananthalar and Another

APPELLANT

Vs

Narayana Prasad and Another

RESPONDENT

Date of Decision : 11-08-1926

Acts Referred:

Citation : AIR 1927 Mad 190 : (1926) 24 LW 836

Hon'ble Judges : Srinivasa Aiyangar, J

Bench : Division Bench

Judgement

Srinivasa Aiyangar, J.—This is an application by the decree-holders for an order absolute for sale of the property which in and by the decree was charged with the payment of the amount for which the decree was passed against the defendant on the ground that the judgment-debtor has made default in the payment of the amount. It appears that the Deputy Registrar issued on the execution application of the decree-holders notice to a person whose name appeared as a mortgagee on the certificate of encumbrances obtained by the decree-holders for purposes of execution. I do not see why or how it was necessary to issue any notice to the mortgagee at any rate for the purpose of making an order for sale. On his behalf, however, his counsel has now taken objection to the procedure proposed to be adopted by the decree-holders in bringing the property to sale. At first I was disposed to regard the objection made as one for bringing the property to sale in execution on the ground that the decree-holders having a mere charge could enforce the charge only in the regular suit, but the learned counsel for the subsequent mortgagee stated that that was not his objection. He submitted that the proper procedure which the decree-holders should follow would be to attach the property as in the case of an ordinary money decree and then bring the property to sale. He frankly admitted that the object with which he contended that the property should first be attached was, to use his own words, "to make a call for claims" or, in other words, to allow a person like his client to make a claim on the footing of an attachment of property.

2. It is clear from the sections of the CPC that the object of an attachment of immovable property is merely to place the property in custodia legis and the effect of an attachment has been in a series of decisions stated only to amount to a restraint on alienation by the judgment-debtor. Even the alienation that may be made is not altogether void but only subject to the sale that may be effected pursuant to the attachment. In these circumstances, I do not see what principle there is for requiring that this property, which in and by the decree itself has been charged with the payment of the amount, should be required to be attached by the Court as in the case of a mere decree for money the payment of which is not charged on immovable property.

3. In the case of Subramanian Chettiar v. Raja of Ramnad [1917] 41 Mad. 327 it has been held by this Court that property made security for the payment of the decree amount could be proceeded against by an order for sale in execution in the same suit without a fresh suit. The learned counsel for the mortgagee referred to the case of Sowbagia Ammal Vs. Manicka Mudaliar and Others, The head-note in that case is wrong and misleading. There is no decision in that case that the only course open to a charge holder was to attach the property and then bring it to sale. In fact, what the learned Judges say at page 603 is that they were of opinion that the plaintiff was entitled to execute her decree by bringing to sale the properties charged with her maintenance. They do not speak of any preparatory attachment of property. Apparently in that case there had been an attachment, but there is no decision by the learned Judges that such an attachment was necessary according to the rules of procedure.

4. I am satisfied that, having regard to the nature of the attachment in the Civil Procedure Code, it is not necessary that any property charged with the payment of the amount of a decree should be attached by the decree-holder. The proper mode of enforcing the charge would be to treat the decree as if it were a preliminary decree for sale and afterwards, on default being committed, and an application being made for the sale of the property, to pass an order in the nature of a decree absolute for sale. It is not denied that the amount due to the plaintiffs has been failed to be paid. The plaintiffs decree-holders have, therefore, become entitled to enforce the charge.

5. There will, therefore, be an order absolute for the sale of the property. Time for filing sale papers one month. I make no order as to costs.