

(1938) 10 AHC CK 0016
In the Allahabad High Court

Md. Karimul Rahman Khan and Another	APPELLANT
Vs	
Saraswati Sugar Syndicate and Others	RESPONDENT

Date of Decision : 18-10-1938

Acts Referred:

Citation : (1938) 10 AHC CK 0016

Hon'ble Judges : Iqbal Ahmad, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Iqbal Ahmad, J.—Apart from the question whether the order sought to be assailed by the present appeal is an appealable order, we have come to the conclusion that there are no merits in this appeal and that the decision of the Court below must stand. 16 is well settled that so long as the mortgaged property remains in the hands of the mortgagor it is open to the mortgagee to realize the mortgage debt from the whole or any portion of the mortgaged property. The reason for this rule is that every item of mortgaged property is a security for the entire mortgage debt, and, as such, it is open to the mortgagee to realize the mortgage debt from any item of the mortgaged property. This rule is however subject to two exceptions. Firstly the rule is subject to the doctrine of marshalling provided for by Sections 56 and 81, T.P. Act, and secondly to the Court's power under Order 34, Rule 4, Civil P.C., to adjust the equities between the mortgagor and subsequent transferees from him by directing that the various items of mortgaged properties be sold in a certain order. The order in which the properties are to be sold may be regulated either by the decree for sale passed by the Court or in the course of execution proceedings of such a decree.

2. The provisions of Section 56 are analogous to the provisions of Section 81, T.P. Act, and the only difference between the two Sections is that Sec 56 prescribes the rule as to marshalling by subsequent purchasers, whereas Section 81 provides for the marshalling of securities at the instance of a subsequent mortgagee. The rule of law enacted by these two Sections is that if the owner of

two or more properties mortgages them to one person and then sells or mortgages one or more of the properties to another person, the buyer or the subsequent mortgagee 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 or mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties. It is evident [from the provisions of these Sections that the rule as to marshalling can prevail only if its application to a particular case is not calculated to prejudice the rights of the prior mortgagee or of any other person who has acquired an interest in any item of the mortgaged property and that for consideration. The application of the rule as to marshalling has the effect of adjusting the equities between the mortgagor and subsequent transferees from him and can be enforced by a Court as against the prior mortgagee, provided his interests are not adversely affected by the application of the rule. Further, it is clear that marshalling can be enforced only at the instance of a subsequent purchaser or a subsequent mortgagee of one of the items of the mortgaged property.

3. In the case before us the rule as to marshalling has no application for the simple reason that the subsequent purchaser in the present case, viz. the Saraswati Sugar Syndicate, Lahore, which is respondent 1 in the present appeal, has not invoked to its assistance the rule as to marshalling and this appeal is by the legal representatives of the mortgagor who unsuccessfully prayed in the Court below that the various items of the mortgaged properties should be sold in a particular order. The question that arises for consideration in the present appeal therefore is whether the second exception to the general rule mentioned at the inception of our judgment has any application to the facts of the present case. It has been laid down in a series of cases that, even if the doctrine of marshalling is not strictly applicable, the Court has, under Order 34, Rule 4, Civil P.C., the power to direct the order in which various items of mortgaged properties are to be sold, provided the order laid down by the Court does not in any way prejudice the rights of the mortgagee decree-holder.

4. In *Nobin Chandra Bhattacharyya Chowdhuri Vs. Debendra Sen and Others*, , it was held that, if the Court finds that a stranger to the mortgage transaction purchased a portion of the mortgaged property bona fide and without notice of the mortgage and on payment not merely of the value of the equity of redemption but the value of the absolute interest in properties, the Court has jurisdiction to make such provision as regards the order of sale of the various items of mortgaged property as would work no injustice to the stranger purchaser. It was observed in that case that, when the interest of a third person has intervened who has bona fide taken a transfer of a portion of the mortgaged property, the mortgagee is not entitled to insist on his right to sell such portion of the mortgaged property as he likes, and that in such a case it is for the Court to regulate the order of sale of the various items of mortgaged properties in such a way as to do justice to the bona fide subsequent transferee without in any way

prejudicing the right of the mortgagee to realize the whole of his mortgage debt. This decision was based on the provisions of Order 34, Rule 4, Civil P.C., which lays down that, a preliminary decree for sale should provide that in default of the payment of the mortgage debt, the plaintiff mortgagee shall be entitled to a final decree directing "that the mortgaged property or a sufficient part thereof be sold." This provision leads to the conclusion that, while ordinarily a mortgagee is entitled to realize the mortgage debt from the whole of the mortgaged property, it is open to the Court in cases in which it is necessary to adjust the equities arising between the subsequent transferees from the mortgagor and the mortgagor to direct that in the first instance only such properties as were not transferred by the mortgagor are to be sold, and if the proceeds of the sale of such properties are not sufficient to satisfy the mortgage debt then the properties transferred to subsequent transferees may be sold. In *Kommineri Appayya v. Mangala Rangayya* (1908) 31 Mad 419, while it was observed that

a bona fide purchaser, who purchases for value a portion of a, mortgaged property without notice of such mortgage, has no right, in a suit by the mortgagee to enforce his mortgage, to insist that the portion not sold to him must be proceeded against first and the portion purchased by him must be sold only for the balance, if any due,

it was laid down that

it is competent to the Court u/s 88, T.P. Act (which corresponds to Order 34, Rule 4 Civil P.C.) to order a sufficient portion of the mortgaged property to be sold; and if the portion not sold by the mortgagor is sufficient, and if the mortgagee will not be prejudiced, the Court may by its decree direct such unsold portion to be sold first.

5. It was further held in that case that if a decree directs the sale of the whole of the mortgaged property, the Court, in execution, may first bring to sale the portion not transferred by the mortgagor and if the sale proceeds be sufficient, stop the sale of the portion transferred by the mortgagor. Similarly, it was ruled in *Raghavachariar v. Krishna Reddi* AIR (1924) Mad. 509 that in executing a mortgage decree the Court can direct, at the instance of a subsequent transferee of one of the items of the mortgaged property, the sale of some of the items of the mortgaged property first before selling the property transferred to the subsequent transferee, provided the mortgagee is in no way prejudiced. The question was considered at length by a Bench of this Court in *Mirza Qaiser Beg Vs. B. Sheo Shanker Das and Others* and it was held that in cases in which the doctrine of marshalling of securities has no application, it is the paramount right of a mortgagee to have the mortgages satisfied by sale of over part of the mortgaged property, but this paramount right does not make the mortgagee the complete master of the situation and no long as his rights under the mortgage are not prejudiced the Court executing the decree has, in an appropriate case, full discretion to regulate the order in which the mortgaged properties should be sold, provided it is necessary to so regulate the order with a view to do justice

between two subsequent transferees from the mortgagor. The consideration of the appeal before us must therefore be approached on the assumption that a Court executing a decree for sale passed on the basis of a mortgage has full discretion to prescribe the order in which the various items of the properties directed to be sold by that decree are to be sold, provided it is necessary to do so with a view to adjust the equities arising between two subsequent transferees from the mortgagor or with a view to protect the rights of a subsequent transferee and further provided that the order of sale prescribed by the Court has not the effect of prejudicing the right of the mortgagee to realize the whole of the decretal amount.

6. The facts giving rise to the disputes between the parties that has culminated in the present appeal are not disputed and are as follows : One Ahmad Saeed Khan owned zamindari in various villages including a village called Nauli. His zamindari properties were subject to a simple mortgage in favour of Kishori Lal and Babu Lal respondents 2 and 3. On 1st October 1922 Ahmad Saeed Khan executed a waqf alal aulad of all his zamindari properties. In this deed specific mention of the mortgage debt due to respondents 2 and 3 was made and it was provided that it would be open to Ahmad Saeed, with the permission of the District Judge, to sell the whole or a part of the dedicated property with a view to satisfy the mortgage debt referred to above. According to the provisions in the deed of waqf, Ahmad Saeed was to be the first mutwalli and after his death his sons, Karimul Rahman and Nazhar Ahmad, were to be the mutwallis. Ahmad Saeed took no steps to transfer any portion of the dedicated properties or to satisfy the mortgage debt with the result that respondents 2 and 3 put their mortgage into suit and eventually obtained a final decree for sale on 2nd October 1932. This decree was for a sum of about Rs. 60,000 and directed the sale of the entire mortgaged property including village Nauli. The decree holders applied for execution of this decree in December 1932 and then Ahmad Saeed filed an application before the District Judge soliciting permission to sell village Nauli with a view to satisfy the decree. The District Judge granted this application on 18th February 1933 and on that very date Ahmad Saeed died and his sons, Karimul Rahman and Mazhar Ahmad, became the mutwallis of the waqf. Those mutwallis on 24th February 1933 sold village Nauli to two ladies, Masudi Begum and Israr Fatima, for a sum of Rs. 1,00,000 and out of the sale consideration a sum of about Rs. 43,000 was left in the hands of these vendees for payment to respondents 2 and 3, decree-holders. It may be mentioned here that Masudi Begum is a sister of Ahmad Saeed and Israr Fatima is a daughter of Ahmad Saeed.

7. It has been stated above that the mortgage decree in favour of respondents 2 and 3 was for about Rs. 60,000 and that only about Rs. 43,000 were left with the vendees for payment to the decree-holders. The remaining sum of about Rs. 17,000 was paid by the two mutwallis to the decree-holders in part satisfaction of the decree on 6th January 1934. It appears that by 29th January 1934 Masudi Begum and Israr Fatima had entered into an agreement with the Saraswati

Sugar Syndicate, Lahore, respondent 1, for sale of village Nauli for a sum of Rs. 1,00,000 and in pursuance of that agreement respondent 1 paid a sum of Rs. 25,000 to respondents 2 and 3, the decree-holders, on 29th January 1934. On receipt of this sum of Rs. 25,000 the decree-holders filed an application in the execution Court mentioning that they had released Nauli from the charge created by the decree and they would be in no case entitled to sell village Nauli in execution of their decree. The Court accepted this application and ordered that village Nauli would not in future be liable to sale in execution of the decree. It is common ground that on 26th May 1934, Masudi Begum and Israr Fatima executed a deed of sale in favour of respondent 1 with respect to village Nauli for a lac of rupees and out of the sale consideration a sum of Rs. 35,000 was left with respondent 1 for payment to the vendors on future dates.

8. On 26th January 1935 the appellants, who are the mutwallis of the waqf, filed an application in the execution Court praying that the decretal amount be realized first from sale of village Nauli and this application was granted on 27th April 1935. It is however necessary to mention that no notice of this application was given to respondent 1. Respondent 1 in its turn on 1st August 1935 filed an objection in the execution Court pointing out that in view of the decree-holders application dated 29th January 1934 and the order passed by the Court on that date, it was not open to the decree holders to sell village Nauli. This objection was headed as an objection u/s 47 and Section 151, Civil P.C. The present appellants were not impleaded as parties to the objection, nor was notice of this objection given to them. The application was disposed of by the Court on 3rd August 1935. The Court observed that the decree-holders counsel had no objection to the prayer of respondent 1 and ordered that village Nauli shall not be sold. The present appellants then, on 16th September 1935, filed an application praying that the order dated 3rd August 1935 be recalled. This application was headed as an application under Sections 47 and 151, Civil P.C. The Court below dismissed this application on 6th January 1936 holding that as the order dated 3rd August 1935 had not been appealed against, it became final and could not be assailed. The appeal before us is against the order dated 6th January 1936.

9. A preliminary objection has been raised to the hearing of the appeal on the ground that the order does not fall within the purview of Section 47 and as such is not appealable. In support of this contention reliance has been placed by the learned Counsel on *Alimuddin and Others Vs. Gobind Prasad*, *Mangat Rai and Others Vs. Babu Ram and Rati Singh* and *Another Vs. Kunwar Damodar Lal*, The first two cases just mentioned have no application to the case before us. In the first case it was held that no appeal lies against an order passed by the execution Court fixing the estimated value of the property sought to be sold in proceedings under Order 21, Rule 66 and in the second case it was held that an order passed by an execution Court rejecting an application for stay of sale does not fall within the purview of Section 47, Civil P.C., and is not appealable. The order before us is not of the nature referred to in the first two decisions noted above. Those cases

therefore are clearly distinguishable. Much reliance has however been placed by the learned Counsel for the respondents on the decision in *Rati Singh and Another Vs. Kunwar Damodar Lal*, In that case the execution Court had ordered that the mortgagee decree-holder must sell certain items of mortgaged properties first and if he was unable to realize his decree money by the sale of those properties, then he was entitled to proceed against the remaining items of the mortgaged properties. This Court held that this order of the execution Court

amounted to a temporary stay of execution against defendants 4 and 5 and merely decided the mode in which the execution was to proceed and there was no conclusive determination of the decree-holder's right to proceed against defendants 4 and 5, and therefore the order was not a decree as defined in Section 2(2) and was not appealable.

10. A diametrically opposite view was expressed in *Qaiser Beg v. Sheo Shanker Das* to which reference has already been made. One of the learned Judges constituting the Bench made the following observation:

There was some discussion in the course of arguments that no appeal lies from the order passed by the lower Appellate Court. That the question arising between the parties relates to execution, discharge or satisfaction of the decree within the meaning of Section 47, Civil P.C., cannot be doubted and has not been questioned. It is however contended that in so far as the order does not amount to a formal expression of an adjudication determining the rights of the parties, it is not a decree within the meaning of Section 2(2), Civil P.C. I am unable to accede to this contention. The whole question is whether the decree-holders have an absolute right to choose the order in which the mortgaged properties should be sold in disregard of the rights of the appellant, or whether the rights of the parties in this respect are regulated by the discretion of the Court. Any answer to these questions necessarily involves adjudication of the rights of the parties. Where the right of one or the other of the parties to have a certain thing done depends upon the discretion of the Court, the order of the Court giving such direction against one party or the other necessarily decides the right in controversy in the particular case and is to that extent a decree if the order is one passed u/s 47, Civil P.C. For these reasons I am of opinion that an appeal lay to this Court from the order passed by the lower Appellate Court now in question.

11. In *Khirodhar Singh v. Gajadhar Lal* it was held that an order regulating the order in which the mortgaged properties are to be sold is "a final order between the parties in a matter relating to the execution, satisfaction and discharge of the decree" and is appealable. We have noticed these cases with a view to show that there appears to be divergence of judicial opinion on the question whether or not an order of the nature passed by the Court below is an appealable order. But having regard to the fact that we have come to the conclusion that the appeal must fail on the merits, we refrain from deciding the preliminary objection raised by the respondents' counsel.

12. Very little need be said as to the merits of the appeal. The transfer in favour of Masudi Begum and Israr Patima was made by the legal representatives of Ahmad Saeed after the decree for sale had been passed in favour of respondents 2 and 3. Respondents 2 and 3 were no parties to the agreement between the vendors and the vendee as to the payment of Rs. 43,000 in part satisfaction of the decretal amount. Similarly, the sale by Masudi Begum and Israr Patima in favour of respondent 1 was without the consent of respondents 2 and 3. The case before us is not a case in which a subsequent transferee from the mortgagor invokes the assistance of the Court for the protection of the interest acquired by him in some of the items of the mortgaged properties. This is a case in which the legal representatives of the mortgagor in effect seek the specific performance of an agreement entered into between them and their transferees for payment of a portion of the amount due on the basis of the decree for sale. No authority has been shown to us which would justify our acceding to the request of the appellants to fetter the rights of the decree-holders in the present case by laying down the order in which the various items of the mortgaged properties are to be sold. It is to be noted in this connexion that on payment of a sum of Rs. 25,000 by respondent 1, the decree holders, viz. respondents 2 and 3, entered into an agreement with respondent 1 not to proceed against village Nauli. Respondents 2 and 3 are entitled to say that this agreement be respected by the Court and that the appellants be left to seek their remedy, if any, as against respondent 1. It is needless to observe that the mere refusal by decree-holders to proceed against village Nauli cannot adversely affect the rights of the appellants to claim contribution as against village Nauli, provided they have such a right in law. The appeal must therefore fail and is accordingly dismissed. Having regard to all the circumstances of the case, we have come to the conclusion that it would be just to direct the parties to bear their own costs here and below and we order accordingly.