

(1990) 10 MAD CK 0041
In the Madras High Court
Case No : A.A.A.O. No. 68 of 1988

M.S. Doraisami Iyer

APPELLANT

Vs

A.R. Arunachalam Chettiar and others

RESPONDENT

Date of Decision : 31-10-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58

Citation : AIR 1991 Mad 275 : (1991) 1 MLJ 49

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Advocate : M.V. Venkateseshan, for the Appellant; V. Krishnan and S.V. Jayaraman, for the Respondent

Judgement

Srinivasan, J.—This Civil Miscellaneous Second Appeal is against an order dismissing an appeal filed by the appellant against an order

dismissing his application under Order 21, Rule 58 C.P.C. for excluding the property in question from the execution proceedings initiated against

the same by the first respondent herein.

2. The short facts which are necessary to understand the claim made by the appellant are these: The appellant filed a suit, O.S. No. 127 of 1966

against the second respondent for recovery of Rs. 17,512.67 and obtained a decree. The second respondent filed an appeal in this Court, A.S.

377 of 1967. When the appeal was pending an order was made by this Court in an application for stay filed by the second respondent directing

him to furnish security in the shape of immovable property for a sum of Rs. 10,000/- as condition for stay. The second respondent filed an

application in the trial Court for accepting the property in question as security. He filed a draft security bond on 9-11-1967. The petition for

acceptance of security was being adjourned from time to time for various reasons. On 7-12-1967 the property was treated and it was found to be worth Rs. 17,000/-. Even after the test report was filed the matter was being adjourned. It was posted to 26-2-1968 for the purpose of filing of documents by the second respondent. On 2-1-68 the second respondent borrowed money from the first respondent and executed a promissory note and deposited title deeds relating to the property in question. On 5-1-1968 the memorandum of agreement of deposit of title deeds was registered. On 26-2-1968 the Court made an endorsement that original documents were produced before Court and posted the matter for orders to the next date. Ultimately on 1-3-1968 a registered security bond was filed in Court and was accepted. The appeal in this Court filed by the second respondent was dismissed on 18-7-1973. The appellant filed E.P. 154/75 for executing the decree by proceeding against the property. In the sale proclamation the appellant made in endorsement as follows:

The title deeds relating to the property have not been filed in Court and that the purchaser will take the property subject to the risk of there being mortgages by deposit of title deeds or mortgages not disclosed in the encumbrance certificate.

3. That shows that the appellant was aware of the mortgage dated 5-1-1968 in favour of the first respondent; yet, the appellant did not take any steps from 1975 onwards to assert his rights, if any, as against the said mortgage.

4. The first respondent filed O.S. No. 18 of 1977 on foot of mortgage and got a decree. He filed an execution petition for bringing the property to sale in E.P. No. 123 of 1982.

5. The appellant filed E.A. 273 of 1985 under Order 21, Rule 58, C.P.C. for excluding the property from the execution proceedings claiming that his right over the property by virtue of the security bond in O.S. No. 127 of 1966 will have precedence over the mortgage dated 5-1-1968 executed in favour of the first respondent.

6. The trial Court dismissed the application taking the view that the appellant has no right to interfere with the execution proceedings. That was confirmed by the appellate Court and the appeal by the appellant was dismissed.

7. This Civil Miscellaneous second appeal can be dismissed on a very short

ground that the application filed by the appellant in the executing Court was itself not maintainable. The application is one under Order 21, Rule 58, C.P.C. No such application can be maintained in a proceeding in execution of a mortgage decree. Rule 58 of Order 21, C.P.C. can come into play only when there is an attachment. In the case of mortgage there is no question of attachment and in this case, there was no attachment as such. Consequently, the application was not maintainable. The appeal by the appellant before the lower Appellate Court was also not maintainable.

8. With regard to merits also, even assuming that the appellant has got a prior mortgage right over the property, he cannot seek to have the property excluded from the execution proceeding. Execution is launched by the first respondent, who has obtained a decree on fact of a mortgage.

If the appellant has got right of priority over the said mortgage he has to enforce it in appropriate proceedings against the first respondent or any

Court-auction purchaser, who may purchase the property in the execution proceedings. He cannot seek the relief of excluding the property from

the execution proceedings initiated by the mortgage decree-holder.

9. Thus the appellant is not entitled to claim the relief in the present proceedings. Hence this appeal fails and is dismissed. However, there will be

no order as to costs.

10. Appeal dismissed.