(1945) 04 MAD CK 0005

In the Madras High Court

Musali Ammal APPELLANT

Vs

K.E. Chellaperumal Mudaliar and Another RESPONDENT

Date of Decision : 25-04-1945

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89

Citation : AIR 1946 Mad 145 : (1945) 58 LW 457 : (1945) 2 MLJ 305

Hon'ble Judges : Somayya, J

Bench : Division Bench

Judgement

Somayya, J.—The suit out of which this second appeal arises was filed by the plaintiffs-respondents for the recovery of a sum of Rs. 800

said to be due on a mortgage, Ex. P-l, dated the 19th June, 1927. This was executed by the first defendant and by the father of defendants 2 to 5.

There was an earlier mortgage of the suit property effected by the mortgagors in favour of one Muniswami Muda-liar. That mortgagee''s assignee

filed O.S. No. 261 of 1931, obtained a decree and brought the properties to sale in execution of that mortgage decree. One Muniswami Naicker

became the purchaser. Before the sale was confirmed, items 1 and 2 covered by the suit mortgage which are Survey Nos. 80 and 81 were sold to

the vendor of the sixth defendant who is the appellant in this second appeal and with the money raised under that sale deed the mortgagors made a

deposit under O. 21, Rule 89 of the CPC and got the sale set aside. The sixth defendant subsequently purchased the property from his vendor.

The plaintiffs claim a mortgage decree over all the items on the ground that the purchase by the sixth defendant''s vendor and the purchase by the

seventh defendant of item 3 were all subsequent to the mortgage in their favour. The defence is that there are some equities in favour of the sixth defendant inasmuch his vendor''s money went for the setting aside of the sale under O. 21, Rule 89. The argument is also put thus: the plaintiffs

were parties to the previous mortgagee''s suit of 1931. They were bound by that decree. In execution of that decree the properties were sold away

and purchased by a third party. Therefore the plaintiffs have no right to claim priority over that purchaser. There is nothing to be said against the

argument so far. But the trouble is the appellant has not acquired that purchaser''s rights and what is more, the Court auction at which a third party

became the purchaser was subsequently set aside at the instance of the mortgagor under O. 21, Rule 89. The law Undoubtedly is that the plaintiff

would have had no right if only the auction sale held in pursuance of the prior mortgagee''s decree had not been set aside. As against the purchaser

in execution of the mortgage decree the present plaintiffs would have no claim. But there the matter ends. Since the purchase has been set aside,

the plaintiffs have a right of proceeding against the mortgaged properties. The purchase in execution of the prior mortgage decree not being in the

way of the plaintiffs, there is no reason for denying the plaintiffs the right which they claim against the suit properties. Viewed from the standpoint of

the money advanced by the appellant''s vendor having been utilised by the mortgagor for action under O. 21, Rule 89, the difficulty is that after the

Transfer of Property Act was amended in 1930 a right of subrogation can be recognised only if there is a registered instrument by the mortgagor

giving this right of subrogation to the person who advanced money to the mortgagor for the purpose of enabling the mortgagor to pay off an earlier

mortgage. It is no doubt true that the plaintiffs have gained an advantage which they would not have got if the prior purchase had not been set

aside. The learned advocate for the appellant has drawn my attention to the decision of Ramesam and Jackson, JJ. in Ramaswami Pillai v.

Narayanaswami Pillai (1924) 48 M.L.J. 100. But the proposition stated there is only that a subsequent mortgagee who is made a party to the prior

mortgagee''s suit is not entitled to any rights as against the purchaser in execution of the prior mortgagee''s decree. But that decision is no authority

for the proposition that if the sale in execution of the prior mortgagee''s decree is set aside, the second mortgagee would not be entitled to the rights

under his mortgage. If the argument of the learned advocate for the appellant is accepted, the plaintiffs should have no right whatever. According to him, the plaintiff''s rights became extinguished as against the items which were sold away in court-auction. But I cannot accede to this proposition seeing that the auction sale was subsequently set aside.

2. The suit mortgage comprised four items. Of these items 1 and 2 were purchased by the sixth defendant''s vendor and thereafter by the sixth defendant. Item 3 was purchased in court-auction by the seventh defendant. There is still another item, a house in Conjeeveram which has not been sold away to any one. This apparently is still in the possession of the mortgagors. There can be no possible objection to a direction that the plaintiffs-respondents should in the first instance proceed against item 4 which has not been subsequently sold to any one and that they can proceed against items 1 to 3 after exhausting their remedies against item 4. This modification will be embodied in the decree.

3. Subject to this modification the decree of the lower appellate Court is confirmed and the second appeal is dismissed with costs. Time for payment is extended till the 15th July, 1945.