

(1911) 11 MAD CK 0009
In the Madras High Court

Nataraja Iyer

APPELLANT

Vs

The South India Bank and Another

RESPONDENT

Date of Decision : 16-11-1911

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 54

Citation : 13 Ind. Cas. 91

Hon'ble Judges : Spencer, J;Abdur Rahim, J

Bench : Division Bench

Judgement

1. The question in this appeal is, whether the sale in execution of a decree of a debt due to the judgment-debtor under a hypothecation bond is

liable to be set aside on the ground of irregularity. It cannot be so set aside if it is to be regarded, as held by the lower Court, as moveable

property within the meaning of Order XXI, Rule 46, corresponding to Section 268 of the old Code. The language of Rule 46 which treats as

moveable property a ""debt not secured by a negotiable instrument,"" is undoubtedly wide enough to cover a debt secured by a hypothecation bond

on a simple mortgage.

2. But, it is contended, that such a debt is Immovable property within the definition of such property as given in the General Clauses Act, as

including a benefit arising out of land. It may be that a security of this character is a benefit arising out of land, but supposing that this definition

would show that a simple mortgage-debt would, generally speaking, be regarded as Immovable property, still we have got to see whether the

meaning is really what is contemplated by the provisions of the CPC relating to the execution of decrees.

3. It seems to us that the provisions of Rule 54, Order XXI, corresponding to Section 274 of the Code of 1882, are not meant to apply to

property of the nature of a debt secured by a hypothecation bond. For instance, as pointed out in *Karim-un-nissa v. Phul Chand* 15 AP. 134 if the

property to be attached is a mortgage-debt, where the mortgagee is not in possession nor is entitled to possession of the mortgage property, the

requirements as to the proclamation of the order at some place or adjacent to the property, and the affixing in a conspicuous part of the property,

could not be applied. These provisions seem to contemplate that the Immovable property should be in the nature of tangible property. Further, the

mortgagee, not, being entitled to possession, his decree-holder would not be entitled to go upon the land for the purpose of proclaiming or affixing

the order. Then, there is another difficulty in the way of holding that, mortgage-debt is to be treated as Immovable property for the purpose of

attachment. Rule 54 does not provide for any order prohibiting the mortgagor, that is, the person owing the debt, from paying the debt to the

mortgagee whose right is sought to be attached, and without such an order, the object, of attachment might be frustrated. Rule 46, on the other

hand, provides for such prohibiting order being passed. The fact is, as pointed out in *Tarwadi Bholanath v. Bui Kashi* 26 BU. 305 and other cases,

the security must follow the debt and if the debt is once attached, the benefit of the security would accrue to the attaching creditor, if his remedy

against the property still exists.

4. Much reliance, we may also mention, has been placed on behalf of the appellant on the definition of mortgage as an interest in Immovable

property as given in the Transfer of Property Act. But the real question, as we have said, is, whether it is Immovable property within the meaning

of Rule 54, Civil Procedure Code, and, for the reasons we have stated, it is difficult to regard it as such.

5. There is some diversity of judicial opinion on the question under discussion, but we are satisfied that the weight of opinion is, undoubtedly, in

favour of the view we have taken. See *Debendra Kumar Mandal v. Rup Lal Dass* 12 CP. 546; *Kasinath Das v. Sadasiv Patnaick* 20 C.P 805;

Tarwadi Bholanath v. Bai Kashi 26 B.P 305; *Karim-un-nissa v. Phul Chand* 15 A.P 134; *Bijnath Lohea v. Binoyendranath Palet* 6 C.W.N. 5 and

Bal Dharup Marwadi v. Ram Chandra Balwant Kulkarni 19 B. 121. As regards this Court, opinion seems to have fluctuated. While Turner, C.J., in

Appasawmi v. Scott 9 M.P 5 was inclined to adopt the view which has the support of the majority of the High Courts, the other two learned

Judges favoured a different view. In Sami Iyer v. Krishna Sami 10 M.P 169 the inclination was to support the view taken by the majority of the

Judges in Appasawmi v. Scott 9 M.P 5. In Muniappa Naick v. Subramanya Iyer 18 M.P 437 the view adopted in Debendra Kumar Mondal v.

Rup Lal Das 12 CP. 546 and Kasinath Das v. Sadasiv Patnaick 20 CP. 805 is expressly approved, though the learned Judges seem to imply that

a sale u/s 268 of the Code of 1882 might be irregular. Achamma v. Basappa 8 M.L.J. 1 simply follows Muniappa Naick v. Subramaniya Iyer 10

M.P 169. There is thus some uncertainty as to the exact view held by this Court on the point under discussion. But, as the conclusion at which we

have unhesitatingly arrived is undoubtedly supported by preponderance of authority of the other High Courts, we do not think it necessary to refer

the matter to a Pull Bench. The appeal will, therefore, be dismissed with costs.