(1934) 08 MAD CK 0049

In the Madras High Court

Panaganti Venkatarenga Rayanim Gar — APPELLANT

Vs

Sree Mahant Prayag Doss Jee Varu and Another — RESPONDENT

Date of Decision : 30-08-1934

Acts Referred:

Citation : AIR 1935 Mad 118 : 166 Ind. Cas. 979

Hon'ble Judges : Curgenven, J

Bench : Division Bench

Judgement

Curgenven, J.—The order under appeal directs that execution will proceed under a mortgage decree. There was a preliminary decree passed in the ordinary course and the parties then by consent tiled a draft of a decree under which this order for execution was passed. The respondent has taken the preliminary objection that no appeal will lie from the order. The appellant pleads that he is not at the moment in a position to meet this point and we think that in view of the order which we propose to pass it is unnecessary for us to decide it.

2. The only question which the appeal raises is as to the effect to be given to a passage in the decree with regard to the decree-holder''s right to apply for sale. The decree provides that the mortgaged property should be delivered to the mortgagee on or before 1st July 1929 and that the decree-holder should enjoy it in lieu of subsequent interest and that the judgment-debtors should have a right to redelivery on condition of paying the full amount of the decree by 30th Juno 1932. If they should fail to pay the amount on or before that date the decree-holder should be at liberty to apply for sale in due execution proceedings. In point of fact the decree-bolder applied some considerable time before that date, namely, on 21st December 1931, and the objection was accordingly raised that his application was premature. The learned Subordinate Judge professes himself unable to see how this conclusion can be deduced from the terms of the decree; but we think that it is perfectly clear, and indeed before us no attempt has been made to sustain this position. That does not necessarily mean however that we should allow the appeal. The lower Court has itself observed that at the time

when it was passing the order the due date for the application had already expired and we find that it had expired even before the counter was filed by the judgment-debtor on 24th August 1932. Accordingly it amounts to little more than a mere technicality that the actual date of the application was earlier than the earliest date which the decree provided for. We think there can be no doubt that the Court has got discretion to condone an irregularity of this character. There are a number of cases in which this course has been adopted where suits have been filed for reliefs which had not fallen due at the time of the plaint, as for instance, money due under a mortgage bond : see Sethucherla Ramchandra v. Maharajah of Jeypore 1917 Mad. 198, and Subbaraya Chetty v. Nachiar Ammal 1918 Mad. 143 and an ejectment filed before the date of the termination of the lease : see Mammad v. Veerayya 1929 M.W.N. 165. This course can no doubt only be adopted where no prejudice is caused to the opposite side.

3. In the present case we cannot find that any such prejudice has been caused. It has been suggested that the judgment-debtor might have found greater difficulty in raising money to pay off the decree debt owing to the pendency of the execution proceedings, but it is not said that he made any attempt to do any such thing. We therefore think that there are no sufficient grounds for interfering with the order that execution should proceed passed by the lower Court and we dismiss the appeal, but in the circumstances without costs.

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