(1991) 03 AP CK 0013

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 3057 of 1989

Pujjuru Suryanarayana APPELLANT

Vs

Union Bank of India RESPONDENT

Date of Decision : 07-03-1991

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 34 Rule 15(2), 115

Citation : (1991) 2 ALT 361 : (1991) 2 APLJ 198

Hon'ble Judges : P. Laxmi Narasimha Sarma, J

Bench : Single Bench

Advocate : K. Ranga Rao, for the Appellant; E.S. Ramachandra Murthy, for the Respondent

Final Decision : Dismissed

Judgement

P. Laxmi Narasimha Sarma, J.—This revision is filed against the order of the learned I Additional District Munsiff, Vijayawada, in E.P. No 145 of 1987 dated 12th July, 1989. whereby the execution petition filed by the bank-decree-holder for attaching the properties of the Judgment-debtor and to issue arrest notice was allowed.

2. The first judgment-debtor is the petitioner in this revision. The bank-decree-holder filed O.S. No. 2711 ofl973 for foreclosure of the mortgage created in its favour by the defendants by deposit of title deeds. In the mortgage suit, a preliminary decree was passed on 27th July, 1974, under the provisions of Order XXXIV CPC. Subsequently, the decree-holder-bank filed I. A. No. 1037 of 1981 to condone the delay in filing the application for passing of the final decree. The same was dismissed by the court and it has become final. The fact remains that no final decree is passed in the mortgage suit in favour of the decree-holder according to the provisions of Order XXXIV CPC.

3. Later, E.P. No. 145 of 1987 was filed fore executing the preliminary decree dt. 27-7-1974 by attaching the moveable properties of the judgment debtor and also

for the arrest, etc., One of the objections raised on behalf of the judgment-debtor was that this execution petition was not maintainable in view of the fact that no final decree was passed in the mortgage suit in O.S.No. 2711 of 1973. The preliminary decree, which was passed, on 27th July, 1974, cannot be put in execution. Only a final decree that is passed under the provisions of Order 34 CPC pursuant to the preliminary decree can be put into execution. The objection raised in the execution petition was rejected by the learned Judge relying upon the provisions of Sub-rule (2) of Rule 15 of Order XXXIV CPC. Questioning the said order, the present civil revision petition is filed by the first judgment-debtor as mentioned above. It is contended on behalf of the petitioner that Sub-rule (2) of Rule 15 of Order XXXIV CPC has no application to a mortgage decree and that the reliance placed by the lower Court on the judgment of this Court in Rama Mandiram v. Raghavamma,(1984(1) ALT 8) is not sustainable. On the other hand, it is contended by Shri E.S. Ramachandra Murthy, learned counsel appearing for the decree-holder-bank, that Sub-rule (2) of Rule 15 of Order XXXIV CPC clearly applies even to a mortgage decree. The relevant provision is as follows :

"15 (2) : Where a decree orders payment of money and charges it on Immovable property on default of payment, the amount may be realised by sale of that properly in execution of that decree".

It is at once clear that Sub-rule (2) applies to a decree which "orders payment of money and charges it on moveable property on default of payment,--". The language is clear. It applies only to decree for the payment of money which charge the same on Immovable property in default of payment of money. This is not a case of any charge being created by the act of parties or by operation of law u/s 100 of the transfer of property Act. This is a pare and simple suit laid on a mortgage for closing the same and a preliminary mortgage decree was passed under the provisions of Order XXXIV CPC. In interpreting Sub-rule (2) of Rule 15, Sub-rule (1) of Rule 15 will come to aid. It is as follows :

15 (1) All the provisions contained in this order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title deeds within the meaning of Section 58 and to a charge within the meaning of Section 100 of the Transfer of Property Act, 1982".

The sub-rule says that all the provisions contained in the suit, Order, namely, Order XXXIV, which apply to a simple mortgage, so far as may be, apply to a mortgage by deposit of title deeds and to a charge within the meaning of Section 100, Transfer of Property Act. Therefore, the reference to ''charge'' in Sub-rule (2) of Rule 15 is referable to the ''charge'' created u/s 100, Transfer of Property Act, as mentioned in Sub-rule (1) of Rule 15.

4. Rama Mandiram''s Case (1 supra) was dealing with a case of a charge created by the decree within the meaning of Section 100 of the Transfer of Property Act. The learned Judge, in the said decision, dealt with the question whether there is

any necessity of obtaining any separate final decree to enforce a decree of a charge created u/s 100 of the Transfer of Property Act. It is held in the said decision as follows :

"Hence on a true construction of Order 34 Rule 15 (2) CPC read with Section 97(2), Act 104 of 1976 there is no necessity of obtaining a separate final decree to enforce the decree of a charge since the advent of the Amending Act 104 of 1976".

The facts in the said decision were that the temple obtained a decree against the defendant--tenant for recovery of Rs. 2,102-82 ps. towards the arrears of maktha and also obtained a charge for recovery of the said amount in respect of ''B'' schedule property. The decree holder-temple filed E.P. to execute the said decree for recovery of the said amount by sale of the ''B'' schedule property which was a charge created by the very same decree. The contention there was that it is a charge decree within the meaning of Section 100 of the Transfer of Property Act and therefore, the same cannot be put in execution before obtaining a final decree. In dealing with the said contention, the learned Judge held, on a construction of Sub-rule (2) of Rule 15 of Order 34, CPC, as it stood after amending Act 104 of 1976 amending the Code of Civil Procedure, that there is no necessity of filing a separate suit or obtaining a separate final decree for executing the charge decree. The learned Judge repelled the contention that a final decree will have to be passed under the provisions of Order 34 CPC or at any rate a suit will have to be filed for enforcing the charge created by the decree. Earlier there was any amount of controversy whether the charge decree can be straightaway enforced by putting it in execution or whether a separate suit will have to be filed for enforcing the charge, and, in some cases, the Courts have held that a final decree will have to be obtained under the provisions of Order XXXIV CPC before the charge decree can be put into execution. To settle the said controversy, the amendment was brought in by the Amending Act 104 of 1976 (CPC) by incorporating Sub-rule (2) of Rule 15 of Order XXXIV. The object of introducing Sub-rule (2) in Rule 15 of Order XXXIV was to enable a ''charge-decree-holder'' to straightaway execute the decree without recourse to the filing of a separate suit or even obtaining a final decree. In fact, this is what is stated by a Division Bench of this Court in Sri Venugopala Swamy Temples v. Narayana, (1988 (2) APLJ 40) which is as follows :

"Under Rule 15 (2) CPC it is clearly provided that when a charge is created on any immovable property under a decree, the amount may be realised by sale of that property in execution of that decree. Even a plain reading of Sub-rule (2) of Rule 15 CPC makes it clear that there is no necessity of filing a separate suit or obtaining a final decree treating the earlier decree as a preliminary decree".

5. Further, a reading of Sub-rules (2), (3) and (5) of Order 34 CPC clearly indicate that before a final decree is passed in a suit for foreclosure of the mortgage debarring the defendant from all right to redeem the mortgaged property, the defendant is entitled to make the payment into Court and can apply

for ordering the plaintiff to deliver all the documents referred to in the preliminary decree to the defendant. This indicates that till the passing of final decree, the defendant is entitled to redeem the mortgage. Sub-rule (5) of Order 34 CPC also gives an indication that at any time before the confirmation of the sale made in pursuance of a final decree passed under Sub-rule (3) of this Rule, the defendant makes payment into Court of the amount due from him, the Courts shall, on an application made by the defendant, pass a final decree ordering the plaintiff to deliver the documents referred to in the preliminary decree to the defendant and also ordering him to transfer the mortgaged property etc. Therefore, this provision clearly indicates, that till the passing of final decree and even till the confirmation of the sale made in pursuance of the final decree, the defendant is entitled to redeem the mortgage. If the contention of the petitioner is to be accepted that the preliminary decree can be executed, the above provision, viz., Sub-rules (3) and (5) of Order 34 CPC and the entitlement of the defendant to redeem the mortgage on complying with the conditions contained therein will become redundant.

6. In the present case, we are not concerned with a charge decree created u/s 106 of Transfer of Property Act. We are concerned in the present case with a preliminary decree passed under Order 34 CPC in a suit filed for foreclosure of the mortgage. In my opinion, Sub-rule (2) of Rule 15 of Order 34 CPC has no application, whatsoever |to a mortgage decree. The preliminary decree obtained on the basis of a mortgage in a suit for foreclosure cannot be put in execution relying upon Sub-rule (2) of Rule 15 of Order 34 CPC. The decree holder will have to necessarily obtain a final decree pursuant to the preliminary decree before it is put in execution. I am supported in this view by the judgment of G. Ramanujulu Naidu, J. in C.R.P. No. 2168 of 1987 dated 18-11-1988 which is directly in point. In that view of the matter, this revision is allowed. The order of the lower Court is set aside and the Execution petition is dismissed as not maintainable. However, the amount which was deposited by the first judgment-debtor, drawn by the bank already, need not be returned. No costs.