

(1935) 01 MAD CK 0011
In the Madras High Court

R. Venkatesa Aiyangar

APPELLANT

Vs

P.R.Y. Manikkavachakam Chetty and Others

RESPONDENT

Date of Decision : 29-01-1935

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 13

Citation : AIR 1935 Mad 660 : (1935) 41 LW 665 : (1935) 68 MLJ 738

Hon'ble Judges : King, J

Bench : Division Bench

Judgement

King, J.—These are connected appeals concerned with p property which has been subject to five successive mortgages. The first was a

usufructuary mortgage executed in January, 1910, for Rs. 4,000; the second was a simple mortgage executed in July, 1912 for Rs. 500; the third

was a simple mortgage executed in August, 1917 for Rs. 10,000; the fourth was a simple mortgage executed also in August, 1917 for Rs. 691-

12-0 and the fifth was a simple mortgage executed on the 27th February, 1920 for Rs. 4,500. The fifth mortgage was executed in favour of the

appellant in these appeals and of the sum of Rs. 4,500 secured by that mortgage, Rs. 4,000 was devoted to the discharge of the first usufructuary

mortgage of 1910 on the same day.

2. In 1923 the second mortgagee filed a suit (O.S. No. 799 of 1923) to enforce his mortgage in which the appellant was impleaded as the fifth

defendant. The appellant there claimed that he was entitled to priority in respect of the Rs. 4,000 which he had paid to redeem the first mortgage

together with interest on that sum, and a decree was passed recognising that contention in full. The property was in due course proclaimed for sale

and then an order was passed under Order 34, Rule 12 with the consent of the appellant that the property should be sold free of his rights as

subrogated mortgagee and that he himself should be paid first out of the sale proceeds. Meanwhile, however, before the date of the sale the third

mortgagee paid off the decree amount to the second mortgagee and no sale was held, the decree being declared fully satisfied. This was on 25th

January, 1928. On the 13th March the appellant filed an application requesting that the property should be brought to sale in execution of the same

decree in O.S. No. 799 of 1923 resting his rights upon the order passed under Order 34, Rule 12. This application was dismissed by the District

Munsif and the District Munsif's Order was upheld by the learned District Judge of South Arcot. Against this, the appellant has filed C.M.S.A.

No. 116 of 1931.

3. In 1925 the third mortgagee filed O.S. No. 7 of 1925. Here again, the appellant was impleaded as the seventh defendant and again he claimed

priority for the sum of Rs. 4,000 with interest. The judgment in this suit was pronounced on 23rd December, 1925, allowing priority to the extent

of Rs. 4,000 but without any discussion of the claim to receive interest on this sum and the decree was drawn up in accordance with the terms of

the judgment. In April, 1926, the appellant applied for the amendment of this decree, his first relief being " to make clear that his priority was in

regard to the Rs. 4,000 and interest thereon ". This application was permitted to be withdrawn in July, 1926, with liberty to bring a fresh petition.

In October, 1926, a second application was made by the appellant in which he no longer repeated his request to amend the decree but asked that

" the Court might be pleased to direct the sale of the hypotheca free of the petitioner's prior mortgage and that out of the proceeds the principal

and interest due should be paid to the petitioner". This petition was disposed of on 18th February, 1927, by the following order:

Both parties have no objection to sell the properties in question free of the petitioner's prior mortgage. The question as to whether as claimed

herein the petitioner is entitled to claim also interest on his prior mortgage amount of Rs. 4,000 shall be considered under Order 34, Rule 13, Civil

Procedure Code, after the realisation of the sale proceeds and when the same is distributed. The petitioner is at liberty then to press his claim for

the same. Petition is closed.

4. In due course the sale was held and in October, 1927, the petitioner applied for a cheque for Rs. 4,000 plus interest thereon. The cheque was

issued for Rs. 4,000, but the District Munsif refused to allow the petitioner's claim for interest holding that in the first place he is precluded from

obtaining 7 interest by the terms of the decree which was being executed and in the second place, that according to law he was not entitled to any

interest. Against this order the present C. M. A. No. 308 of 1928 has been filed.

5. The first question argued before us was with regard to the terms of the decree. Paragraph 2 of the decree runs as follows:

That if such payment is not made on or before the said 23rd day of June, 1926, the mortgaged property hereunder described or a sufficient part

thereof be sold, but that the rights of the 7th defendant (that is, the present appellant) to the extent of Rs. 4,000 (rupees four thousand only) paid in

discharge of Exs. III and III-a shall be reserved over certain items.

6. It is argued on behalf of the respondent that this decree does not provide for the payment of any interest to the appellant and that in so far as

interest has not been specifically mentioned in the decree, the claim for interest is barred unless the decree be amended. This argument, we think,

has considerable force, but at the same time the decree is not so clearly worded as to be free from all ambiguity and we think it is possible to

construe the decree as reserving to the appellant such rights as are inherent in or flow from the discharge of the prior mortgage, and if those rights

include the right to receive interest on the amount paid, then we think effect might be given in execution to this matter, even though the word "

interest " does not appear in the decree nor is there any calculation of it or any sum so calculated mentioned in the decree. We have accordingly

heard the appeal on its merits.

7. The merits of this appeal involve what is purely a question of law, and for the moment, we need not refer to the actual positions occupied by the

parties in this appeal but will refer to a hypothetical case in which there are three mortgages on the same property and the third mortgagee has

redeemed the first mortgage and has been therefore subrogated to the rights of the first mortgagee. We will speak of the mortgages as the first, the

intermediate and the third mortgage. Ordinarily, of course, it is clear that when a

third mortgagee is subrogated to the rights of the first mortgagee, he stands in the shoes of the first mortgagee, and his rights are identical with the rights already possessed by the first mortgagee. But it is argued in support of this appeal that this principle has been modified in certain situations. We have been informed that where the interest payable on the first mortgage is higher than the interest payable on the third, when the third mortgagee redeems the first mortgage and is subrogated to the rights of the first mortgagee, he cannot claim the interest provided for in the first mortgage but only the interest to which he has a right on the terms of his own third mortgage. We have also been referred to a case in which the third mortgage was a usufructuary mortgage and the first mortgage, a simple one. It has there been held that the third mortgagee on redeeming the first mortgage is entitled not only to receive the interest provided for in the first mortgage but also to retain his rights as usufructuary mortgagee and remain in possession of the mortgaged property until the first mortgage amount has been discharged. These cases however do not touch the real question at issue, which we consider to be the rights of the intermediate mortgagee. We can conceive of no principle of law by which the rights of the intermediate mortgagee can be adversely affected by anything done without his knowledge by a mortgagor and the first and the third mortgagees and it will be seen at once upon an examination of the two cases to which we have been referred, that although some modification was there made of the ordinary principle that the third mortgagee, stands exactly in the shoes of the first mortgagee in neither case has prejudice been caused to the intermediate mortgagee.

8. To return now to the present case (i.e., C.M.A. No. 308) the situation is this, that when the third and fourth mortgages were taken, the third and fourth mortgagees took their securities subject to a prior usufructuary mortgage for Rs. 4,000. Not only at the time when he executed his second mortgage but at any subsequent period those mortgagees could redeem the first mortgage by paying Rs. 4,000 and Rs. 4,000 only. If the appellant's contention is to be upheld, they are now saddled with a liability of over Rs. 7,000 in advance of their own securities and this has been done without their knowledge and without their consent. There is of course no direct authority in support of the present contention of the appellant

and we must decline to accept it.

9. The appellant however next falls back upon the argument that even though he can make no legal claim for interest, the parties have agreed that

he should be paid that interest. He refers us to an order of the Subordinate Judge passed on 18th February, 1927, in E. P. R. No. 131 of 1926.

That order runs as follows:

Both parties agree that lot No. 39 shall be sold subject to the decree in O.S. No. 799 of 1923....

and it is argued for the appellant that what that order means is that in carrying out the sale of that particular lot and in distributing the sale proceeds

reference will be made by the parties to the provisions of the decree in the earlier suit, and therefore in effect that the parties agreed that the

appellant who is granted priority in both suits should receive not only merely Rs. 4,000 but the interest which the decree in O.S. No. 799 of 1923

awarded him. We are unable to accept this argument because we consider that it entirely misinterprets the real meaning of the words "subject to

the decree". All that is meant, we think, by the lower Court's order is that whatever may happen with regard to the sale of this lot, any rights which

may still subsist under the earlier decree remain unaffected. For example, if the appellant has the right which he now claims in the connected appeal

to execute the decree in O.S. No. 799 of 1923 the actual fact of the sale held in execution of the decree in O.S. No. 7 of 1925 will not affect his

right. But we are entirely unable to agree that there was or could have been any agreement between the parties that the terms of the decree in O.S.

No. 799 of 1923 should be referred to and incorporated in the decree in O.S. No. 7 of 1925 when that latter decree was actually being executed.

We accordingly hold that the appellant in C.M.A. No. 308 of 1928 fails on both these points on the merits and this appeal must be dismissed with

costs.

10. The connected appeal C.M.S.A. No. 116 of 1931 has already been briefly referred to. The appellant claims as an alternative remedy to his

prayer in C.M.A. No. 308 of 1928 that he should now be entitled to execute the decree in O.S. No. 799 of 1923. He can refer us to no provision

of the CPC and to no judicial ruling which authorises this right. But he says that his right is inherent in the language of Order 34, Rule 12. Order 34,

Rule 12, runs as follows:

Where any property the sale of which is directed under this order subject to a prior mortgage, the Court may, with the consent of the prior

mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he

had in the property sold.

11. It is conceded by the learned Advocate for the appellant that the prior mortgagee can himself make no application under Order 34, Rule 12. It

is the decree-holder in the suit who alone can make this application. When he makes it, of course the prior mortgagee, whose rights must be

safeguarded, has to be consulted and he is asked whether he prefers to have the sale subject to or free of his mortgage. If he chooses the latter

course, a provision is made that the amount of his priority shall be paid off first from the sale proceeds. This, however, is in our opinion very far

from constituting him an alternative plaintiff in the suit and it is only if he is so constituted that he can have any right to execute the decree. The very

terms of the Order contemplate that an actual execution application has been already moved by the decree-holder, and we think it is absurd to

visualise any situation in which from the moment such an order is passed two persons can be alternatively entitled to apply for execution

independently of each other. Even while the decree still remains alive, we can see nothing in the language of Order 34, Rule 12, which permits a

prior mortgagee to have the mortgaged property sold; still less can we see any authority in this order for an application made like the present one

after the decree has already been declared fully satisfied. We are therefore unable to accept the contention of the appellant in this appeal and it too

is dismissed with costs - one set of costs in each case.