(1958) 02 MP CK 0024

In the Madhya Pradesh High Court

Case No : Civil Revision No. 294 of 1956

Ram Gopal Amarchand Mahajan APPELLANT

Vs

Dhannalal Pomaduji Kahar RESPONDENT

Date of Decision : 25-02-1958

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 83, 73

Citation : AIR 1958 MP 201 : (1958) 3 MPLJ 333

Hon'ble Judges : P.V. Dixit, J

Bench : Single Bench

Advocate : S.R. Joshi, for the Appellant;

Final Decision : Dismissed

Judgement

P.V. Dixit, J.

The question that arises for consideration in this revision petition is whether if in execution of a mortgage decree the mortgagor-judgment-debtor effects a private alienation of the mortgaged property with the consent of the Court and of the mortgagee decree-holder and deposits in Court the amount obtained by means of private alienation for the satisfaction of the mortgage-decree, the amount so realised and deposited in Court is liable to rateable distribution between the holders of decrees for the payment of money against the judgment-debtor. In this case, one Mukund held a mortgage-decree against Dhannalal.

When the mortgaged property was about to be sold in execution of a decree, Dhannalal sold the property against which the decree was passed by private alienation with the consent of the Court and of the mortgagee decree-holder and deposited Rs. 675/-, as the amount obtained by this sale, for payment to the mortgagee decree-holder. The petitioner Ramgopal, and one other person, who held against Dhannalal decrees for the payment of money, claimed to participate in the amount obtained by the sale of the mortgaged property by private alienation.

This prayer was rejected by the Civil Judge, Second Class, Burwaha, on the grounds that the decree obtained by Mukund was a mortgage-decree and not a decree for the payment of money; that there was nothing to indicate that Mukund agreed to relinquish his mortgage lien when he gave his consent to the sale of the mortgaged property by private alienation; and that the mere fact that he gave his consent did not amount to relinquishment of the mortgage security. Ramgopal has now come up in revision to this Court.

Mr. Joshi, learned counsel for the petitioner, argued that the amount obtained by Dhannalal by private alienation of the property against which Mukund held a mortgage-decree and deposited by him in the Court was "assets" for the purposes of Section 73 C. P. C. and that the mortgagee decree-holder Mukund should be taken to have waived his mortgage lien when he consented to the private alienation. Learned counsel relied on Ramanath Panda v. Damodar Sahu, AIR 1950 Orissa 230 (A).

I am unable to accept this contention. One of the conditions necessary for the applicability of Section 73 C. P. C. is that the attaching creditor as well as the decree-holders claiming rateable distribution in the assets should be holders of decrees for the payment of money. The decree which Mukund held against Dhannalal was a mortgage-decree and not a decree for the payment of any money. This is not disputed. Now it is no doubt open to the holder of a mortgage-decree to give up his mortgage security and to become a holder of a decree for the payment of money only.

But where the holder of a mortgage-decree has not done anything to give up his mortgage lien, nor made any statement in the Court to the effect he would give up his mortgage security if the judgment-debtor would satisfy the decree by private alienation, then the bare, fact that the mortgagee consented to alienation would not be sufficient to reduce him to the status of the holder of a decree for the payment of money.

Here learned counsel for the applicant conceded that there was nothing on record to indicate that Mukund relinquished his mortgage security or made any statement in the Court to the effect that he would give up his security if Dhannalal were to satisfy the decree by private alienation. In the absence of any such express consent on the part of Mukund, I do not think it can be held that Mukund had given up his mortgage security and that his rights as mortgagee under the decree came to an end when he allowed the judgment-debtor Dhannalal to effect a private alienation of the property covered by his decree. No doubt Order 21 Rule 83, C. P. C. does not apply to a sale in enforcement of a mortgage.

But that does not mean that whenever a holder of a mortgage-decree gives consent to a private alienation of the mortgaged property, the decree-holder''s rights as a mortgagee come to an end and he becomes a holder of the decree for the payment of money. This view of the matter finds support in the decision of the Lahore High Court in Benarasi Das v. Gopichand AIR 1924 Lah 132 (B), where it was held that the rights of the holder of a mortgage- decree do not come to an end by the mere fact that the decree-holder gave permission to the judgment-debtor to effect a priavte alienation of the mortgaged property and that in the absence of any express consent on the part of the decree-holder relinquishing his mortgage security it could not be held that the decree-holder had given up his mortgage security or that his rights as a mortgagee had corne to an end.

If, as I think, Mukund remained a holder of the mortgage-decree even after the private sale effected by Dhannalal of the mortgaged property, then Section 73 C. P. C. has no application whatsoever. The amount deposited by Dhannalal being the sale proceeds of the mortgaged property, Mukund was entitled to claim that the other decree-holders had no right to that money until his own mortgage claim was satisfied in full.

The decision in Ramanath Panda Vs. Damodar Sahu and Others, is not in point. What was held in that case was that the word "assets" in Section 73, C. P. C. is not confined to those only which are realised by process of compulsory sale, and that monies by whatever course they are realised, once they come into the Court are to be treated as assets available for distribution u/s 73, C. P. C.

The Orissa case does not lay down that the proceeds from the sale of a mortgaged property by private alienation become assets for the purpose of Section 73, C. P. C. for distribution amongst all the decree-holders of the judgment-debtor and that in such a case the mortgagee decree-holder also must be treated as a holder of a decree for the payment of money.

For all these reasons, the learned Civil Judge was right in coming to the conclusion that he did. This petition is, therefore, rejected. As none appeared for the opponent, there will be no order as to costs of this petition.