
(1964) 02 MAD CK 0008
In the Madras High Court
Case No : A.A.A.O. No. 76 of 1962

Sambandam Pillai and Others

APPELLANT

Vs

Ramaswami Naidu and Others

RESPONDENT

Date of Decision : 14-02-1964

Acts Referred:

Transfer of Property Act, 1882 — Section 56

Citation : AIR 1964 Mad 547 : (1965) ILR (Mad) 154 : (1964) 77 LW 383

Hon'ble Judges : Venkatadri, J

Bench : Single Bench

Advocate : K. Sarvabhauman, for the Appellant; V. Ramaswami, K. Alagiriswami and K. Gopalaswami, for the Respondent

Final Decision : Allowed

Judgement

Venkatadri, J.—This appeal arises out of execution proceedings in O S No. 31 of 1945. on the file of the Sub Court, Cuddalore The 6th

defendant in the suit is the first appellant herein He and his son filed an application, E A No 700 of 1960 out of which this appeal arises, for

directing the decree-holder in O.S. No 31 of 1945, to sell items 1 to 15 and 17 to 25 of the decree first in execution and to sell item 16 afterwards

When this application came up before the learned Subordinate fudge Cuddalore, he allowed the application, subject to the condition, namely, that

item 16 would be sold in the order in which it was found in the decree seriatim The assignee decree holder filed an appeal against the said direction

to the District Judge. Cuddalore. He held that the assignee decree-holder had a right to proceed only against item 16 which belonged to

Sambandam Pillai, the 6th defendant, the original mortgagor, and thus set aside the order of the learned Subordinate Fudge The assignee decree-

holder was thus permitted to proceed in execution only against item 16. It is against this order the 6th defendant has preferred this appeal.

2. It is necessary to state briefly the facts which led to the filing of the petition by the appellants herein in the executing Court. A security bond was

executed for Rs 9,000/ by one Venugopal Naidu, the 2nd defendant in the suit in favour of the District Munsif Vridhachalam, for the benefit of one

Seshayya Naidu. The security bond comprised of 25 items of property belonging to Venugopal Naidu. While the security bond was in force

Venugopala Naidu and his sons defendants 3 to 5, sold item 16 of the property to the 6th defendant-appellant for Rs 3,000/. Similarly, defendants

2 to 5 executed another sale-deed in respect of items 20, 24 and 25 in favour of the 9th and 10th defendants, who are the legal representatives of

the 7th defendant. Subsequently, in the year 1945, Seshayya Naidu filed the suit O.S. 31 of 1945, on the file of the Sub Court Cuddalore. On the

security bond executed by Venugopala Naidu in favour of the District Munsif Virdhachalam. and all the purchasers were impleaded as parties. A

preliminary decree was passed on 8-1-1947 for Rs. 9570-4-0. The decree was against defendants 2 to 6 and 8 to 10, and the charge was

spread over all the items of property. Subsequently, the decree-holder, Seshayya Naidu, assigned the decree to one Ramaswami Naidu. the

present first respondent herein.

A final decree was passed on 18-7-1985. The said Ramaswami Naidu, after obtaining the assignment of the decree, released items 20, 24 and 25

in favour of the 9th and 10th defendants on 10th March, 1958 by a registered lease deed, Ex. B-I, in consideration of Rs. 100/-. On 16th July,

1958, the assignee decree-holder filed Ex P. No. 398 of 1958 praying for a sale of all the 25 items without mentioning the release of items 20, 24

and 25 under Ex. B-I, already referred to. When the Court returned the petition on 13-8-1958, with a direction that he should file the sale papers,

the assignee-decree-holder filed the sale papers on 25-8-1958, only in respect of item 16 with a note that, as the encumbrance certificates in

respect of items 1 to 15 and 17 to 25 have not yet been obtained, he would bring those items to sale subsequently. Before the said E. P. came for

hearing, the assignee decree-holder released items 1 to 11, 14, 15, 17 to 19 and 21 to 23 in favour of the second defendant, Venugopala Naidu

the person who executed the security bond, for a sum of Rs. 500/- an extent of 23-66 acres of punja land and 4-70 acres nanja land. The first

appellant herein objected to the procedure adopted by the assignee-decree-holder. The execution application was, therefore, withdrawn. Again,

on 29-2-1960, the assignee decree-holder filed another E P (E. P. No. 152 of 1960) for the sale of item 16

The appellant herein filed E. A. No. 700 of 1900, alleging that he is the bona fide purchaser of item 16 from defendants 2 to 5 for a valid

consideration of Rs 3,000/- that the first respondent took an assignment of the decree for a low consideration and is maliciously bringing to sale

only item 16, and that the other respondents got the secured property on release from the assignee decree-holder for a low consideration. He,

therefore, prayed the Court that his property, item 16, should be ordered to be sold last, after items 1 to 15 and 17 to 25. The assignee-decree-

holder resisted the application supported by the second defendant, Venugopala Naidu, who obtained release of the major items of property. The

assignee-decree-holder asserted that, as a mortgagee-assignee decree-holder, he was entitled to release some items and to proceed against any

item of the mortgage as he pleased and submitted that this matter could not be gone into in execution proceedings. The learned Subordinate Judge

was convinced that the assignee decree-holder was actuated by mala fides in singling out item 16 and in bringing that property to sale, and allowed

the application filed by the 6th defendant and ordered that the properties should be sold in the order in which they were found in the decree. The

learned District Judge, on appeal by the assignee-decree-holder, observed that the Court should frustrate any attempt on the part of the decree-

holders to throw most of the burden mala fide on only one of the mortgaged properties.

However, he came to the conclusion that this mortgagee would have a paramount right to have the entire mortgage amount recovered from all or

any of the properties comprised in the mortgage and that this right could be whittled down only by clear and express words in the enactment or by

necessary intendment, and that the provisions of Section 56 of the Transfer of Property Act and Order XXXIV Rules 4 and 5 CPC neither

expressly nor by necessary intendment curtail the powers of the mortgagee to release his rights in respect of some properties of the mortgage by

virtue of the dominant right to realise the entire decree debt only from some of the properties comprised in the mortgage The sixth defendant has come in appeal.

3. Now, I have to consider how far this observation made by the District Judge is correct and in accordance with law. A Bench of this Court has

held as early as 1906 in *Krishna Aiyar v. Muthukumarasamia Pillai*, ILR 29 Mad 217,

. ... it was quite competent to the Court to exercise the control, which it did, so as to bring the different items of property comprised in the decree

to sale in a particular order with a view properly to adjust the equities possessed by the parties who were before it and who were all the parties

interested in the different items constituting the security "" It is true that a Full Bench of this Court in *K. Appayya v. M. Rangayya*, ILR 31 Mad 419

has held that a bona fide purchaser, who purchases for value a portion of a mortgaged property without notice of such mortgage, has no right in a

suit by the mortgagee to enforce his mortgage, to insist that the portion not sold to him must be proceeded against first and the portion purchased

by him must be sold only for the balance, if any, due. But the principle laid down by the Full Bench was subsequently referred to and explained by

another Division Bench of this Court in *Raghavachariar v. Krishna Reddi*, 46 MLJ 32 . AIR 1924 Mad 509:-

The only question that I have to consider is whether it is right that the order of sale of these properties should be regulated by the order of Court

and that, in my judgment, must depend on whether the appellant has got a good equitable right as between himself and the mortgagor and as

between himself and the other persons interested in the other mortgaged property; and if he has a right to preference then it is the duty of the Court

to give him preference taking care of course that the mortgagee is not prejudiced.

Thus, there is no direct authority that the mortgagee is the absolute master of the situation and that he could dictate to the Court the order in which

he would sell the mortgaged property. On the other hand, there is plenty of authority in support of the view that there is a discretion vested in Court

in fixing the order in which the property should be put up for sale, and. of course, this discretion is to be exercised in a reasonable and just manner

consistent with the equities of the case The facts of this case disclose mala fides

of the assignee decree holder and a conspiracy between the assignee-decree-holder and the person who originally executed the security bond, Venugopala Naidu the second defendant in the suit to bring item 16 to sale (the property originally belonged to the second defendant and subsequently sold by defendants 2 to 5 to the appellant herein), after giving release of all the other items of property to the second and the seventh defendants.

The main object seems to be that after enabling Venugopala Naidu to get back all the items of property which he originally gave as security in favour of the District Munsif, Vridhachalam, for a low consideration of Rs. 500 and Rs. 100 the assignee decree-holder wanted to proceed against item 16 only for recovery of the decree amount. It is a deliberate attempt on the part of the assignee decree-holder and Venugopala Naidu to throw the entire burden of the decree on item 16 only.

It has been held by a Division Bench of the Calcutta High Court as early as 1905 in *Surjiram Marwari v. Barhamdeo Pershad* 1 CLJ 337.

It is not open to mortgagee to throw the burden of the entire debt upon a portion only of the mortgaged property and release the remainder. The same principle has been reiterated in *Imamali v. Baijnath Ramsahu*, ILR 33 Cal 613 and also in *Jugal Kishore v. Kedarnath*, ILR 34 All 606. This

has been followed in *Mirza Qaiser Beg Vs. B. Sheo Shanker Das and Others* where *Niarnaullah*. I made the following observation at page 88:

If the court executing the decree which directs sale of numerous properties has a discretion to sell the mortgaged properties in any order it deems equitable, it should be guided by what it thinks to be consonant with justice to all the parties concerned with due regard to the mortgagee's right to have his mortgage money satisfied by sale of all the mortgaged properties or a sufficient part thereof. The court should frustrate any attempt on his part to throw most of the burden on one only of the mortgaged properties. That the court has such discretion admits, in my opinion, of no doubt.

Though there are about 25 items of property in the decree, the assignee decree-holder released major items of property and concentrated on only one item, namely, item 16. to recover the decree debt. Mr. Rashbehary Chose, in his *Tagore Law Lectures* 4th Edn. Vol. I. at page 369 states

For the law would not suffer the creditor to select his own victim, and from

caprice of favouritism to turn a "common burden" into "a gross personal oppression

In *Kuppuswami Goundar Vs. K. Muthuswami Goundan and Others*, Mack J. in a case of similar circumstances observed.

"It is true that a mortgagee decree-holder has ordinarily a right to bring the items of hypothecs in his decree to sale in any order that he pleases that is most convenient for him to realise his decree as quickly as possible This right cannot however include a right to single out one purchaser of an item of hypotheca and insist on bringing that item to sale out of mala fide motives such as spite or personal enmity. In such a case, if the executing court has reason to believe that a decree-holder in making a differentiation which the law allows him, is animated by mala fide motives, it can and should step in and direct an equitable sale without prejudice, of course, to the mortgagee's right to bring every bit of the hypotheca in satisfaction of his decree "

By the conduct of the assignee decree-holder, the appellants lost a valuable right of contribution from the other items of the property By releasing major items of property for a very small consideration, the assignee decree-holder must be deemed to have voluntarily released out substantial portion of the security. In such circumstances, what is the law to be applied is summed up in a treatise on the Law and Practice of Real Property, *Mortgage Foreclosure* by Charles Hastings Wiltside, 5th Edn Vol. 2, page 1143, paragraph 707 as follows"

....if the mortgagee releases from the mortgage, one or more parcels of the premises primarily liable, he thereby releases pro rata the portion secondarily liable, and he cannot enforce the lien against the residue without deducting the value of the part released from the amount due on the mortgage. In case the value of the property released is equal to the full amount of the mortgage debt, the mortgagee will, of course, lose his debt so far as the lien of his mortgage is concerned"" In effect, the assignee decree-holder extinguished the charged lien on major items of the property, and, if it is found that he is responsible for it, then the ruling made in ILR 29 Mad 217 should be applied, namely,

If the action of the mortgagee had had the effect of extinguishing a mortgage lien upon any portion of the mortgage property so as to relieve it from

the liability to bear its proportion of the debt, he cannot recover more than what the property he proceeds against would be rateably liable for.

Therefore, on a review of the entire case law on the subject, I feel that the mortgagee should not be permitted to unequally distribute the mortgage

money on two different properties and to release" one lightly and burden the other more than what it normally should be. Therefore in the interests

of justice. I allow this appeal and direct that, if the assignee decree-holder agrees, the rateable liability of item 16 should be ascertained and its

owner allowed to redeem it on payment of the proportionate amount of the mortgage money, and in default, item 16 should be sold for a

realisation of that proportionate amount but if the mortgagee does not agree to such partial redemption the assignee decree-holder should bring all

the items of property for sale before he sells item 16

4. In the result, the appeal is allowed with costs, and the execution application is remanded to the trial court for final disposal in the light of the

directions given in this judgment.