

(2002) 03 KAR CK 0056

In the Karnataka High Court

Case No : Regular First Appeal No. 408 of 1997

Smt. Sukanya

APPELLANT

Vs

Canara Bank, Sagar Branch and Others

RESPONDENT

Date of Decision : 11-03-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, 151, 96

Citation : (2002) 3 CivCC 160 : (2003) 115 CompCas 698 : (2002) ILR (Kar) 2555 : (2002) 3 KarLJ 487 : (2002) 2 KCCR 1405 : (2002) 4 RCR(Civil) 415

Hon'ble Judges : P. Vishwanatha Shetty, J

Bench : Single Bench

Advocate : M.N. Pramila, for the Appellant; Ashwin S. Halady, for the Respondent

Final Decision : Allowed

Judgement

P. Vishwanatha Shetty, J.—In this appeal filed u/s 96 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code"), the appellant has called in question the correctness of the order dated 15th April, 1997 made in Execution Case No. 228 of 1994 by the Court of Civil Judge and Additional Chief Judicial Magistrate, Sagar, rejecting the application filed by her under Order 21, Rule 58 of the Code.

2. Facts, which are not in serious dispute, may briefly be stated as hereunder:

(a) The first respondent, in this appeal, is a Nationalised Bank and has obtained preliminary decree dated 22nd July, 1992 in O.S. No. 80 of 1989, on the file of the Court of Civil Judge at Sagar, against respondents 2 and 3, who were the defendants in the suit and who will hereinafter be referred to as the judgment-debtors, for a sum of Rs. 1,27,086.90 along with interest at 14 per cent per annum from the date of grant of the loan to the judgment-debtors till the date of realisation. The preliminary decree further provided that in the event of default in payment of the amount within six months from the date of the decree, the

decree-holder was entitled to apply for the final decree directing that the properties mortgaged and described in Schedules "A" and "B" be brought to sale for recovery of the amount due to the decree-holder. The subject-matter of dispute in this appeal is confined to site and house measuring 15"x75" bearing Khata No. 460 and Assessment No. 4126, situated at Sagar town, which was described as Schedule "A" to the plaint (hereinafter referred to as "the suit schedule property"). Since the judgment-debtors failed to pay the decretal amount in terms of the preliminary decree, the decree-holder applied for the final decree in F.D.P. No. 8 of 1993 and obtained final decree dated 4th July, 1994 for sale of the suit schedule property.

(b) It is the case of the appellant that the suit schedule property was purchased by her by means of registered sale deed dated 22nd September, 1989 from one Sharadamma and since the date of the purchase, the appellant has been in actual possession and enjoyment of the suit schedule property. It is her further case that before the purchase of the suit schedule property, she had obtained the Encumbrance Certificate which indicated nil encumbrance. According to the appellant, the suit schedule property originally belonged to one Gulabamma and the said Gulabamma sold it to one Gowramma, who had, in turn, bequeathed her interest in the suit schedule property by means of Will dated 1st May, 1988 to one Sharada, the vendor of the appellant. It is her further case that she came to know through news item that the suit schedule property was mortgaged to the decree-holder and the same was brought to sale and, therefore, she made an application under Order 21, Rule 58 of the Code before the Executing Court objecting for the sale of the suit schedule property.

(c) The application filed by the appellant was resisted by the decree-holder contending, inter alia, that the decree-holder, in terms of the decree obtained, was entitled to get the suit schedule property sold for recovery of the amount due to it and the application filed by the appellant under Order 21, Rule 58 of the Code, was not maintainable.

(d) The learned Civil Judge, by the order under appeal, rejected the application filed by the appellant on the ground that the application filed under Order 21, Rule 58 of the Code is not maintainable. After coming to the conclusion that the application is not maintainable, the learned Civil Judge has proceeded to hold that it is not permissible for the appellant to contend that the suit schedule property was not mortgaged in favour of the first respondent-Bank. He has also rejected the prayer of the appellant for summoning of documents. As noticed by me earlier, being aggrieved by the said order, this appeal is presented.

3. Ms. Geetha Menon, learned Counsel appearing for the appellant, submitted that the entire approach made by the learned Civil Judge that the application filed by the appellant objecting to the sale of the suit schedule property, in final decree proceedings is not maintainable, is erroneous in law. She pointed out that though the application filed by the appellant was not maintainable under Order 21, Rule 58 of the Code, since the property in respect of which the appellant has

acquired title by means of registered sale deed dated 22nd September, 1989, was brought to sale by the first respondent-Bank pursuant to the decree obtained by it against the second respondent-judgment debtor, the learned Civil Judge ought to have held that the Court has inherent power to examine the objections raised by the appellant on an enquiry being held in that behalf. It is her submission that when Rule 58 of Order 21 of the Code provides for the objections being raised to the attachment of any property made in execution of the decree on the ground that such property is not liable to be attached; and when such an objection being raised, a duty is cast on the Court to adjudicate upon the objections raised for attachment of the property; and similarly when Rule 97 of Order 21 of the Code, provides for resistance or obstruction by any person for decree for possession being executed or for sale of any property in execution of decree; and on such resistance or obstruction being placed, the decree-holder could make an application to the Court complaining of such resistance or obstruction; and when such an application is made, the Court is required to adjudicate upon the application filed seeking for removal of obstruction or resistance, on the same analogy, it must be held that when the right of the owner of a property is threatened and the property is brought to sale, it must be held that such a person has a right to move the Court seeking adjudication of his rights to the property, notwithstanding that a decree for sale of the property had been obtained, provided the person, who raises such an obstruction or who resists for the sale of the property, was not a party to the decree; and the Court has a duty to conduct an enquiry and adjudicate upon the rights of the parties in the light of the objections raised. She further submitted that when the learned Civil Judge has taken the view that the application filed by the appellant raising objection to sale of the suit schedule property was not maintainable, he has seriously erred in law in proceeding to record a finding that it is not permissible for the appellant to raise obstruction with regard to the sale of the suit schedule property on the ground that the same was mortgaged in favour of the first respondent. She also submitted that the learned Judge has seriously erred in proceeding to pass the order without conducting an enquiry with regard to the objections raised by the appellant against the sale of the suit schedule property.

4. However, Sri Ashwin D. Halady, learned Counsel appearing for the first respondent, strongly supported the order under appeal. He pointed out that since there is no provision made in the code enabling a person, who claims right, title and interest in respect of a property, to object for the sale of the property in execution of the final decree obtained for sale of such property, the learned Judge has rightly taken the view that the application filed by the appellant was not maintainable. He pointed out that the learned Civil Judge has rightly taken the view that the application filed under Order 21, Rule 58 of the Code was not maintainable as the provision contained in Rule 58 of Order 21 of the Code applies only in cases where objections are preferred for attachment of a property in execution of the decree on the ground that such property was not liable to

attachment. In other words, it is his submission that since the property in question was brought to sale in execution of the final decree obtained by the first respondent-Bank, the learned Civil Judge has rightly taken the view that the application filed under Rule 58 of Order 21 of the Code was not maintainable.

5. In the light of the rival contentions advanced by the learned Counsels appearing for the parties, the only question that would arise for consideration, is whether the order under appeal is liable to be interfered with by this Court?

6. Even according to the case of the first respondent, the mortgage of the suit schedule property was created by means of deposit of documents/title deeds made on 29th November, 1983; and evidencing such deposit of title deeds, a letter was given on 30th of November, 1983. It is also not in dispute that on the date of the alleged deposit of title deeds of the suit schedule property, one Smt. Gowramma, who is the mother of the second respondent-judgment debtor was the owner of the suit schedule property. However, it is the case of the appellant that the appellant has purchased the suit schedule property from one Sharadamma, who is the wife of the second respondent-judgment debtor by means of registered sale deed dated 22nd of September, 1989 as the said Sharadamma had become the absolute owner of the suit schedule property by virtue of Will dated 1st May, 1989 executed by the said Gowramma bequeathing her right, title and interest in the said property in favour of her daughter-in-law, the aforesaid Sharadamma. It is the further case of the appellant that at the time of the purchase of the suit schedule property, he had obtained the Encumbrance Certificate from the office of the Sub-registrar, which showed "nil" encumbrance in respect of the said property. It is her further case that the said property was not mortgaged in favour of the first respondent by deposit of title deeds. Admittedly, the appellant was not a party to the decree, both preliminary and final, made in O.S. No. 80 of 1989, whereby the suit schedule property was directed to be sold for recovery of the amount due to the first respondent. Therefore, the real question that would arise for consideration is as to whether the said property was mortgaged in favour of the first respondent? If, as a matter of fact, the suit schedule property was not mortgaged in favour of the first respondent-Bank by means of deposit of title deeds as claimed by the appellant, the first respondent-Bank will not get any right to get the suit schedule property sold pursuant to the decree obtained by it. The decree obtained by the first respondent-Bank will not be binding on the appellant. The judgment made in O.S. No. 80 of 1989 does not indicate that the original of the title deeds relating to the suit schedule property was produced and marked as a piece of evidence in the suit. The only document referred to in the judgment made in O.S. No. 80 of 1989 in support of the case of the first respondent that the suit schedule property was mortgaged in favour of the first respondent by creating equitable mortgage by deposit of title deeds, is the letter dated 30th of November, 1989, which had been produced as Exhibit P. 18. No doubt, as rightly contended by Sri Ashwin, the provisions of Order 21, Rule 58 of the Code have no application when the property was brought to sale in execution of a final

decree made directing the sale of the suit schedule property as the said provisions are applicable only in cases where a claim is preferred or an objection is made to the attachment of any property in execution of the decree on the ground that such property is not liable for attachment. However, that does not mean that the real owner of the property, who is not a party to a decree made for sale of the property, in which he has right, title and interest, cannot object for the sale of the said property either before the sale of the said property takes place or before he is dispossessed from the said property. The provisions of Rule 97 of Order 21 of the Code provide for raising obstruction or resistance by a person in possession of the property from being dispossessed from the property by a person who has obtained a decree for possession or by a person who has purchased the property sold in execution of the decree. Sub-rule (2) of Rule 97 of Order 21 of the Code provides that if such resistance is placed by a person in possession, the decree-holder, who has obtained a decree for possession of an immovable property or who has purchased the property in execution of the decree for sale, is entitled to move the Court and get the objections or resistance removed after adjudication of the rights of the parties. Further, Rule 99 of Order 21 of the Code provides that where any person other than the judgment-debtor is dispossessed from an immovable property by the holder of a decree for possession of such property or where such property is sold in execution of a decree by the purchaser of such property, the person who has been dispossessed from such an immovable property, can make an application to the Court complaining of such dispossession; and when such an application is made, the Court is required to adjudicate upon the application in accordance with the provisions contained in the Code. Therefore, the provisions contained in Rules 58, 97 and 99 of Order 21 of the Code, entitle a person who claim right, title and interest in respect of a property, to resist or place obstruction when his rights are threatened or interfered with as provided for in the said provisions. Under these circumstances, can it be said that in the absence of a specific provision in the Code providing a right to a person who claims right, title and interest in respect of a property, which is directed to be sold pursuant to a final decree made for sale of the property for recovery of the amount due to a decree-holder, he has no right to raise any objection for sale of the said property before actually the sale takes place, and he should wait till the property is sold, or till either he is sought to be dispossessed or he is actually dispossessed? To my mind, it appears that when the law has provided for a remedy to the parties to raise objections even with regard to the attachment made when the properties are attached pursuant to a decree made as provided under Rule 58 of Order 21 of the Code and a party is entitled to raise an objection or resist from being dispossessed from the property pursuant to a decree for possession obtained, or a decree obtained by a purchaser in execution of the sale of the property even before the sale takes place, or he is dispossessed from the said property, the person whose property is brought to sale, is entitled to move the Court to adjudicate upon his rights regarding the property in question provided he was not a party to the decree obtained for the sale of such property. In my view, this power is required to be

conferred on the Court u/s 151 of the Code, which provides for inherent power of the Court. The law-makers keeping in mind that the provisions in the Code cannot provide for all contingencies or situations, have provided for Section 151 of the "Code which confers inherent power on the Court. No doubt, as rightly pointed out by Shri Ashwin, the application filed under Order 21, Rule 58 of the Code does not even refer to Section 151 of the Code. But, I am of the view that so long as the Court has inherent power u/s 151 of the Code, in the light of the view expressed by me above, merely because Section 151 of the Code is not referred to in the application filed, it should not be a ground to deny the relief to the appellant if the appellant is otherwise entitled. Ultimately, the Courts have a duty to adjudicate upon the rights of the parties and such adjudication should be done by looking into the substance of the grievance and not by making a technical and pedantic approach. Therefore, I am of the view that on this short ground, the order under appeal is liable to be set aside.

7. Further, as rightly pointed out by the learned Counsel appearing for the appellant, when the learned Civil Judge has taken the view that the application filed by the appellant was not maintainable, he has seriously erred in law in proceeding to record a finding that it was not permissible for the appellant to challenge the decree obtained by the first respondent for sale of the suit schedule property. As noticed by me earlier, the real crux of the matter is, whether the suit schedule property was mortgaged in favour of the first respondent-Bank by creating equitable mortgage by deposit of title deeds. If there is no mortgage of the schedule property by creating equitable mortgage by deposit of title deeds, the Bank is not entitled to get the suit schedule property sold pursuant to a decree obtained. Admittedly, as noticed by me earlier, the suit schedule property was purchased by the appellant on 22nd September, 1989. The suit was filed on 20th September, 1989, the preliminary decree was made on 22nd July, 1992 and final decree for sale of the suit schedule property was made on 4th July, 1994. Therefore, long prior to the date of the preliminary decree and the final decree, the appellant had become the owner of the suit schedule property. Under these circumstances, I am of the view that it is open to the appellant, who is the owner of the property, to show that the suit schedule property was not mortgaged in favour of the first respondent-Bank. It is necessary to point out that unless the equitable mortgage is created after fully complying with the procedure prescribed for creation of equitable mortgage by deposit of title deeds, there would not be an equitable mortgage created in law. Any error committed by the decree-holder by not obtaining the original of the documents/title deeds cannot affect the rights of a bona fide purchaser of a property in respect of which a decree for sale of the said property is obtained. In this connection, it is useful to refer to the observations made by the Hon'ble Supreme Court in the case of K.J. Nathan Vs. S.V. Maruty Reddy and Others, , wherein, at paragraph 10 of the judgment, the Supreme Court has observed thus:

"....Therefore, such a mortgage of property takes effect against a mortgage deed

subsequently executed and registered in respect of the same property. The three requisites for such a mortgage are, (i) debt; (ii) deposit of title deeds; and (iii) an intention that the deeds shall be security for the debt. Whether there is an intention that the deeds shall be security for the debt is a question of fact in each case. The said fact will have to be decided just like any other fact on presumptions and on oral, documentary or circumstantial evidence. There is no presumption of law that the mere deposit of title deeds constitutes a mortgage, for no such presumption has been laid down either in the Indian Evidence Act or in the Transfer of Property Act. But a Court may presume u/s 114 of the Indian Evidence Act that under certain circumstances a loan and a deposit of title deeds constitute a mortgage. But that is really an inference as to the existence of one fact from the existence of some other fact or facts. Nor the fact that at the time the title deeds were deposited there was an intention to execute a mortgage deed in itself negatives, or is inconsistent with, the intention to create a mortgage by deposit of title deeds to be in force till the mortgage deed was executed. The decisions of English Courts making a distinction between the debt preceding the deposit and that following it can at best be only a guide; but the said distinction itself cannot be considered to be a rule of law for application under all circumstances. Physical delivery of documents by the debtor to the creditor is not the only mode of deposit. A Court will have to ascertain in each case whether in substance there is a delivery of title deeds by the debtor to the creditor. If the creditor was already in possession of the title deeds, it would be hyper-technical to insist upon the formality of the creditor delivering the title deeds to the debtor and the debtor re-delivering them to the creditor. What would be necessary in those circumstances is whether the parties agreed to treat the documents in the possession of the creditor or his agent as delivery to him for the purpose of the transaction".

Therefore, as noticed by me earlier, if there is no mortgage of the property in question, the property in question cannot be brought for sale. It is also necessary to point out that it was very convenient for the second respondent, who was the first defendant in suit O.S. No. 80 of 1989, not to resist the claim of the first respondent-Bank that the suit schedule property was mortgaged by creating equitable mortgage by deposit of title deeds as it was sold by his wife to the appellant. Therefore, non-consideration of the contention of the appellant that there was no mortgage of the suit schedule property in the objections raised by the appellant objecting for the sale of the suit schedule property at the instance of the first respondent-Bank, would seriously affect the property rights of the appellant. Therefore, even in the absence of a specific provision in the Code, it would be in the interest of justice, good conscience and equity, to confer power on the Court u/s 151 of the Code to consider the objections raised by the appellant for sale of the property in question.

8. In the light of the discussion made above, I am of the view that the decision of the Delhi High Court in the case of Punjab National Bank Vs. Orkids and Others, , relied upon by the learned Counsel for the first respondent, is of no

assistance to him. That was a case where the party was objecting for attachment on the ground that there was an agreement to sell the property in question to the objector. That is not the position here. In this case, as noticed by me earlier, the appellant has acquired title to the suit schedule property by virtue of the sale deed executed in her favour. Further, in the case of Vannarakkal Kallalathil Sreedharan Vs. Chandramaath Balakrishnan and Another, the Hon"ble Supreme Court has observed that the rights of the attaching creditor shall not be allowed to override the contractual obligation arising from an antecedent agreement for sale of the attached property. It is useful to refer to the observation made at paragraph 9 of the said judgment, which reads as hereunder;

"In our opinion, the view taken by the High Courts of Madras, Bombay, Calcutta and Travancore-Cochin in the aforesaid cases appears to be reasonable and could be accepted as correct. The agreement for sale indeed creates an obligation attached to the ownership of property and since the attaching creditor is entitled to attach only the right, title and interest of the judgment-debtor, the attachment cannot be free from the obligations incurred under the contract for sale. Section 64 of the CPC, no doubt was intended to protect the attaching creditor but if the subsequent conveyance is in pursuance of the agreement for sale which was before the attachment, the contractual obligation arising therefrom must be allowed to prevail over the rights of the attaching creditor. The rights of the attaching creditor shall not be allowed to override the contractual obligation arising from an antecedent agreement for sale of the attached property. The attaching creditor cannot ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor".

In my view, the observation made by the Hon"ble Supreme Court in the case of Vannarakkal Kallalathil Sreedharan, supra, while dealing with the question of objections raised under Rule 58 of Order 21 of the Code, can be made applicable with regard to the objections raised by the owner of the property when the property is brought to sale by a decree-holder by virtue of a decree passed in his favour for sale of the property for recovery of the amount due to him, provided the objector to the said decree is not a party.

9. In the light of the discussion made above, I am of the view that the order dated 15th April, 1997 made on I.A. No. II in Execution Case No. 220 of 1994 by the Court of Civil Judge and Additional Chief Judicial Magistrate, Sagar, is liable to be set aside and is accordingly set aside. The matter is remitted to the Court of Civil Judge and Additional Chief Judicial Magistrate, Sagar, with a direction to treat the application filed by the appellant as the one filed u/s 151 of the Code and consider her objections for the sale of the suit schedule property pursuant to the decree obtained in O.S. No. 80 of 1989 by the first respondent. The Trial Court is directed to conduct necessary enquiry and take appropriate decision in the matter,

10. In terms stated above, this appeal is allowed and disposed off. However, no order is made as to costs.