

(1969) 09 MAD CK 0014
In the Madras High Court
Case No : A.A.O. No. 62 of 1965

S.V.K.N. Palaniappa Chettiar

APPELLANT

Vs

V.R.P.L.M. Palaniappa Chettiar and Others

RESPONDENT

Date of Decision : 11-09-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 73(1)

Citation : AIR 1970 Mad 401 : (1970) 83 LW 122 : (1970) 2 MLJ 458

Hon'ble Judges : Venkataraman, J;Kailasam, J

Bench : Division Bench

Advocate : K.S. Ramachandra Aiyer and R. Srinivasa Iyenger, for the Appellant;
V. Vedantachari and A. Venkatesan, for the Respondent

Final Decision : Dismissed

Judgement

Venkataraman, J.—This is an appeal against the order dated 2-1-1965 of the learned Subordinate Judge, Madurai, dismissing the

application E. A. 12 of. 1964 In E. P. 15 of 1958 in O. S. No. 96 of 1943 which the appellant filed calling upon the respondents 1 to 4 in the

petition and in the appeal to redeposit the amount of Rs. 18,289-24 which they had drawn out. The facts have been fully stated in the judgment

under appeal and it is enough to mention the following facts. One Rayaloo Aivar and Company had a mortgage over five items of properties dated

14-9-1921. It obtained a decree in O. S. No. 75 of 1934 which was duly confirmed in appeal. In execution it brought Item 1 of the hypotheca to

sale on 15-1-1956 for Rs. 24000. The decree in O. S. 75 of 1934 was fully satisfied and there remained a surplus amount of Rs. 19595-8-10. In

the said suit the predecessor-in-title of the respondents 1 to 4 herein was impleaded as the 3rd defendant because he held a subsequent mortgage

dated 9-1-1926 over those five items and another item. He filed his own suit, O. S. 91 of 1938, to enforce the mortgage and obtained the usual

preliminary and final decrees. Respondents 1 to 4 had filed an execution petition in enforcement of their mortgage decree In O. S. 91 of 1938, and

it was during the pendency of that execution petition, the earlier sale in O. S. 75 of 1934 took place. The Court ordered even in O. S. 75 of 1934

that the subsequent mortgagee, the third defendant therein would be entitled to the surplus sale proceeds after satisfaction of the first mortgagee's

claim. In pursuance of this direction, the respondents filed E. A. 282 of 1955 in O. S. 75 of 1934 for payment to them of the sum of Rs. 19595-8-

10 representing the substituted security for item 1 in their capacity as second mortgagee decree-holders. That petition was dismissed on 22-7-

1955 on the ground that they should work out their rights in execution of their mortgage decree in O. S. 91 of 1938.

2. On 27-7-1956 they filed an application in E. A. 645 of 1956 in E. P. 349 of 1955 in O. S. 91 of 1938 to send for the sum of Rs. 19595-8-10

from O. S. 75 of 1934 being their substituted security. The petition was ordered on 6-10-1956 (the date 6-10-1958 appealing in the printed copy

of judgment under appeal is a mistake for 6-10-1956). The learned Judge overruled some objections taken by the judgment-debtors mortgagors

about the E. P. being time barred and finally on 18-4-1958, ordered the issue of a cheque in favour of the respondent for the sum of Rupees

18289-24.

3. Before the cheque was issued, the appellant herein got the said amount attached in his own E. P. 15 of 1958 in O. S. 96 of 1943. The

attachment was made on the footing that the money belonged to the judgment debtors. The appellant is a simple money decree-holder. The

attachment was on 12-7-1958.

4. The actual money which was sent for to the credit of O. S. 91 of 1938 was paid to the respondents 1 to 4 as ordered by the learned

Subordinate Judge. Thereafter, the appellant filed E. A. 12 of 1964 put of which this appeal arises for directing the respondents 1 to 4 to redeposit

the said amount. The said application has been dismissed by the learned Subordinate Judge and it is against that order the present appeal has been

filed.

5. The main reason given by the learned Subordinate Judge for dismissing the application of the appellant is that the respondents 1 to 4 are entitled

to the amount in question as substituted security in place of their rights as second mortgagees and that their claim will obviously have preference

over that of a simple money decree-holder like the appellant. This reasoning obviously is sound and is borne out by the provisions of Section

73(1), proviso (c), Civil P. C. which runs in these terms--

Where any Immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of

sale shall be applied -- first, in defraying the expenses of the sale; secondly, in discharging the amount due under the decree; thirdly, in discharging

the interest and principal moneys due on subsequent incumbrances (if any); and fourthly, rateably among the holders of decrees for the payment of

any money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such

sale for execution of such decrees, and have not obtained satisfaction thereof.

It will be noted that the sale in O. S. 75 of 1934 took place in discharge of the incumbrance therein and after satisfying the expenses of the sale and

the amount due under that decree there remained a surplus and under the third clause of the proviso (c), the respondents 1 to 4 being the

subsequent encumbrancers (second mortgagee) would be entitled to the amount; and only if there was some money left after satisfying their claim,

the fourth clause of the proviso (c) providing for rateable distribution for the simple money decree-holders of the judgment-debtor would come into

play. The appellant will come only under the fourth clause. Hence the order of the learned Subordinate Judge is correct. Having regard to the

wording of Section 73 which after all only embodies the substantive law that a mortgage will take priority over a simple money creditor. Otherwise

the whole object of a mortgage would be defeated. This doctrine is pointed out by a Bench of this Court in Shanmugham Chettiar v. Palaniappa

Chettiar, ILR (1964) 2 Mad 101 : 78 Mad LW 44, that where the hypotheca is sold, the security will fasten itself on the sale proceeds which

come by way of substituted security.

6. The learned counsel for the applicant has no effective answer to this contention. He argued the appeal on the footing that the attachment of the

amount by his client took place on 12-7-1958 and that the money was sent for to the credit of O. S. 91 of 1938 only on 6-10-1958 and that since

the attachment was prior to the order dated 6-10-1959. That order cannot be availed by the respondents 1 to 4. But it has been pointed out to us

that 6-10-1958 is a mistake for 6-10-1956, and we have satisfied ourselves on that point. That is also another reason why the argument of the

appellant has to fail. The learned counsel for the appellant urged that there were special circumstances in this case. We are unable to find any

special circumstances, particularly to overcome the effect of Section 73(1) proviso (c).

7. In the result, the appeal fails and is dismissed with costs one set.