(1986) 10 KAR CK 0007

In the Karnataka High Court

Case No : C.R.P. No. 2377 of 1983

Syndicate Bank APPELLANT

Vs

Pundalika Nayak RESPONDENT

Date of Decision : 16-10-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 95, Order 21 Rule 97, Order 34 Rule 1
Transfer of Property Act, 1882 — Section 52

Citation : (1986) 10 KAR CK 0007

Hon'ble Judges : Kulkarni, J

Bench : Single Bench

Advocate : Tukaram S. Pai, for the Appellant; B.P. Holla, for R-3, for the Respondent

Final Decision : Dismissed

Judgement

Kulkarni, J.—This is a revision by the petitioner-decree-holder-auction purchaser against the order dated 29th March, 1983, passed by the 1st Additional Civil Judge, Mangalore, in Misc. Case No. 19 of 1982 and on I. A. No 1 filed in Execution Case No. 129 of 1978, dismissing them bath.

2. There was a partition between G. Madhava Nayak and the other members of his family including respondents-1 and 2 as per the registered duplicate partition deed Exhibit D2 and Exhibit P13 dated 23-6-1967. In that partition, the suit properties had fallen to the share of respondents-1 and 2. Respondents-1 and 2 effected an equitable mortgage in respect of the suit property in favour of Vijaya Bank as per Exhibit D1 dated 5-11-1971. While effecting the equitable mortgage as above, respondents-1 and 2 produced the duplicate partition deed Exhibit D2 dated 23-6-1967 and other documents by way of security for the loan advanced by the Vijaya Bank to them. The Vijaya Bank filed a suit in O. S. No. 109 of 1973 as per the certified copy of the plaint Exhibit D11 against the present respondents-1 and 2 to recover Rs. 23, 193-82 due under the said equitable

mortgage. A preliminary decree as per the certified copy of the preliminary decree Exhibit D5 was passed on 16-9-1975 in O.S.No 109 of 1973 against the present respondents 1 and 2. A final decree as per the certified copy Exhibit D6 came to be passed on 21-9-1976 in the said suit filed by Vijaya Bank. Thereafter Vijaya Bank sued out execution in Execution Case No. 19 of 1977 and with the permission of the Court purchased the suit property itself for Rs. 28,000/- in a Court auction sale held on 15-7-1978. The said Court auction sale was confirmed on 17-11-1978. The Vijaya Bank obtained the sale certificate as per Exhibit D4. Thereafter the Vijaya Bank filed an application on 16-3-1979 under Order 21 Rule 95 C.P.C. in Miscellaneous Case No. 13 of 1979 for possession. As per the delivery receipt Exhibit D9, the Vijaya Bank took possession of the suit properties on 7-4-1979. Exhibit D8 is the certified copy of the Memo dated 22-7-1980 relating to the taking of the possession of the property. Thereafter the Vijaya Bank sold the suit properties to respondent-3 as per the sale deed Exhibit D10 dated 2-2-1982 for Rs. 88,000/-and handed over possession of the properties to respondent-3. Respondent-4 is a tenant in respect of a portion of the suit properly who had initially attorned to Vijaya Bank and thereafter to respondent-3.

3. Respondents-1 and 2 to whom the suit properties had been allotted in the partition as per Exhibits P13 and D2, again effected an equitable mortgage regarding the suit properties in favour of the revision petitioner-Syndicate Bank on August 28, 1972. Respondents-1 and 2 produced the duplicate partition deed Exhibit P13 and other documents while creating the equitable mortgage. Exhibits P2 to P7 are the documents evidencing the equitable mortgage by respondents-1 and 2 in favour of the Syndicate Bank on August 28, 1972. The decree holder-revision petitioner Syndicate Bank filed a suit in O. S. No. 107 of 1975 on 13-8-1975 to recover Rs. 33,561-21 from respondents-1 and 2. A preliminary decree came to be passed in the said suit on 13-8-1975 against respondents-1 and 2 in the said suit. On March 30, 1977, a final decree as per Exhibit P16 came to be passed in the said suit against respondents-1 and 2. The Syndicate Bark sued out execution in Execution Case No. 129 of 1978 against respondents-1 and 2 to recover the said amount due under the final decree Exhibit P16. The suit properties were brought to sale in the said execution 21-8-1981. The decree holder Syndicate Bank itself with the permission of the Court, purchased the suit properties in a Court auction held on 21-8-1981 for Rs. 35,000/-.The sale was confirmed on October 22, 1981. The sale certificate Exhibit P17 dated 7-12-1981 was issued to the decree holder Syndicate Bank. The Syndicate Bank filed an application in Miscellaneous Case No. 19 of 1982 under Order 21 Rule 95 C.P.C. against respondents-1 and 2 for obtaining possession of the properties purchased by it in the Court auction sale. When the bailiff went with the delivery warrant to the suit properties, respondent-3 offered obstruction to the delivery of the possession to the Syndicate Bank and gave obstruction to the said effect in writing to the bailiff. Respondent-4 who was in possession of a portion of the suit property as a tenant also offered obstruction. Hence the Syndicate Bank filed I.A. No. 1 in the said execution (Execution Case No. 129 of 1978) under Order 21

Rule 97 C.P.C. to remove the obstruction and to put it in possession of the property after removing the obstruction.

4. The Syndicate Bank contended that the proceedings culminating in the passing of the preliminary decree and the final decree in favour of the Vijaya Bank and the execution proceedings sued out by the Vijaya Bank and the Court auction sale held on 15-7-1978 in the execution filed by the Vijaya Bank and the auction purchase by the Vijaya Bank and the proceedings relating to the delivery of the possession of the property to the Vijaya Bank, were hit by Section 52 of the Transfer of Property Act, and the said proceedings were all null and void under Order 34 Rule 1 C.P.C. as the puisne mortgagee i.e. the Syndicate Bank had not been made a party to any of the proceedings initiated by Vijaya Bank against respondents-1 and 2. In short, the Syndicate Bank contended that Vijaya Bank did not get any title to the suit properties and that Vijaya Bank bad no right in the suit properties. Therefore Respondent-3 who is a subsequent purchaser from Vijaya Bank and who has purchased the suit properties during the pendency of the proceedings initiated by the Syndicate Bank, had no right to resist the delivery of the possession of the property. Similarly respondent-4 also had no right to resist the delivery of the possession of the property to the Syndicate Bank.

5. Respondents-3 and 4 denied all the allegations put forward by the Syndicate Bank. They resisted the Miscellaneous Case as well as I.A. No. 1 filed by the Syndicate Bank.

6. In the Court below, the decree holder marked Exhibits P1 to P17. Respondents-3 and 4 marked Exhibits D1 to D21. No oral evidence was adduced by the parties.

7. The Trial Court on a circumspection of the evidence, dismissed the Miscellaneous Case No. 19/1982 and I.A. No. 1 filed by the Syndicate Bank in the execution case. Hence the present revision.

8. The equitable mortgages effected by respondents-1 and 2 in favour of Vijaya Bank and the Syndicate Bank are not in dispute. The subsequent proceedings initiated by the Vijaya Bank and the Syndicate Bank also are also not in dispute. It is also not in dispute that the Vijaya Bank in pursuance of the final decree obtained by it against respondents-1 and 2, sued out the execution and purchased the mortgaged suit properties itself with the permission of the Court and after filing an application under Older 21 Rule 95 C.P.C. obtained possession of the suit properties itself. It is also undisputed that Vijaya Bank thereafter sold the suit properties to respondent-3 under the sale deed Exhibit D10 dated 2-2-1982. It is also undisputed that respondent-3 is in actual possession of a portion of the suit property. It is also undisputed that respondent 4 is in possession of the remaining portion of the suit property as a tenant.

9. The proviso to Section 6 of the Karnataka Stamp Act, 1957, reads as :-

Provided that nothing contained in this Act shall render Chargeable with duty exceeding four rupees and fifty paise a counter-part or duplicate of any instrument chargeable with duty and in respect of which the proper duty has been paid."

Article 22 of the Schedule to the Karnataka Stamp Act reads as :

"22. Counterpart or Duplicate of any instruments, chargeable with duty and in respect of which the proper duty has been paid

(a) If the duty with which the original instruments is chargeable does not exceed four rupees and fifty paise.

The same duty as is payable on the original.

(b) in any other case etc., etc ,"

Six rupees

In this case, the present respondents-1 and 2 and others who were parties to the partition brought about in their family, appear to have taken counterparts or duplicates of the partition deed as provided by Section 6 and Article 22 of the Schedule to the Stamp Act. Respondents-1 and 2 who appear to be shrewd business people, appear to have taken advantage of having in their possession the duplicates of the partition deed. Taking advantage of it, they produced one of the duplicates of the partition deed before Vijaya Bank and effected an equitable mortgage in regard to the suit properties and obtained a loan. Respondents-1 and 2 again produced another counterpart of the same partition deed in the Syndicate Bank and subsequently effected an equitable mortgage in regard to the suit properties which had fallen to their share in the said partition. A mortgage by deposit of title deeds, is not required to be registered. A memorandum creating equitable mortgage, does not also require registration. Therefore, the Syndicate Bank was quite unaware of the first equitable mortgage created by respondents-1 and 2 in favour of the Vijaya Bank. Naturally an equitable mortgage which is not required by law to be registered, will not find a place in the encumbrance certificate. Therefore the encumbrance certificate produced by respondents-1 and 2 to the Syndicate Bank, did not make a mention of the equitable mortgage effected by them formerly in favour of the Vijaja Bark. Therefore both the Banks, as rightly pointed out by the Court below, were taken for a ride by respondents-1 and 2. Respondents-1 and 2 taking advantage of possession of the duplicates of the partition deed, took loans from Vijaya Bank as well as Syndicate Bank by effecting equitable mortgages of the same suit properties without intimating either of them about the mortgage or the encumbrance already effected. It appears to me that regard being had to the fact that the law allows duplicates of the partition to be registered, the Banks should be very cautious in advancing loans by way of equitable mortgage on such duplicates of the partition deeds. The Banks would be justified in refusing to advance loans on the strength of such duplicates of the partition deeds. If they advance loans on the strength of such duplicates of partition deeds, they are likely to come into trouble.

10. The Learned Counsel Shri Holla for Respondents-3 and 4 submitted that the original partition deed itself which would have been charged with higher duty, should be accepted as a document of title for effecting the equitable mortgage and that the duplicates should not be and could not be the subject matter of an equitable mortgage, in the case of partition, the main partition deed as well as the duplicates thereof which are stamped under the Karnataka Stamp Act and which are registered, would be the originals themselves. Therefore his argument that an equitable mortgage created on the strength of such a duplicate partition deed was no equitable mortgage at all, merits to be rejected. In such cases, the mortgagees would be taking the risk in advancing loans by way of equitable mortgage. Therefore as cautioned above, it is for the Banks to make up their mind as to whether they should advance loans on equitable mortgage on the strength of such duplicates.

11. The equitable mortgage Exhibit D1 in favour of Vijaya Bank was created by respondents-1 and 2 on 5-11-1971. The equitable mortgage in favour of the Syndicate Bank by Respondents-1 and 2 was created on 28th August, 1972. Therefore the Vijaya Bank is the first mortgagee and the Syndicate Bank is the puisne mortgagee. It is not disputed before me and it cannot be disputed at all and in fact it is not disputed. The Vijaya Bank as can be seen from the certified copy of the plaint Exhibit D11, filed O.S. No. 109/73 against Respondents-1 and 2 to recover the loan. The Syndicate Bank filed O.S. No. 107/75 on 138-1975. Thus, it becomes clear that O.S. No. 107/75 has been filed by the Syndicate Bank nearly two years after the Vijaya Bank filed O.S. No. 109/73. The preliminary decree as per Exhibit D5 was passed in favour of Vijaya Bank on 16-9-1975. Thus, it becomes clear that the preliminary decree came to be passed in O.S. No. 109/75 filed by the Vijaya Bank, after the Syndicate Bank filed O.S. No. 107/75 on 13-8-1975. The final decree, as can be seen from Exhibit D6, was obtained by the Vijaya Bank on 21-9-1976 i.e. during the pendency of O.S. No. 107/75 filed by the Syndicate Bank against Respondents-1 and 2. The execution in Execution Case No. 19 of 1977 was filed by the Vijaya Bank during the pendency of the suit filed by the Syndicate Bank. The auction sale was held on 15-7-1978 in Execution case No. 19 of 1977 sued out by the Vijaya Bank i.e. during the pendency of the suit initiated by the Syndicate Bank. The purchase by the decree holder-Vijaya Bank-auction purchaser of the suit properties and the confirmation of the sale on 17-11-1978 and the issuance of the sale certificate and the filing of the Miscellaneous Case No. 13 of 1979 filed by Vijaya Bank on 16-3-1979 for delivery of possession under Order 21 Rule 95 C.P.C. and taking possession of the property en 7-4-1979 by the Vijaya Bank, are undisputedly during the pendency of the proceedings in O.S. No. 107/75 filed by the Syndicate Bank. The Vijaya Bank which purchased the property in Execution Case No. 19/77 sold the suit properties to Respondent-3 as per the sale deed Exhibit D10 dated 2-2-1982 for Rs. 88,000/-. The Vijaya Bank which purchased the suit

properties for Rs. 28.000/- on 15-7-1978 sold the same to respondent on 2-2-1982 for Rs. 88,000/-. Thus it becomes clear that it has made a net profit of nearly Rs. 60.000/- within a short time after it purchased the same. Now the question is whether the doctrine of lis pendens laid down by Section 52 of the Transfer of Property Act would apply to Court sales in execution of the mortgage decrees.

12. The learned Counsel Shri Tukaram Pai for the revision petitioner Syndicate Bank relied on Subbarao v. Venkataseshacharlu AIR 1949 Mad 207; Kedar Nath Lal and Another Vs. Ganesh Ram and Others, ; Ram Sanehi Lal and Another Vs. Janki Prasad and Others ; and Samarendra Nath Sinha and Another Vs. Krishna Kumar Nag, and contended that though Section 52 of the Transfer of Property Act may not strictly apply to Court sales, yet the principle underlying lis pendens would apply to such alienations by the Court.

13. The learned Counsel Shri Holla for respondents-3 and 4 referred me to Smt. Laxmi Devi Vs. Sethani Mukand Kanwar and Others, It was a case where Smt. Mukand Kanwar challenged the validity of an auction sale held on 14th May, 1954, in execution of a money decree passed in favour of Ratan Lal Dani, Secretary, Hindu Charitable Aushdhalaya, Ajmer, respondent-2. Respondent-3 Umrao Mal who was the owner of the property, mortgaged it to the appellant Laxmi Devi, Later respondent-2 obtained a money decree against respondent-3 for a large amount, and in execution of this money decree he brought the property in question to sale. The auction sale was accordingly held on 14th May, 1954, and the appellant purchased the property subject to the preexisting mortgage in her favour. The amount due under the mortgage was Rs. 33,264/- and as auction purchaser, the appellant paid Rs. 2,800/- where by she purchased the equity of redemption vesting in respondent-3 the judgment debtor. It is the validity of this sale that was challenged in the said Supreme Court case. One of the questions raised in the said Supreme Court case was whether respondent-1 was a person whose interests had been affected by the impugned sale.

14. In para 16 on page 838, the Supreme Court has stated as :-

"In our opinion, the positive provision contained in Section 2(d) must prevail over the definition of "transfer of property" prescribed by Section 5. No doubt, the purpose of the definition is to indicate the class of transfers to which the provisions of the Transfer of Property Act are intended to be applied; but a definition of this Kind cannot over ride the clear and positive direction contained in the specific words used by Section 2(d). As we have already seen, the result of the saving clause enacted by Section 2(d), is to emphasise the fact that the provisions of Section 57 and those contained in Chapter IV mast apply to transfer by operation of law. Such a positive provision cannot be made to yield as to what appear to be the effect of the definition prescribed by Section 5 ; and so, we are inclined to hold that notwithstanding the definition prescribed by Section 5, the latter part of Section 100 must be deemed to include the auction sales."

As can be seen from para 17 of the Supreme Court decision, the question that fell for consideration was whether the auction-purchaser would be covered by the latter part of Section 100 of the Transfer of Properly Act. The Supreme Court has stated in para 17 as :-

In the first decision, the Allahabad High Court had taken the view that auction sales do not fall within the purview of the latter part of Section 100, while in the latter case, a contrary view had been accepted. The Full Bench preferred the latter view to the former. Since this Full Bench decision was pronounced in the Allahabad High Court, auction-purchasers have been consistently held to fall under the latter part of.Section 100. It has been held by the Full Bench that when the relevant clause in the latter part of Section 100 speaks of any property in the hands of person to whom such property has been transferred, the concept of transfer is wide enough to include transfers effected by acts of parties as well as transfers effected by operation of law. The same view has been accepted by the Patna High Court in Rajkishore Lall and Others Vs. Begum Sultan Jehan and Others, and by the Punjab High Court in Manna Singh Allah Singh Vs. Wasti Ram Saraf and Others, The decision of the Madras High Court in, Surayya v. Venkataramanamma (AIR 1940 Madras 701) and the decision of the Calcutta High Court in L.A. Creet Vs. Firm Gangaraj-Gulraj and Others, which appear to support the contrary view do not, in our opinion, correctly represent the true legal position in this matter."

The Supreme Court stated clearly that the result of the saving clause enacted by Section 2(d) of the Transfer of Property Act is to emphasise the fact that the provisions of Section 57 and those contained on Chapter IV must apply to transfer by operation of law. Chapter IV relates 10 mortgages. Therefore according to the Supreme Court, Chapter IV applies to transfer by operation of law. Therefore, in my opinion, the said Laxmi Devi''s case5 might not help the learned Counsel Shri Holla in this connection.

15. Then the learned Counsel Shri Holla relied on C.V. Raghavachar Vs. Lakshminarasamma and Others, Srinivasamurthy in the said Raghavachar''s case is a transferee from the prior mortgagee auction purchaser. C.V. Raghavachar is a subsequent auction purchaser in a subsequent mortgage suit. The Supreme Court has held in para 5 as :-

"The High Court has held rightly that the prior mortgagee when he himself purchased the mortgaged property, became entitled as assignee of the equity of redemption to redeem the subsequent mortgages. The High Court also held that if there is a conflict between the right of the prior mortgagee as assignee of the equity of redemption to redeem the puisne mortgagee and the right of the puisne mortgagee to redeem the prior mortgagee, the right of the prior mortgagee takes priority. There can be no dispute that while the puisne mortgagee had a right to redeem the prior mortgagee, the prior mortgagee after he himself auction purchased the property had the last right of redemption as the assignee of the equity of redemption. As already stated there is no finding that the omission to implead the puisne mortgagees in the first mortgagee''s suit was designed to create a right prejudicial to the puisne mortgagee''s claim. The High Court noticed that the suit brought by the legal representatives of Srinivasamurthy to whom the prior mortgagor had transferred his interest was not a suit for redemption but the High Court pointed out that in the suit instituted by the present appellant (O.S. 889 of 1962) the preferential right of the prior mortgagee to redeem the puisne mortgagee had been pleaded as an alternative case. The High Court thought that "it is not desirable to drive the parties to another suit and it is desirable to determine the priority as between the rights of redemption claimed by the rival purchasers". The appellant who had notice of the claim of preferential right made by the legal representatives of Srinivasamurthy in Suit No. 889 of 1962 cannot make a grievance that he has been taken unawares. In our opinion, on the facts of the case the view taken by the High Court cannot be questioned as illegal or improper. After it was found that the prior mortgagee had the right to redeem the subsequent mortgagees the High Court held rightly that the transferees of the prior mortgagees'' interest were entitled to possession of the property."

This decision appears to have diluted the principles laid down in Samarendra Nath Sinha and Another Vs. Krishna Kumar Nag, and Kedar Nath Lal and Another Vs. Ganesh Ram and Others, . In view of the decision in the said C.V. Raghavachar Vs. Lakshminarasamma and Others, and in view the ruling in Varki Chacko Vs. Ouseph Pramena, it appears to me that the rule of lis pendens may not strictly apply to previous Court auction sales. This Court had an occasion to deal with similar matter in Kamalamma v. K. Srinivasa Rao 1966(1) KLJ 451. This Court in the said case has held as:--

"Where a mortgage of a family property was created before the institution of a partition suit, a sale in execution in enforcement of the mortgage is not affected by the doctrine of lis pendens.

A mortgagee becomes a transferee of the interest in the immovable property on the date of the mortgage and acquires on that date the right to sell the mortgaged property for the recovery of the debt. Neither the institution of the suit, nor the sale in execution of the mortgage decree, can fall within Section 52 T.P. Act, since such a sale does not involve the transfer of a property. In bringing the suit property to sale, the mortgagee does no more than to enforce a right which had come into being long before the other suit was commenced.

Similarly, where family properties were attached by creditors long before a partition suit was commenced, the partition suit which was subsequently instituted cannot to any extent affect the rights of the creditors in the earlier suits to enforce their rights which had accrued to them very much before the partition suit was commenced."

16. Therefore, in my opinion, the Trial Court rightly held that the proceedings in which Vijaya Bank purchased the petition property, were not hit by the principles

of lis pendens mentioned in Section 52 of the Transfer of Property Act. Therefore the argument of the learned Counsel Shri Tukaram Pai that all the proceedings resulting in the Court auction sale of the suit properties in favour of Vijaya Bank and leading to delivery of possession to Vijaya Bank were hit by Section 52 of the Transfer of Property Act, merits to be rejected.

17. It is undisputed that the Syndicate Bank which is a puisne mortgagee, was not impleaded as a party to the suit-O.S. No. 109/73-filed by Vijaya Bank to enforce the equitable mortgage dated 5-11-1971 executed by respondents 1 and 2 in its favour. It is also undisputed that Vijaya Bank had not made the puisne mortgagee Syndicate Bank a party either to the final decree or to the execution case or to the proceedings initiated under Order 21 Rule 95 C.P.C.

18. Order 34 Rule 1 C.P.C. reads as :--

"Parties to suits for foreclosure, sale and redemption :-

Subject to the provisions of this Code, all persons having an interest either in the mortgage-security of in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Explanation :- A puisne mortgagee may sue for foreclosure or for sale without mating the prior mortgagee & party to the suit ; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage."

19. The learned author Shri Mulla in his Civil Procedure Code, 13th edition, Vol, 11, page 1434 has stated as :--

"Where a person who ought to have been joined as a party under this rule is not joined as a party, and a decree is passed in the suit, the decree cannot affect his rights (see notes below, "Mahomedan co-heirs"). To take a case which frequently occurs, if a second or subsequent mortgagee who ought to be, but is not joined as a party to a suit by the prior mortgagee, the proceedings in the suit are not binding on him so as to affect his rights under the second mortgage. As second mortgagee he could have sued the mortgagor for a sale of the property subject to the first mortgage, or he could have redeemed the first mortgage and then sued the mortgagor for sale on both the mortgages. The point to be noted is that the second mortgagee does not lose either of these rights, merely because a decree has been passed in the prior mortgagee''s suit, and the mortgaged property has been sold in execution of the decree. The sale has not the effect of displacing the second mortgagee and leaving him with nothing but a claim against the balance (if any) of the sale proceeds of the property after satisfying the first mortgagee. The omission to implead the second mortgagee does not in any way prejudice his rights. That his right to sue for sale (subject, of course, to the first mortgage) is not lost, has been held by a Full Bench of the Calcutta High Court. That his right to redeem the first mortgage and to have the property sold to satisfy his own claim is not lost has been held in the undermentioned and numerous other cases cited elsewhere in the notes to this rule."

20. It has been laid down in Nagu Tukaram Ghatule Vs. Gopal Ganesh Gadgil, that where a prior mortgagee obtains a decree and executes the decree, the proceedings between him and the mortgagor do not affect the puisne mortgagee''s right to redeem. Similar principle is also laid down in Rattan Chand Vs. Prite Shah Sant Ram of Amritsar and Others, Therefore the non-jointer of the Syndicate Bank which is a puisne mortgagee in the suit filed by Vijaya Bank, does not render the proceedings in the suit null and void. At the most it can be said that those proceedings do not affect the rights of the puisne mortgagee Syndicate Bank.

21. In Lakshmi Amma Vs. Rama Iyer, it is stated that as between the auction purchasers on the strength of decrees of various mortgages of different dates, the purchaser who has purchased the property earliest in point of time is entitled to possession. The said Kerala decision laid down as :-

"Where the competition for possession is between the purchasers under mortgages of different dates upon the property sold in execution, the purchaser, whose purchase is earliest m point of time is entitled to possession and the rights of a simple mortgagee, who omitted to make a subsequent puisne mortgagee a party to his suit, should be worked out in a proper suit instituted for that purpose by him or his representative -in- interest. Hence, a prior mortgagee who is only a later purchaser, is not entitled to get possession."

Even in M.N. Nagendran Chettiar Vs. Lakshmi Ammal, it is held that the deciding (sic) is priority in the date of sale which carried with it the right to possession. In Bogi Arijisah Vs. Kanniappa Mudaliar, it is stated that the first purchaser is entitled to retain possession and to a decree for permanent injunction restraining the second purchaser from obtaining delivery of possession on the basis of his purchase. In the said Bogi Arijisah Vs. Kanniappa Mudaliar, it is stated by the Madras High Court as :-

"Where there are two purchasers in execution of two decrees on two mortgages, one prior and the other subsequent, and in the suit on the first mortgage the second mortgagee was not made a party and in the suit on the second mortgage the first mortgagee was not made a party, in a contest between the two auction purchasers, the first purchaser is entitled to retain possession and to a decree for a perpetual injunction restraining the second purchaser from obtaining delivery of possession on the basis of his purchase at the Court sale in execution of the decree obtained by him on foot of the second mortgage".

22. The Supreme Court also has held in C.V. Raghavachar Lakshminarasamma and Ors., as:-

"Where it was found that the prior mortgagee had the right to redeem the subsequent mortgages the transferees of the prior mortgagees'' interest were entitled to possession of the property."

23. Therefore the Court below, in my opinion, was correct in holding that non-

jointer of the Syndicate Bank in the suit filed by Vijaya Bank, did not render the proceedings initiated by Vijaya Bank null and void and that the proceedings initiated by Vijaya Bank did not affect the rights of the puisne mortgagee Syndicate Bank and that the rights of the Syndicate Bank remained unaffected by the said proceedings initiated by Vijaya Bank. The Court below was justified in holding that the right of the Syndicate Bank had remained unaffected by the proceedings initiated by the Vijaya Bank and that the Syndicate Bank was at liberty to have recourse to the legal remedies provided under the law.

24. The learned Counsel Shri Tukaram Pai then urged that the trial Court had not considered Order 21 Rules 101 and 103 C.P.C. The trial Court has considered about the same in para 15 of its order. It has stated as :--

"We have seen above that the petitioner Bank being not made a party in the suit brought by the prior mortgagee Vijaya Bank, its right of redemption is unaffected. The question is whether the right of the petitioner could be determined and adjusted and proper relief could be granted to the petitioner in this proceeding itself. Though Order 21 Rule 101 C.P.C. empowers the Court to determine all questions relating to right, title or interest in the properly, as the prior mortgagee Vijaya Bank is not a party to this proceeding, in my view, the question as to what is the right of the petitioner in the mortgaged property and what relief the petitioner is entitled cannot be decided and determined in this proceeding."

25. The Vijaya Bank is not a party either to I.A. No. 1 filed in the execution or to the Miscellaneous case filed by the Syndicate Bank. Therefore the right, title and interest of the Vijaya Bank as against the Syndicate Bank, cannot be decided in these proceedings at all. Therefore the trial Court rightly left the question of rights title and interest of the auction-purchaser Bank open and to be decided by separate proceedings. As already stated above and as laid down by the decisions above referred to, the first purchaser in point of time is entitled to retain possession as against the subsequent purchaser. Therefore the trial Court rightly dismissed the Miscellaneous Case filed under Order 21 Rule 95 C.P.C. and I.A. No. 1 filed by the puisne mortgagee Syndicate Bank under Order 21 Rule 97 C.P.C.

26. Thus, under the above circumstances, the order passed by the Court below needs no interference, and the revision is dismissed.

