

(1938) 11 MAD CK 0052
In the Madras High Court

Varadarajam Pillai by guardian Malayaperumal Pillai	APPELLANT
Vs	
Krishnamurthi Pillai	RESPONDENT

Date of Decision : 04-11-1938

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 14

Citation : AIR 1939 Mad 436 : (1939) 49 LW 411 : (1939) 1 MLJ 680

Hon'ble Judges : King, J

Bench : Division Bench

Judgement

King, J.—The appellant here is the successor in interest of the mortgagor who on 1st September, 1926, executed a mortgage deed in favour of the plaintiff's father for Rs. 10,000. In 1932, the mortgagor executed a promissory note to the plaintiff himself for the interest then due upon the mortgage bond. Later in 1932, the plaintiff filed a suit and obtained a decree for the claim upon the promissory note and in 1934, he brought an application in execution asking the Court to attach 16 items of property of which all but the first two were the subject-matter of the mortgage. This claim was resisted by the appellant on the ground that Order 34, Rule 14 applied. Both the Courts below have held that Order 34, Rule 14 does not apply to the facts of this case and this is the point for determination in this second appeal.

2. The rule in question runs as follows:

Where a mortgagee has obtained a decree for payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage...

3. Of course if the rule be read literally, it will be seen at once that the appellant can have no case. The mortgagee in this case is one person and the decree-holder is another and it is obviously only if the mortgagee and the decree-holder can be identified as the same person or the same legal entity that Order 34, Rule

14 can come into play. It has been strenuously argued that both the mortgagee and the decree-holder are in essence the joint family consisting of the father and the son, and that therefore the mortgagee and the decree-holder are identical, and then it is argued that the son can be described as the mortgagee as he has some interest in the mortgage or that the father can be described as the decree-holder because it is found as a fact that the promissory note was really taken benami for him. It seems to me impossible to accept any of these propositions. So far as the identity of the decree-holder is concerned, it is clearly impossible in the existing state of the law for the judgment-debtor to say that any one other than the person named in the decree is the decree-holder. The decree-holder therefore can only be the son. It seems to me equally impossible to say that the son is the mortgagee even though it may be that as a member of the joint family he has some rights in the mortgage. It is no doubt a plausible proposition to regard both the mortgagee and the decree-holder as really the joint family. But I have been shown no authority for the employment of such a legal fiction. For it is quite clear that the mortgagee as described in the mortgage is a single person and the decree-holder in the decree is also a single person. No doubt it has been held in connection with proceedings u/s 73 that a decree against the father to which the sons are not nominally parties is a decree against the sons and therefore that when two decrees are in question, one of which is definitely directed against the sons and one only against the father as manager of the joint family they can be held to be against the same judgment-debtor. On the other hand it seems to me that when we are dealing with contracts, the authority of the Privy Council in *Pichappa Chettiar v. Chockalingam Pillai* (1934) 67 M.L.J. 366 (P.C.), is of more value for deciding whether the joint family as a unit can be considered a party to such contracts or not. Their Lordships of the Privy Council quoted with approval the passage from Mayne's Hindu Law in which it is stated that where the managing member of the joint family enters into a partnership with a stranger, the family as a unit does not become a partner. No doubt there may be some special circumstances depending on the law of partnership, but it seems to me a very reasonable extension of this dictum to say that where a mortgage is entered into by the manager of the joint Hindu family, the son does not thereby become the mortgagee and similarly where the son obtains a decree, his father does not thereby become the decree-holder; nor can the family as a unit be said, in my opinion, to have entered into either transaction. The learned Counsel for the appellant here, though his argument seems to be plausible in the sense that if a decision be given against him, the main purpose of Order 34, Rule 14 may on the facts of this case have been frustrated, has not been able to adduce any authority in support of his view and in my opinion it requires too many assumptions and a resort to too violent a legal fiction to accept it. I see no sufficient reason for differing from the finding of the learned judges in the Courts below and must dismiss the appeal with costs.

4. It seems to me however reasonable to make one concession on behalf of the appellant here and that is with regard to the order in which the items are to be

sold. Items 1 and 2 must be sold first and only if the amount fetched by those items is insufficient to pay off the decree debt will it be permitted to sell the remaining items. This concession does not prevent the sale of all the items being proclaimed for and if necessary carried out on the same day.

5. Leave to appeal is granted.