

(1945) 04 MAD CK 0002
In the Madras High Court

Venkatachala Pillai

APPELLANT

Vs

M.R. Rajagopal Naidu and Another

RESPONDENT

Date of Decision : 20-04-1945

Acts Referred:

Citation : AIR 1946 Mad 51 : (1945) 58 LW 532 : (1945) 2 MLJ 388

Hon'ble Judges : Bell, J

Bench : Division Bench

Judgement

Bell, J.—This revision petition is against a decision in an execution application before the District Munsif of Poonamallee. The matter arose

out of a maintenance suit which resulted in a decree dated 19th March 1936. This was modified on 6th July 1938 on appeal. Later, the decree

holder assigned it to respondent 1, in the lower Court. He brought the properties to sale in execution and a sale took place on 1st September

1943. Respondent 2 in the lower Court - the petitioner here - bought some of the property in question. On 30th March 1938, some of the same

properties had been mortgaged to the petitioner in the lower Court, respondent 1 here. In the lower Court, the mortgagee finding that the decree

had been executed and property brought to sale by the assignee-decree-holder had been purchased by a stranger, filed an execution application,

the execution application with which we are concerned and succeeded in setting aside the sale on the ground of certain irregularities. The assignee-

decree-holder offered no objection because he no doubt knew that the mortgagee-petitioner was prepared to pay the amount of the maintenance

instalments due under the decree and for which it had been brought to execution. After various complications, the order setting aside the sale was

reversed and the mortgagee thereupon filed O.P. No. 15 of 1944 claiming that he was entitled to redeem and pay off the charge decree so long as

the sale had not been confirmed. In this contention he was upheld by the District Munsif and the auction-purchaser comes in revision to this Court.

2. Two points were raised based on certain authorities. The first was that u/s 100, T.P. Act, a charge must be brought into existence either by act

of parties or by operation of law and inasmuch as the charge here was brought into being by a decree, different considerations apply. The

petitioner relied on AIR 1940 163 (Nagpur) where a Bench of two Judges held that ""by operation of law"" was not the same thing as saying ""by

decree."" In Abdul Ghaffar v. Ishtiaq Ali AIR 43 1943 Oudh. 354 a Full Bench took a contrary view. A Bombay Court in Rustamalli v.

Aftabhusein Khan AIR 31 1943 Bom. 414 approved the Oudh decision in Abdul Ghaffar v. Ishtiaq Ali AIR 43 1943 Oudh. 354. With the

greatest respect, I prefer the Oudh point of view to that of Nagpur in AIR 1940 163 (Nagpur) and I think the words ""by operation of law"" do

include a charge brought into being by a decree of a competent Court.

3. The second point was that inasmuch as the mortgage was executed after a decree had been passed, the mortgagee by reason of the doctrine of

lis pendens had lost any right to redeem any prior encumbrance. The petitioner relied on two cases, AIR 1944 96 (Privy Council) a decision of the

Privy Council, where the facts in my opinion are quite different and afford no guidance, and Ramasami Pillai v. Trichinopoly Co-operative Credit

Bank, Ltd. AIR 22 1935 Mad. 867. The latter case deals with facts which are more like those of the present case, but with, the important

difference that in that case the sale had been confirmed and whole of the transaction relating to the execution of the decree was finished. The Court

there held that in such circumstances a subsequent mortgagee seeking to redeem had lost any possible right to interfere. In the present case, the

mortgagee does not dispute the fact that he took the mortgage subject to the charge. His offer to pay off the prior encumbrance means that he will

pro tanto pay off the decree-holder whose rights are those which are protected u/s 52, T.P. Act. The only person that can possibly be aggrieved is

the auction-purchaser, but his sale has not been confirmed and all that he can claim is that he be compensated for the trouble, time and money that

he has wasted in attending to what has proved to be from his point of view an abortive auction. In the result I think that the decision of the lower Court is right and this petition should be dismissed with costs.