

(1975) 02 MAD CK 0033

In the Madras High Court

Case No : Appeal No. 477 of 1969 and C.R.P. No. 2479 of 1967

V.P. Padmavathi Ammal and Others

APPELLANT

Vs

P.S. Swaminatha Iyer and Others

RESPONDENT

Date of Decision : 11-02-1975

Acts Referred:

Transfer of Property Act, 1882 — Section 69(1), 69(3)

Citation : AIR 1975 Mad 343 : (1975) 88 LW 371 : (1975) 2 MLJ 27

Hon'ble Judges : N.S. Ramaswami, J

Bench : Single Bench

Final Decision : Allowed

Judgement

N.S. Ramaswami, J.—The legal representatives of a mortgagor whose property had been sold u/s 69 of the Transfer of Property Act are the appellants in the appeal and the petitioners in the revision petition. The plaintiff who is the auction purchaser of the property filed the suit for possession. It was resisted by the legal representatives of the mortgagor who have been impleaded as defendants 1 to 8 in the suit, on the ground that the plaintiff is only a nominee of the mortgagee and that therefore the private sale u/s 69 of the Transfer of Property Act is wholly invalid. An issue was framed touching the above question. However, at the time of the trial, when the defendants wanted to cross-examine the plaintiff while he was in the witness-box, regarding the question whether he was only a nominee of the mortgagee, the court below held that by virtue of Sub-section (3) of Section 69, it was not open to the defendants to attack the sale in the manner in which they tried to do, and disallowed the cross-examination which was sought to be made. The learned Judge passed an order holding that the defendants cannot be permitted to put any question to the plaintiff and his witnesses regarding the question whether the plaintiff was only a nominee of the mortgagee. Against the abovesaid order, the revision petition is filed. As the defendants had been prevented from cross-examining the plaintiff, they did not take further part in the trial of the suit and the suit was decreed. Against the

decree, the appeal has been filed.

2. I am satisfied that the order of the court below disallowing questions in cross-examination regarding the plea taken by the defendants is wholly wrong. Sub-section (3) of Section 69 which has been relied on by the court below is in the following terms--

"When a sale has been made in professed exercise of such power, the title of the purchaser shall not be impeachable on the ground that no case has arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or improper or irregular exercise of the power, shall have his remedy in damages against the person exercising the power."

It is contended on behalf of the plaintiff-respondent that the plea taken by the defendants amounts to saying that there had been improper or irregular exercise of the power conferred on the mortgagee u/s 69 and that therefore the provisions contained in Sub-section (3) quoted above would apply. The contention is that as the defendants attack the plaintiff's title only on the ground that the exercise of the power conferred on the mortgagee had been improper and irregular, their remedy is only by way of damages as contemplated under Sub-section (3) and that the title itself cannot be questioned. This contention is not correct because the defendants are not attacking the sale in favour of the plaintiff on any of the three grounds mentioned in Sub-section (3). On the contrary, they attack the sale as wholly invalid on the ground that the plaintiff is only an alias for the mortgagee. It cannot be disputed and as a matter of fact it is not disputed that if the mortgagee himself purchases the property u/s 69 of the Transfer of Property Act, such a sale would be wholly void as a person cannot sell the property to himself. It is to be noted that u/s 69, the mortgagee is given the power of sale and therefore he is the seller. He cannot possibly sell the property to himself. If any such sale is purported to be made it would be wholly void. It has been held so by this Court in *The Egmore Benefit Society Vs. K. Aburupammal and Others*, . Therefore, if the sale u/s 69 is in favour of the mortgagee himself, it cannot be contended that the mortgagor cannot attack the title of the purchaser. Sub-section (3) of Section 69 would not be a bar against the mortgagor questioning the title in such a sale. But what is contended on behalf of the plaintiff is that in the present case, the mortgagee himself has not purchased the property and that the plea of the defendants is only that the plaintiff is a nominee of the mortgagee. In the present appeal and the revision petition, I am not concerned with the question whether the plaintiff is really a nominee of the mortgagee or not. That is a matter which has still to be investigated. It is quite possible that the defence taken by the defendants that the plaintiff is only a nominee of the mortgagee is not factually sustainable, but as I said, that is not a matter to be considered in the present appeal and the revision petition. The question is whether the court below is right in shutting out cross-examination by the defendants on the above question. I am quite clear

that the defence taken by the defendants is not one covered by Sub-section (3) of Section 69. It cannot be legitimately contended that that plea amounts to saying that the exercise of power by the mortgagee had been done improperly or irregularly. If really the plaintiff is a nominee of the mortgagee, he does not stand on any different footing than the mortgagee himself. Regarding the present question it does not matter whether the sale is in the name of the mortgagee himself or in the name of his nominee. If the mortgagee cannot effect a valid sale in his favour, by merely putting up his nominee, the position would not be different. Therefore, if really the plaintiff is a nominee of the mortgagee, the sale would be ab initio void. It is not a mere improper or irregular exercise of the power of sale as sought to be made out by the plaintiff. The decision reported in Nithoor Thimmanna Bhat Vs. Aithappa Adyanthaya, , relied on by the court below does not cover the present question.

3. The result is the appeal and the revision petition are allowed. The decree and judgment are set aside and the suit is remitted to the trial Court for fresh disposal, according to law and in the light of the observations above. The Court-fee paid on the appeal memorandum shall be refunded to the appellants. No costs in the appeal as well as the revision petition. The suit being very old, it should be disposed of by the trial Court within two months from this date.