

(1990) 04 MAD CK 0015
In the Madras High Court

Yesodaiammal (died) and Others

APPELLANT

Vs

Mahalakshmi Ammal and Another

RESPONDENT

Date of Decision : 04-04-1990

Acts Referred:

Transfer of Property Act, 1882 — Section 56

Citation : (1991) 1 LW 726 : (1990) 2 MLJ 347

Hon'ble Judges : K.M. Natarajan, J

Bench : Division Bench

Judgement

K.M. Natarajan, J.—This appeal is filed by the 2nd defendant in the suit challenging the judgment and decree passed by the learned

Principal Subordinate Judge, Coimbatore in S.No. 179 of 1979.

2. The facts which are necessary for the disposal of this appeal can be briefly stated as follows: The 1st respondent in this appeal, who is the

plaintiff in the suit, has filed the suit for recovery of a sum of Rs.15,653.75 on the basis of a mortgage deed dated 3-2-1965 executed by one

Sankarappa Thevar and his son the 1st defendant herein, for a sum of Rs. 17,000 agreeing to pay interest at 12 per cent per annum. Subsequently,

Sankarappa Thevar died and his son the 1st defendant alone is his legal representative. Since the 1st defendant has paid only a portion of the amount, the suit has been filed for the balance.

3. The suit is resisted by the 1st defendant on the ground that he is entitled to the benefit of Section 2 of Act 40 of 1979. The 1st defendant has

also pleaded some oral discharge. The 2nd defendant, who is the appellant herein contended that she is a prior mortgagee of item 2 of the suit

property and the 1st defendant had become subscriber of a chit for Rs. 11,000

conducted by her and on 21-1-1964 the 1st defendant created a mortgage by deposit of title deed and received the chit amount. It was agreed that the said equitable mortgage was to ensure for subsequent borrowings by the 1st defendant In pursuance of this agreement, 1st defendant borrowed another sum of Rs.3,500. Since the 1st defendant failed to pay the chit amount and the subsequent loan, a suit was filed in O.S No.64 of 1972 and a decree was obtained. Subsequently, in execution of the decree, item 2 of the property, which was hypothecated, was brought to sale and that the 2nd defendant became the successful bidder in the Court auction. It is stated that the 2nd defendant was not aware of the existence of the mortgage in favour of the plaintiff herein at the time when she filed O.S. No.64 of 1972 and as such she could not give opportunity to the plaintiff to redeem her mortgage. Therefore she prayed that a suitable decree may be passed directing the plaintiff herein to pay the sum due to her in the event of the 2nd item of the hypotheca is desired to be brought to sale.

4. The learned trial judge framed as many as 4 issues and the relevant issue for decision in this appeal is issue No.3, viz., ""Whether the 2nd defendant is entitled to have item 2 of the hypotheca sold as the last item""?

5. The trial court found all the four issues in favour of the plaintiff and decreed the suit as prayed for. Aggrieved by the same, the 2nd defendant has preferred this appeal.

6. The learned Counsel for the appellant - 2nd defendant Mr. N. Varadarajan submitted that the reasoning given by the lower court for rejecting

the plea of equity raised by the 2nd defendant is not sustainable. The learned Counsel further submitted that though the encumbrance certificate

produced and exhibited by the 2nd defendant is one that was obtained after the institution of the suit, the appellant had another Encumbrance

Certificate in connection with the execution proceedings in O.S. No.64 of 1972. But, there is no mention in the earlier E.C. also about this

mortgage in favour of the plaintiff in this--suit Even otherwise, the learned Counsel submitted that though u/s 56 of the Transfer of Property Act the

2nd defendant being, a Court-auction purchaser, is not entitled to the benefits, yet the Court has got ample discretion in equity to grant the request

of the appellant. In this connection, the learned Counsel brought to our notice

two decisions of this Court reported in Sarangapani Pillai v.

Kumbakonam Bank Ltd. 78 L.W. 35 and Jaganathan v. Amrutham and Ors. 1980 T.L.N.J. 402 78 L.W. 35 referred to above, Venkatadri, J.

held that the principle of marshalling as provided in B-56 of the Transfer of Property Act can be applied to a bona fide purchaser for value without

notice of a prior mortgage. It is the constant equity of the court that if a creditor has two funds he shall take his satisfaction out of that fund upon

which another creditor has no lien. Marshalling implies the existence of two sets of properties one of which is subject to both the mortgages and the

other is subject only to the earlier mortgage. In the above quoted case also; there was court auction sale and the auction purchaser pleaded equity

and the learned judge relied on an earlier decision of the Patna High Court in Lachhminarayan Vs. Janmajai Mahton, wherein it was held as follows:

Upon a proper interpretation of the Section, it is manifest that it covers only the case of voluntary sale and that it cannot apply to a person who

purchases the mortgaged properties in execution of a money decree. But the provisions of the Sections are not exhaustive.... The real position is

that in a case of this description, there are two conflicting principles, the first being the principle that the mortgagee is entitled to have his dues

satisfied out of the mortgaged properties in any manner he chooses, and the other principle being that the purchaser for value without notice of the

mortgaged property ought not to suffer any detriment due to any mistake or lack of bona fides on the part of the mortgagor. It is a question of

adjustment of equities upon the particular facts of each case. It was conceded by Mr. P.R. Das that the appellant would be entitled to marshalling

of securities only if he makes out a case that he was a bona fide purchaser for value of the property without notice of the prior mortgage.

If this ratio is applied to the facts of the present case, in equity this Court has got ample power to order sale of the properties purchased by the 2nd

defendant appellant if the other properties were not sufficient to satisfy the decree.

7. The above view has also been affirmed by the later decision, viz. Jaganatha v. Ananthan 1980 T.L.N.J. 402 referred to above, wherein the

learned judge laid down the principle as follows:

If there are no equities in favour of such a party the decree-holder is, of course,

entitled to sell the properties in any order he chooses, of course, subject to directions of Court. If an auction purchaser at a court sale makes out a case that he was a bona fide purchaser for value of the property without notice of the prior mortgage or charge, the Court may, in its discretion, apply the principle of marshalling on a consideration of the particular equity involved. This has been recognised by the Division Bench of the Patna High Court in *Lachhminarayan Vs. Janmaijai Mahton*, .

Later another Bench of the same High Court, in *Mt. Rajo Kuer Vs. Brij Bihari Prasad and Others*, , after referring to the aforesaid earlier Bench judgment, also took the same view. *S.K. Jha, J.*, of the same High Court in *Most. Lagan Barta Devi Vs. Suba Rai and Others*, has taken the view that where no order of sale of the mortgaged properties has been prescribed by the mortgage decree, the executing Court, has, in certain exceptional circumstances where equity demands it, a discretion to regulate the order in which the mortgaged properties ought to be sold and the power of the executing Court in this regard is very limited and is intended only for the purpose of adjusting equities between the parties in exceptional cases. *Venkatadri, J. in Sambandam Pillai v. Ramaswami Naidu ILR (1965) 1 Mad. 154* held that there is a discretion vested in the Court in fixing the order in which the property should be put up for sale, and this discretion is to be exercised in a reasonable and just manner consistent with the equities of the case.

8. The learned Counsel also drew our attention to Order 34, Rule 4, C.P.C. wherein it is provided that while passing a preliminary decree, there is to be a provision to the effect that the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and submitted that the entire property need not be put for sale and only such sufficient part thereof so as to satisfy the decree can be directed to be sold.

9. We find in the instant case that it is not in dispute that the 2nd defendant who got an equitable mortgage in her favour subsequently filed O.S.No.64 of 1962. Further, it is stated that the encumbrance certificate obtained by the 2nd defendant did not reveal the existence of the suit mortgage and, therefore, the plaintiff could not be impleaded in that suit. Further, she is a bona fide purchaser for value without notice of the

encumbrance in favour of the plaintiff in this suit. As against this evidence of the 2nd defendant-appellant, there is no contra evidence on the side of

the plaintiff to show that there was any collusion between the 2nd defendant and the 1st defendant in this suit and we find that in view of the ratio

laid down in 78 L.W. 35 referred to above and in view of the provisions under Order 34, Rule 4, C.P.C., the Court has ample discretion to pass

necessary direction regarding the order in which the property should be put up for sale on the question of equity, though not u/s 56 of the Transfer

of Property Act. Nothing has been pointed out by the learned Counsel for the plaintiff as to why this Court should not exercise the equity in favour

of the 2nd defendant-appellant. In the circumstances, we feel that the plaintiff-1st respondent in the suit can be directed to bring items 1 and 3 to 5

for sale in the first instance as one 1 pt and if they are not sufficient to satisfy the decree, then the plaintiff is entitled to bring the second item for sale

subsequently.

10. In the result, the appeal is partly allowed and the decree passed by the court below is modified directing the plaintiff-1st respondent to bring

items 1 and 3 to 5 for sale in the first instance. If they are not sufficient to satisfy the decree, then the plaintiff-1st respondent is entitled to bring the

second item for sale subsequently. There is no order as to costs.