

S. Krishnamachariar Vs. the Hanuman Bank Ltd. (In Liquidation) and ors.

S. Krishnamachariar Vs. the Hanuman Bank Ltd. (In Liquidation) and ors.

SooperKanoon Citation : sooperkanoon.com/784077

Court : Chennai

Decided On : Jan-01-1963

Reported in : AIR1963Mad308; [1963]33CompCas543(Mad)

Judge : Ganapatia Pillai and ;Kunhamed Kutti, JJ.

Acts : [Companies Act, 1913](#) - Sections 171 and 232; [Companies Act, 1956](#) - Sections 446 and 537

Appeal No. : A.A.O. No. 81 of 1960

Appellant : S. Krishnamachariar

Respondent : The Hanuman Bank Ltd. (In Liquidation) and ors.

Advocate for Def. : V. Srinivasan and ;T.S. Ramaswami, Advs.

Advocate for Pet/Ap. : V.V. Raghavan, Adv.

Disposition : Appeal allowed

Judgement :

Ganapatia Pillai, J.

1. This is an appeal against an order of the District Judge of West Tanjore in execution proceedings. The application on which the order was passed Was made by the 16th defendant for declaring a sale of certain lots of properties in execution of a mortgage decree to be void on the ground that sanction of the company court was not obtained in accordance with Section 171 read with Section 232 of the Indian Companies Act. Learned Judge in the court below passed an order declaring the sale to be void and the appeal is preferred against that order by the decree-holder-auction purchaser.

2. The facts leading up to this dispute are these. The decree-holder obtained mortgage decree on a mortgage executed by defendants 1 to 4 and the husband of defendants 14 and 15 in 1934 for a sum of Rs. 7600. After this mortgage, defendants 1 to 4 sold the equity of redemption to defendants 5 and 6 (half and half) with direct tions to redeem the mortgage. Defendants 7 to 11 in the suit were alienees of the half share of the equity of redemption sold to the sixth defendant. The fifth defendant created an equitable mortgage in favour of the Hanuman Bank in 1946 over the half share sold to him by defendants 1 to 4. In 1947 the Hanuman Bank went into liquidation. The suit on the mortgage was laid on 1st March 1950 and the Hanuman Bank got itself impleaded as the 16th defendant in that suit by reason of the equitable mortgage in its favour. Among the many contentions raised by the Hanuman Bank, there was a prayer that the properties over which the Hanuman Bank had an equitable mortgage should be sold last. A decree was passed for Rs. 19,546-14-2 on 11th July 1952. By this decree the order in which the properties were to be sold was also settled. Time for redemption was granted for payment of the mortgage amount. Money not being paid on 17th April 1953, a final decree was passed and a sale in execution of the final decree took place on 13th April 1959 and lots 2 to

17 were purchased by the decree-holder himself for a sum of Rs. 3694. As these properties were the properties in which the Hanuman Bank had interest by reason of the equitable mortgage, an application was filed by the 16th defendant to declare the sale void on the ground that leave of the liquidation court had not been obtained for proceeding against the properties over which the bank had 'security.

3. Section 171 of the Indian Companies Act (Section 446 of the new Companies Act) enjoins the obtaining of the leave of the company court in charge of liquidation of the company before any suit or other proceeding is instituted against the company after the order for winding up had been made. Section 232 of the Indian Companies Act (Section 537 of the new Companies Act) declares any attachment or execution put in force without leave of the court after the company has been ordered to be wound up against the estate or effects of the company shall be void. There can be no dispute on the authorities that an execution proceeding for executing a mortgage decree over property in which the Hanuman Bank Ltd., the company in liquidation, had a puisne mortgage, would be a proceeding against the company within the meaning of Section 171. The further question whether such an execution proceeding was one instituted against the estate or the effects, of the company is the only point capable of being argued. There is a direct decision of a single Judge of this Court on this point in *Calicut Bank Ltd. v. Narayanan Nambudiri* : AIR1944Mad84 . There, Kuppaswami Iyer J. following *Periasami Chettiar v. Ramaswami Goundan*, ILR (1941) Mad 53 : AIR 1941 Mad 113, held that in such a case the company was also a debtor of the first mortgagee as the company was liable to pay the first mortgage debt and consequently an execution of that kind would be an execution levied against the estate of the company.

4. The term used in Section 232 'estate or effects of the company' appears to us to be a very wide term. An estate in law means any interest in immoveable property. Effects mean moveable property. Can a puisne mortgagee be said to have an estate in the hypotheca which is being sold at the instance of the first mortgagee? That will depend upon what was being brought to sale. When the first mortgagee brings to sale the hypotheca, he not only puts to sale the mortgage interest which he has, but also the equity of redemption owned by the mortgagor. It is only when both these interests are brought to sale that the purchaser obtains the full title in the property. Consequently if the sale at the instance of the first mortgagee of the hypotheca involves the sale of the equity of redemption what is the effect of this sale upon the estate of the puisne mortgagee? The puisne mortgagee has a mortgage interest in the equity of redemption for payment of the amount due to him. This mortgage interest is certainly interest in immoveable property. By the sale of the equity of redemption this interest of the puisne mortgagee is extinguished. Could it be said in such circumstances that by the sale of equity of redemption at the instance of the first mortgagee the estate of the puisne mortgagee is being proceeded against? Though it might appear somewhat far-fetched, the sale of the equity of redemption can be regarded as a sale of the estate of the puisne mortgagee also. The decisions relied upon by Kuppaswami Aiyar J. for holding that a puisne mortgagee was also a debtor of the first mortgagee were all decisions which arose on the interpretation of the term 'debt' under the Madras Act IV of 1938.

Strictly speaking, those decisions may not apply here because it is not every debt for which a company is liable, which is a debt due by the company. By reason of having obtained the puisne mortgage over the property, the company becomes liable to pay the first mortgage debt. But that is not the test to be applied in finding out whether the execution in this case was against the estate of the company. As already pointed out by us, the puisne mortgagee has an interest in the equity of redemption which is immoveable property and consequently his interest can well be described by the generic term estate. If so, the execution levied by the first mortgagee for bringing the hypotheca to sale for realising his mortgage debt will impliedly mean bringing to sale the estate of the Hanuman Bank Ltd. which had a puisne mortgage over the property. We are therefore in respectful agreement with the decision of Kuppaswami Aiyar, J. in : AIR1944Mad84 .

5. However, there is another point which we have to consider before we could confirm the order of the lower Court. It is common ground that on more than one occasion the sale was adjourned by the executing Court at the instance of the Official liquidators of the Hanuman Bank Ltd., to enable them to deposit the money

necessary to satisfy the decree in favour of the first mortgagee, the appellant herein. The Official Liquidators had thus notice of the sale and had taken part in the proceeding and obtained adjournment of the sale for enabling them to save the estate of the company in liquidation. The question is whether this conduct would amount to waiver of leave of Court enjoined by Section 171. The lower Court has dealt with this question on the ground that of estoppel. But it does not really fall under that category of legal defences. If a party is enabled to waive a pre-requisite to the validity of a proceeding, just as a statutory notice, there is no question of estoppel against that party. The protection given by the statutory requirement may be waived by the party unless some principle like public policy is involved. It is established that at least in English law, no decision of Indian Courts having been brought to our notice, that the requirement as to leave of Court mentioned in Section 171 could for certain purpose be waived by the Official Liquidator of the company,

In *Hill v. B. and K. Theatre Ltd.*, (1914) SC 913, it was held that a company or its liquidator could waive a plea founded on Section 171, and in such circumstances, it was not part of the duty of the Court to put the section into operation. True, such waiver cannot operate to require an official liquidator to admit a claim under a decree rendered inoperative by the bar of non-obtaining of leave. That was laid down by *In the matter of Allahabad Union Bank Ltd* : AIR1928All165 . That is not the position here. The suit itself was commenced with the leave of the winding up Court and therefore the decree is binding on the company. It is only the execution proceeding that is hit by the want of leave under Section 171. The effect of waiver of the requirement as to leave in this case would not compel the liquidator to admit a claim rendered ineffective or inoperative by reason of the bar imposed by Section 171. But, we must also consider the effect of Section 232 in this connection. Section 232 really should be read jointly with Section 171. It merely lays down the effect upon any sale held without the leave of the Court of any of the properties of the company after the commencement of the winding up proceeding. No doubt it says that such sale shall be void. It means that if there was no leave of Court obtained for the proceeding in which the sale resulted, and no waiver by the liquidator or by the company of the requirement as to leave the resulting sale or attachment shall be void. But it could not govern the operation of a case where either leave was obtained or the want of leave was validly waived by the liquidator of the company. In this view, the provisions of Section 232 would not apply to this case.

6. We are of opinion, differing from the learned Judge in the lower Court, that there was effective waiver in this case of want of leave. The conduct of the Official Liquidator in obtaining adjournment of the sale on more than one occasion for the specific purpose of paying up the decree debt due to the first mortgagee amounted to waiver. Therefore, even though no leave of the liquidation Court was obtained for the institution of the execution proceeding in this case, that bar having been validly waived by the Official Liquidator, the execution sale could not be affected either by the provisions of Section 171 or by the provisions of Section 232 of the old Companies Act.

7. In the result, the appeal is allowed, and the order of the lower Court is set aside. The costs of the appellant here should be paid by the Official Liquidators of the Hanuman Bank Ltd. from out of the funds of the bank