

Subbayyan and anr. Vs. Rappa Nagasami Ayyan and ors.

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SooperKanoon Citation : sooperkanoon.com/787524

Court : Chennai

Decided On : Oct-03-1882

Reported in : (1883)ILR6Mad155

Judge : Innes and ;Kindersley, JJ.

Appellant : Subbayyan and anr.

Respondent : Rappa Nagasami Ayyan and ors.

Judgement :

Innes, J.

1. The third defendant, a creditor of first and second defendants, who were respectively the father and brother of the plaintiff's, sued first and second defendants and obtained a decree against them. In execution of the decree he attached the family property, and plaintiffs came forward and objected that they were not parties to the suit and applied for the release of their shares, from attachment. The order passed by the Court executing the decree practically allowed their claim for it confined the sale to be held to the right, title, and interest 1 of the first and second defendants. Third defendant became, the purchaser.

2. He managed to get into possession of the whole notwithstanding the order ! passed, and plaintiffs then brought this suit to recover their shares of the property.

3. The Munsif gave a decree for plaintiffs. The Subordinate Judge thought the decree and execution bound the plaintiffs, as the debt of the father ' was incurred in trade for the family, and dismissed their suit.

4. The case thus comes in appeal before us, and it appears to us that upon the points in question in the Courts below the decision of the Munsif was correct. On the objection of the plaintiffs there was an inquiry and a judicial decision was given to the effect that their interests were not to be affected in execution and that the sale was to be limited in the way already stated. The defendants interested, if they had thought proper to do so, might have appealed against this decision, but they allowed it to become final, and it is not now open to question that the interests of first and second defendants alone passed by the decree and sale.

5. The third defendant, therefore, could properly under the execution take only the right, title, and interest of the first and second defendants and no more.

6. If nothing further appeared, we might at once reverse the judgment of the Subordinate Judge, but it is brought to our notice that the third defendant has paid off mortgages and is in possession of the property not only under the execution but as having taken the place of the mortgagees, and it is suggested that it would be inequitable to allow plaintiffs to recover any portion of the property without paying their proportion of the mortgage amounts so paid.

7. We agree in this view, and, before disposing of the appeal, shall direct an Inquiry by the Subordinate Judge whether third defendant has obtained possession of any and which of the properties in the way stated, and what is the amount of the proportion of the debt due by plaintiffs.

8. The Subordinate Judge is directed to try the foregoing issues upon the evidence already recorded and upon such further evidence as the parties may adduce and to return his finding thereon, together with the evidence to this Court, within four weeks from the date of receiving this order when ten days. civil be allowed for filing objections.

9. In compliance with this order the Subordinate Judge returned a finding to the effect that the third defendant had redeemed items 4-9 in the plaint on payment of Rs. 200.

10. When the case came on for disposal

11. Mr. Wedderburn for the first respondent (third defendant) objected that the judgment of the Court was not in accordance with the law laid down by the Full Bench in Ponnappa Pillai v. Pappuvayyengar I.L.R. 4 Mad. 1 approved of by the Privy Council in Muttayan v. Zamindar of Sivagiri I.L.R. 6 Mad. 1 : S.C.L.E. 9 I.A. 128 and contended that the right, title, and interest of the father (first defendant) which was sold and purchased by the third defendant must be held to pass the whole estate inasmuch as the father had the right to alienate the whole estate in order to pay the debt for which the third defendant had obtained his decree.

12. Balaji Rau for the appellants took exception to the Court's power to reconsider this point which had been determined by the judgment already delivered, but this objection was overruled and the case adjourned for further argument at his request.

13. The appeal came on for hearing on 4th September 1882 when Mr. Shephard and Balaji Rau appeared for the appellants and Mr. Powell for the first respondent.

Innes, J.

14. The case has been re-argued upon the question whether our Judgment of the 27th March 1882 in this case conforms to the view of the majority of the Court in Ponnappa Pillai v. Pappuvayyengar I.L.R. 4 Mad. 1. It was contended by Mr. Powell that in the present case, although the sale was expressed to be limited to the right, title, and interest of the father, first defendant, and of second defendant, yet that, as the father had a disposing power, in the case of a debt due by him not immorally incurred, extending over the interest which his sons might have in the joint family estate, and as the sons are bound to pay the father's debts which were not immorally incurred, the right, title, and interest of the father so sold embraced that of the son. Mr. Shephard contended that the present case was not on all fours

with that of *Girdharee Lall v. Kantoo Lall* 14 B.L.R. 187 : 1 I.A. 321 and that plaintiffs' interests did not pass by the sale.

15. We are of course bound to follow the rules of the Privy Council laid down in the cases of *Girdharee, Lall v. Kantoo Lall* and in *Suraj Bansi Koer v. Sheo Per sad Singh* L. R. 6 I. A. 88 and kindred cases; but we do not consider that those cases ought to induce us to alter our judgment in this case.

16. The decree, a mere money-decree, was against first and second defendants alone, and on attachment of the family estate in execution, plaintiffs preferred a claim which was allowed and the order directed that the sale should be confined to the right, title, and interest of the first and second defendants, the judgment-debtors. Third defendant purchased with due notice that the sale was so limited, and all he bought was a right of action for a partition in which he could have demanded to have ascertained and apportioned off to him the shares of the first and second defendants. He did not do so, but making use of the machinery of the Court got into possession of the whole estate under an irregular process of execution. All that the money-decree could give to the decree-holder was a right of execution against first and second defendants, and the sale, expressly limited as it was, could pass no more than the interests of first and second defendants. This is purely a question of procedure law, and the question of the liability of plaintiffs for the debt of the father does not properly arise under it. We do not see ground therefore for altering our former judgment. Upon the finding now returned by the Subordinate Judge, we shall reverse the decree of the late Subordinate Judge, and, in modification of that of the District Munsif, direct that, on plaintiff's paying Rs. 100 to third defendant, that defendant do make over one-half of the property in dispute to the plaintiffs. In other respects, the decree of the District Munsif is confirmed.

17. The plaintiff's will have the costs of this appeal and their costs incurred in the Lower Appellate Court.