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Court : Chennai

Decided On : Sep-17-1923

Reported in : 83Ind.Cas.918; (1924)46MLJ32

Appellant : Raghavachariar and ors.

Respondent : Duvvuru Krishna Reddi and ors.

Judgement :

Walter Salis Schwabe, K.C., C.J.

1. This is an appeal from the order of the Subordinate Judge, Chittoor, confirming the order of the District Munsif on an application in execution of a mortgage decree. The position shortly was this; that the applicant, the present appellant, had at some time purchased from the mortgagor, without notice to the mortgagee, properties items 1 to 3 and had remained quietly in possession for some 20 years. The mortgage covered other items of property of considerable value which were after the date of the mortgage and after the date of the sale to the appellant mortgaged usufructually such usufructuary mortgagees taking with notice of the existing mortgage. The appellant applied that, in executing the mortgage decree, the other properties should be sold first, and that the properties which he had bought should be brought to sale actually only if there was a deficit on the sale of the other properties. This application was refused and it was refused solely upon the ground that a similar application had been refused in the mortgage suit itself. Now it appears that in the mortgage suit the present appellant-was made a party

and he did contend that he was entitled to have the properties marshalled in such a way that the mortgage amount might be realised, by the sale first of the properties, other than those which he was entitled to, subject to the mortgage. That contention of his was dealt with by the Munsif who heard the case in paragraph 22 of his judgment to which our attention has been called, and he holds, as I understand his judgment, first of all that by the decision of the Full Bench of this Court in Appayya v. Ramayya MLJ 229 (FB) he was precluded from going into the matter at all, and secondly he holds by reason of that decision that the plaintiff, that is the mortgagee, would be prejudiced if he were to receive any such application. I think Appayya v. Ramayya MLJ 229 (FB) is an authority for the first proposition that it was not the right time for the point to be decided, and I think it is also an authority for the second proposition : but so far as I can see, though it is not necessary for one to say so, the District Munsif on that occasion was wrong in respect of his view on the second proposition, because if the properties are brought to sale and some are sold first and the balance is directed to be sold for any deficit that there may be, I cannot see how the plaintiff in the suit suffers any prejudice at all. However that may be, it seems that the view of the Full Bench of this Court was that it was not the right time to dispose of this question. That being so the fact that the learned District Munsif on that ground among other grounds refused the present appellant's then request for this order seems to be a wholly irrelevant consideration. In the judgment in Appayya v. Ramayya I.L.R. (1908) M. 419 it is pointed out that this point can be discussed and decided on the execution proceedings, and it is put in this way: 'Under Section 88 of the Transfer of Property Act, the Court may order that a portion sufficient to discharge the plaintiff's debt be sold and if a particular parcel is sufficient and, if the plaintiff cannot possibly be prejudiced by such a sale, it may be open to the Court to direct in the decree itself its sale before the other property.' That is to say, that if there can be no prejudice, it is possible for the Court to direct in the decree itself this order of sale. But, in the execution of the decree for the sale of the land, one item may be sold first and, if the sale proceeds thereof are sufficient, the sale of the other items may be stopped. In Ramaswami Chetti v. Madura Mill Company Ltd., (1916) 1 M.W.N. 265 a similar point came before a Bench of this Court, and Srinivasa Iyengar, J., puts the point quite clearly when he points out that the decision of the Full Bench in

Appayya v. Ramayya I.L.R(1908) M. 419 was that the Court has a discretion to direct the sale of any particular item if that will be sufficient to pay off the mortgage debt, although in that case under Section 81 of the Transfer of Property no marshalling was allowed as between the parties before the Court. I confess myself to have my own doubts as to how far Section 81 of the Transfer of Property Act does apply but it is not necessary for me to express any opinion on that on this occasion. The only question that I have to consider is whether it is right that the order of sale of these properties should be regulated by the order of Court and that, in my judgment, must depend on whether the appellant has got a good equitable right as between himself and the mortgagor and as between himself and the other persons interested in the other mortgaged property; and if he has a right to preference then it is the duty of the Court to give him preference taking care of course that the mortgagee is not prejudiced. As I have pointed out, the mortgagee is not prejudiced by the order of selling. Therefore I think that the right order to be made in this case and the order which must be made is that the property be put up for sale, items 4 to 16 inclusive being sold before items 1 to 3, items 1 to 3 being sold only if there is not sufficient realised from the sale of the other items to pay the decree amount.

2. Our attention has been called to a recent decision of this Court in appeal against appellate order No. 46 of 1922 which reversed an order dismissing an application by a mortgagee to bring one item of the mortgaged property alone to sale, it being contended by the person claiming an interest in that item of property that the other items of mortgaged property ought to be brought to sale first. I understand that it was held by that judgment that the only occasion on which such a point could be taken was on the hearing of the suit itself. I desire to point out that it seems to me that that proposition is much too general and is contrary to the decision, in *Ram Dhun Dhur v. Romesh Chunder Chowdhry* ILR (1883) C 406 and the decision in *Appayya v. Ramayya* 18 MLJ 239 (FB). In the former case it was held that a mortgagee should not be allowed to bring to sale one item of the mortgaged property only, and in the latter case, the Full Bench case, it was pointed out that there were cases in which it was not possible or right for the order to be made on the hearing of the suit and yet it would or might be open to take the point on the execution proceedings. From what I have already said it follows that in

our view this also is a case where, although the point had been taken and decided against in the suit, it is open to be taken again on the execution proceedings. I agree with the decision in C. M. S. A. No. 46 of 1922 that the mere fact that it was sought to bring one property only to sale is no ground for dismissing the petition so asking but it must not be taken that I agree, if it was the intention of that Court to decide, that when that petition is taken on the file it will not be open to the appellant in that case to have the point raised.

3. In the result this appeal must be allowed with costs.

Waller, J.

4. I agree and I have nothing to add.

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