

Balu Vs. Dhanam and Three Others

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Court : Chennai

Decided On : Sep-09-1999

Reported in : 1999(3)CTC374; (1999)IIMLJ521

Judge : A. Raman, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) -- Sections 2, 11 and 146 -- Orders 31 and 34, Rules 7 and 8

Appeal No. : S.A. No. 1828 of 1987

Appellant : Balu

Respondent : Dhanam and Three Others

Advocate for Def. : Mr. S. Parthasarathy, for ;Mr. M.S. Krishnan, Adv.

Advocate for Pet/Ap. : M/s. Pushpa Sathyanarayanan, for ;Mr. T.R. Rajaraman, Adv,

Judgement :

ORDER

1. The facts of this case lie in a narrow compass.

2. The subject matter of the hypotheca belonged to Dhanam. She executed a mortgage in favour of Balu Chettiar, and borrowed certain amounts. Balu Chettiar assigned the mortgage in favour of one Kadappa Chettiar. The property was at

that time, in the occupation of Sambandamurthi. In the meanwhile, the owner of the property Dhanam viz., the mortgagor filed a suit in O.S.No.- 533 of 1975 for redemption of the mortgage, wherein a preliminary decree was passed on 16.11.1976. She deposited a sum of Rs. 212.75 into Court pursuant to the preliminary decree. After passing of the preliminary decree, she sold the property in favour of one Ramaswamy, who is the 2nd respondent herein. But in spite of her having sold the property in favour of Ramaswamy, she pursued the matter by filing an application in I.A.No. 99 of 1979 for passing of final decree pursuant to the preliminary decree obtained by her and a final decree was passed. At that time, Ramaswamy filed E.P.NO. 430 of 1980 straight away. The right of Ramaswamy, the subsequent purchaser to file the E.P. was questioned by stating that he was not a party to either the original suit or to the final decree proceedings and there is no decree in his favour. The E.P. was dismissed and CRP. No. 364 of 1981 was filed against the same. While dismissing the CRP., it appears that the High Court had observed that it was open to the subsequent purchaser to proceed in accordance with law after getting himself impleaded in the final decree proceedings. Pursuant to the order of the High Court in the CRP., Ramaswamy the subsequent purchaser filed an application in I.A.No. 981 of 1984 impleading Dhanam as well as Balu Chettiar and Sambandamurthi and Kadappa Chettiar as respondents. The said application was contested by the respondents. But, over-ruling the objections, the District Munsif ordered Ramaswamy to be impleaded in the final decree proceedings. It was after that Ramaswamy filed an application in I.A.No. 594 of 1986 for passing of final decree, impleading Balu Chettiar, Sambandamurthi and Kadappa Chettiar as the respondents in the said application. To the said application, the very same objections were raised by the respondents, once again. But the District Munsif, again overruled those objections and allowed the application and passed a final decree. Aggrieved by the said decision, the respondents viz., Balu and Sambandamurthy preferred an appeal to the District Court in A.S.No. 92 of 1987. The District Judge, by his Order dated 21.8.1987, confirmed the order of the District Munsif, dismissed the appeal, and consequently, this second appeal has been preferred.

3. Learned counsel for the appellant contended that there cannot be two final decrees in a mortgage suit. I am not persuaded to accept this argument Order 34

of the Code which relates to mortgage does not prohibit the passing of more than one final decree. Order 31, Rule 7 provides for passing of preliminary decree while Order 31, Rule 8 of the Code provides for passing of final decree in redemption. Admittedly, as on date, the defendants viz., the mortgagees have not complied with the provisions of the preliminary decree. The documents of title have not been handed over. Legal discharge of debt has not been effected. Therefore, on the date when the purchaser Ramaswamy filed an application for preliminary decree, in spite of passing of final decree already, the position was and that still the position that prevailed before passing of the final decree. It continued to prevail despite the passing of a final decree after that on the application of the plaintiff/mortgagor. Therefore, there is no prohibition for passing more than one final decree. The decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication has been completely disposed of. But here, though already a final decree has been passed, the complete disposal of the suit or and adjudication had not taken place. Therefore, the contention of the learned counsel for the appellant that there cannot be two final decrees is without merit.

4. Learned counsel further contended that the order of the courts below cannot be sustained. It is to be pointed out that I.A.No. 981 of 1984 was allowed, whereby the assignee decree holder has been brought on record and was permitted to proceed with the final decree application. This order has not been challenged at all by the affected parties. It is only the assignee decree holder, when his application for filing E.P. was dismissed, took up the matter to the High Court in CRP.No. 3642 of 1981. In that revision, the High Court has observed as follows:

'It is urged that when the revision petitioner is a purchaser, his interest by way of sale ought to have been recognised. I am unable to agree. The proper procedure for the revision petitioners was to have him impleaded as a party to the final decree proceedings. Not having done so, there is no question of recognising his interest by virtue of the sale. Certainly if it is permissible in law, it is open to the petitioner to seek an amendment of the final decree on the basis of the present sale.'

Ofcourse, the assignee decree holder did not file any application for amendment but filed an application to implead him as party in the final decree proceeding, which was allowed. The applications were allowed after contest, But, as against the same, no revision or appeal was preferred by the contesting parties.

5. In this connection, it is necessary to refer to the Rulings reported in *Satyadhyan Ghosal v. Smt. Deorajin Debi*, : [1960]3SCR590 , and *Hindustan Petroleum Corporation Ltd. & another v. K.M. Yakub (Died) & others*, 1996 (2) L.W. 817. The Apex Court has held as follows:

'The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a court whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceeding.'

To the same effect is the decision reported in *Hindustan Petroleum Corporation Ltd. & another v. KM. Yakub (Died) & others*, 1996 (2) L.W. 817. Therefore, the appellant herein having failed to challenge that order cannot now once again raise the same points in all. Rightly or wrongly those aspects have been decided by the Court. Against that, they have not chosen to question it and therefore, they will be bound by principle of *res judicata* in reagitating the same points again.

6. It is also in this connection to be pointed out that Section 146 CPC provides as follows:

'Save as otherwise provided by this Code or by any law for the time being in force, where by proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.'

7. Admittedly, here the proceeding which is in the nature of final decree proceeding has been taken by the assignee decree holder, who claims from the plaintiff, the decree holder. The Supreme Court has held in the decision reported in *C. Subbarayudu v. Brahmanandam*, 1959 SCA 129 that this Section was introduced in the Code of 1908 with the object of facilitating the exercise of rights

by persons in whom they come to be vested by devolution or assignment and that, being a beneficent provision, it should be construed liberally and so as to advance justice, and not in a restricted or technical sense. Therefore, one has to give effect to the object behind enacting Section 146 of the Code. That is what the courts below have done by empowering the assignee decree holder to come on record as a part to the final decree proceeding and passed a final decree consequently. Therefore, I am satisfied that there is no merit in this appeal and the same is liable to be dismissed.

8. In the result, this appeal is dismissed, but in the circumstances, there is no order as to cost. The order and decretal order passed by the courts below are hereby confirmed.

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