Abbakke Vs. B. Krishnayya

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SooperKanoon Citation : sooperkanoon.com/795290

Court : Chennai

Decided On : Feb-17-1909

Reported in : 4Ind.Cas.1120

Judge : Munro and ;Abdur Rahim, JJ.

Appellant : Abbakke

Respondent : B. Krishnayya

Judgement :

1. We think the order of the District Judge is right and that the decisions in Musaheb Zaman Khan v. Inayat-ul-lah 14 A.k 513 and Chandi Charan Roy Choudhri v. Ambika Charan Dutt 31 C.j 792 do not support the proposition which the appellant must establish if he wishes to succeed. Those cases do not lay down that where the question of personal liability of a mortgagor or his assignee was originally put directly in issue at the trial of the action and expressly adjudicated upon and negatived and the decree which is in accordance with such adjudication is allowed to stand as final, even in such a case the decree-holder finding the sale-proceeds of the mortgaged property to be insufficient to satisfy his dues can apply tinder Section 90, Transfer of Property Act, for an order for the sale of the property of the person whose personal liability for the debt he sought to establish in the suit but failed. We think the re opening of the question would be clearly barred under the above circumstances by the principle of res judicata and the learned Judges who decided Musaheb Zaman Khan v. Inayat-ul-lah 14 A.j 513 seem to recognise

this as they do not question the soundness of the decision in Batak Nath v. Pitambar Das 13 A.j 360. The learned Vakil who appeared for the appellant was driven in order to maintain his ground to contend that in a suit to enforce a mortgage the Court is not competent to decide in the first instance the question of the personal liability of the defendant although the parties themselves have asked for such a decision and that it acquires jurisdiction to deal with that question only after the security has been sold and its sale-proceeds are found to be insufficient. It is enough to say that there is nothing in reason or in the Code to warrant such a contention. No doubt Section 90 read with Sections 88 and 89 shows that the proper procedure to follow in mortgage suits is to postpone the consideration of the right of the plaintiff to sell the properties of the defendant until the need or it has actually arisen, and that is all that is pointed out in Musaheb Zaman Khan v. Inayat-ul-tah 14 A. k 513 Batak Nath v. Pitambar Das 13 A.k 360; Malaiperumal Iyengar v. Nachiappa Chetty 5 M.L.J. 294 and Chandi Charan Roy Choudhri v. Ambika Charan Dutt 31 C. k 792. But that is not sufficient for the appellant's purpose and we are not prepared to go further and to say that the decision in the first instance on the question of the personal liability of the 2nd defendant is to be regarded as of no effect in law. As regards the construction of the decree we have no doubt reading it in the light of the judgment and the pleadings that it clearly negatived the right of the appellant to hold the 2nd defendant personally liable for the debt to any extent whatever.

2. The appeal fails and is dismissed with costs.