

Rangaswami Naidu Vs. Angusami Naidu and ors.

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Court : Chennai

Decided On : Apr-11-1958

Reported in : AIR1959Mad407; (1958)2MLJ271

Judge : Ramachandra Iyer, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 33, Rules 10 and 14

Appeal No. : Civil Revn. Petn. No. 474 of 1956

Appellant : Rangaswami Naidu

Respondent : Angusami Naidu and ors.

Advocate for Def. : Addl. Govt. Pleader and ;M.R. Narayanaswami, Adv.

Advocate for Pet/Ap. : S. Thyagaraja Iyer, Adv.

Disposition : Revision allowed

Judgement :

1. This revision petition is filed at the instance of the decree-holder in a mortgage suit against the order of the Subordinate Judge of Coim-batore in E. A. No. 426 of 1956. That was an application for the issue of a cheque by the petitioner-decree-holder. The petitioner obtained a mortgage from the first respondent and he filed O. S. No. 27, of 1953 on the file of the Sub Court, Coimbatore, for a decree for the sale of the mortgage properties. A preliminary decree was passed on 6-4-1953

and the final decree was passed on 15-6-1954. In execution of the final decree the mortgage properties were brought to sale and a sum of Rs. 4,041-5-0 was put into Court representing the proceeds of sale,

The decree-holder, thereafter filed E. A. No. 426 of 1955, an application for the withdrawal of the amount. The auction purchaser filed a memorandum into Court stating that as the Government was taking proceedings to bring to sale the properties in execution of a decree in their favour for Court-fee in another suit it was necessary that the dues to the Government should be paid out of the amount in Court deposit. Notice was given to the Government Pleader who supported the case of the auction purchaser and claimed that the Court-fee due to the Government should be paid out of the amount in Court deposit. Before proceeding further it is necessary to state the circumstances under which the Government became entitled to recover Court-fee from the first-respondent.

The wife and children of the first respondent filed a suit in forma pauperis in O. S. No. 357 of 1949 for partition and separate possession of the family properties including the mortgaged properties. A decree was passed in their favour and the Court-fee due to the Government was made payable and was also made a charge on the properties in that suit. The learned Subordinate Judge held that as in the partition suit the entire properties were charged for the Court-fee and as the mortgagee did not make the Government a party to the mortgage suit the latter would be entitled to be paid out of the Kale proceeds in Court deposit in the mortgage decree the amount representing the Court-fee due to them. The decree-holder has filed the above civil revision petition against the order of the learned Subordinate Judge. Order 33, R. 10, C. P. C. states.

"Where the plaintiff succeeds in the suit, the Court shall calculate the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; such amount shall be recoverable by the State Government from any party ordered by the decree to pay the same and shall be a first charge on the subject matter of the suit."

Rule 14 states :

"Where an order is made under Rule 10, Rule 11 or 11-A the Court shall forthwith cause a copy of the decree or order to be forwarded to the Collector who may without prejudice to any other mode of recovery, recover the amount of Court-fees specified therein from the person or property liable for the payment as if it were an arrear of land revenue."

The provisions of Rule 14 may not be of much assistance in this case as the Government have not yet taken steps to recover the Court-fee payable. The only point for consideration is whether Court-fee due to the Government is a first charge on the properties sold or whether it would be only a first charge on the subject matter of the suit in which the order for payment of the Court-fee was made. It may be noticed that the mortgage was long anterior to the partition suit. It was not contended that the mortgage was not binding on the plaintiffs in the partition suit. Therefore the subject matter of the suit can only be the equity of redemption in the properties, that is, the property subject to the mortgage in favour of the petitioner.

The charge created in favour of the Government in respect of Court-fee due to them in the partition suit would only be over the properties subject to the mortgage. The learned Subordinate Judge overruled this objection stating that as the mortgage suit was filed subsequent to the passing of the order in favour of the Government in the partition suit, the Government would not be bound by the mortgage decree as they were not made parties. Under Order 33, Rule 10 and under the terms of the decree in O. S. No. 357 of 1949, the Government got only a charge. A charge does not create any interest in the property.

It is unnecessary to decide the question whether the Government was a necessary party to the mortgage suit as even assuming that they were necessary parties the petitioner who was the mortgagee decree-holder, cannot be deprived of the fruits of his decree. The right of the Government was only by enforcing their own right in appropriate proceedings. The law on the subject in regard to prior and puisne mortgagees filing suits without impleading each other has been considered by a Full Bench of our High Court in *Nugendra Chettiar v. Lakshmi Aniam*, ILR 56 Mad 846: (AIR 1933 Mad 583). The contention of Mr. Ramaswami appearing on behalf

of the Additional Government Pleader is that the right of the Government was paramount and superior even to that of the mortgagee.

He relied upon the provisions of Order 33, Rule 10 C. P. C. as giving a first charge on the property itself and argued that the rights of the mortgagee would only be subordinate to the rights of the Government so far as recovery of Court-fee is concerned. In this connection he relied upon the provisions of Order 33, Rule 14, wherein the Government is authorised to recover Court-fee as if it were an arrear of land revenue. It is now well settled that the rule that sales by the Government for the realisation of its dues would discharge prior encumbrances is confined only to cases where the arrears due is public revenue for which the property is made first security by statutory declaration. In cases however where the amount due to the Government is made recoverable as if it were a land revenue, the sale would be subject to prior encumbrances. The present case is of the latter variety.

The mortgagee has a right of property which he acquired on the date of the mortgage and the property that is left with the mortgagor was only subject to that mortgage. The charge in favour of the Government can only relate to the equity of redemption and cannot take precedence over the mortgagee's right. Learned counsel appearing for the Government then relied on the decision in *Chakravarthi Iyengar v. Gangadhara Mudaliar*, . That was a case where a suit on mortgage for the sale of mortgage property was filed in forma pauperis. The subject matter of the suit was the entire property as the prayer was one for sale of that property by way of enforcing the mortgage. The question of the Government's right to have the first charge on the property came in for consideration and it was held that it would be a first charge.

That case can have no application to the present) one where the claim was in respect of the Court-fee due in another suit where the subject matter was only the equity of redemption. Learned counsel next referred to the decision in *Sankaran Nambudripad v. Ramaswami Iyer*, ILR 41 Mad

691.: (AIR 1919 Mad 590). That was a suit for recovery of amount due to the Government towards repayment of the advance under the Land Improvement Loans Act. Under the provisions of Section 7(1) of the Act a first charge is created

on the property itself. The learned Judges held that on a construction of Section 7 of the Act it was clear that the rights of the Government were paramount to that of any other encumbrancer. The principle of that decision will have no application to a case where liability was created under Order 33, Rule 10, C. P. C.

It was then contended on behalf of the respondent that both the petitioner and the respondent having charges on the property, the latter would be entitled to a preferential payment on the basis of the rule that as between the creditors of the same class, the State is entitled to priority. I have already held that the rights of the Government are only over the equity of redemption in the property and therefore subordinate to the rights of the mortgagee. Further a charge-holder has no interest in the property, while a mortgagee has. In this view it is unnecessary to consider further the validity of the argument.

2. I am therefore of opinion that the judgment of the learned Subordinate Judge cannot be sustained and that the petitioner would be entitled to payment out of the amount realised in execution of his mortgage decree. The civil revision petition is, therefore, allowed, with costs against the seventh respondent.

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