

K. Rangachariar Vs. the Trinity Bank, Ltd. and anr.

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Court : Chennai

Decided On : Oct-14-1947

Reported in : AIR1948Mad411; (1948)1MLJ61

Appellant : K. Rangachariar

Respondent : The Trinity Bank, Ltd. and anr.

Judgement :

Frederick William Gentle, C.J.

1. This appeal arises out of a mortgage suit in which a decree for sale was passed. The mortgaged properties were three items of which, so far as material item No. 1 became vested in the 12th defendant to the suit, the second respondent in this appeal and items 2 and 3 were vested in the sixth defendant to the suit and the appellant in this appeal, the first respondent here being the mortgagee. The learned Additional Subordinate Judge of Trichinopoly settled the proclamation of sale, one of the terms being items 2 and 3 should be sold prior to item 1 of the three pieces of hypotheca. This is an appeal by the sixth defendant in the suit against the direction by the learned Additional Subordinate Judge for items 2 and 3 to be auctioned prior to item 1.

2. At the outset, learned Counsel on behalf of the second respondent, the 12th defendant in the suit, took a preliminary objection against the maintainability of the present appeal. He placed his objection on three grounds: (1) that Order 43 Rule 1

of the Code does not include an order, as was made when the proclamation of sale was settled, as one which is subject to appeal by virtue of that rule. (2) that the question arising in the appeal is a dispute as between two judgment-debtors and not one arising as between the decree-holder and the judgment-debtor, consequently it is not subject to the provisions of Section 47 of the Code and cannot be made the subject of an appeal; and (3) that the settlement of the proclamation of sale and its terms by the lower Court was not an adjudication of any right but was merely an administrative order and not a judicial one and therefore there is no right of appeal.

3. It is convenient to deal, in the first instance, with the third objection. This has been the subject of pronouncement by a Full Bench of this Court in *Sivagami Achi v. Subramania Iyer* (1903) 14 M.L.J. 57 : I.L.R. Mad. 259 That decision was given under the Code of Civil Procedure of 1882, in which secs. 244 and 287 correspond respectively to Section 47 and Order 21, Rule 66 of Code of 1908. It was held that proceedings under Section 287 were administrative and not judicial and that no appeal lay from an order made under it pursuant to Section 244. *Lanka Rama Naidu v. Lanka Ramakrishna Naidu* (1923) 46 M.L.J. 192 is a decision by a Division Bench of this Court after the Code of 1908 had come into force. In the judgment, the opinion is expressed that Order 21, Rule 66 corresponds, so far as may be, to the provisions of Section 287 of the older Code and although the phraseology of the new provision is not entirely in accord with the wording of the latter section, nevertheless the effect is the same and that there is no difference in principle regarding the provisions of the two Codes. It was held that a Judge acts not judicially, but merely administratively, when he settles a sale proclamation, and, it would follow there is no appeal from the settlement of such a proclamation. In the course of argument before us, learned Counsel for the appellant did not seek to criticise the correctness of the last mentioned decision, in so far as it relates to the analogy between the provisions of the Codes of 1882, and 1908. In *Venkataseshayya v. Ramaraju* : AIR1935 Mad714 Pandrang Rao J., sitting alone, expressed the opinion in accordance with the previous two decisions regarding the nature of an order settling a sale proclamation, that it is an administrative order and no appeal lies therefrom.

4. We are bound by the decision of the Full Bench of this Court in *Sivagami Achi v. Subramania Iyer* (1903) 14 M.L.J. 57 : I.L.R. Mad. 259 unless it can be shown that it is distinguishable in so far as the present appeal is concerned. It has not been so shown, and it must follow, in my opinion, the order by which the learned Additional Subordinate Judge of Trichinopoly settled a proclamation of sale, was an administrative order from which no appeal can lie and that the preliminary objection raised by the learned Counsel for the respondent must prevail.

5. In regard to the other two grounds of objection, so far as the first one is; concerned, it was not challenged in argument by the learned Counsel for the appellant that Order 43, Rule 1 does not include in its provisions, an order against which the present appeal is made. So far as the second objection raised by learned Counsel for the respondent is concerned, there is a conflict between decisions in this Court. *Bapanna Garu v. Jaggarao Garu* : AIR1943 Mad407 and *Anavarasada Khan Pani Sahib v. Misiri Khan Pani Sahib* : (1916)31MLJ44 are decisions to the effect that disputes as between co-judgment-debtors or co-decree-holders are not covered by Section 47 and consequently no appeal from any order relating to such disputes lies. Those decisions appear to be in conflict with *Vedaviasa Iyer v. The Madura Hindu Labha Nidhi Ltd* : AIR1924 Mad365 . In light of the conclusion expressed that the third objection to the present appeal must prevail, it is unnecessary to discuss and consider the above conflicting decisions or to refer the subject matter of the conflict for the consideration of a Full Bench.

6. In my opinion, this appeal must be dismissed with costs, one set for each respondent. The first respondent may add the amount of his costs to the decretal debt in the mortgage suit.

Govinda Menon, J.

7. I agree.