

Sambanda Mudaliar Vs. Muthuswami Mudaliar

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Court : Chennai

Decided On : Jul-17-1987

Reported in : (1989)1MLJ414

Appellant : Sambanda Mudaliar

Respondent : Muthuswami Mudaliar

Judgement :

ORDER

K.M. Natarajan, J.

1. This appeal is directed against the order passed by the Subordinate Judge, Tirupattur, allowing the application to remove the obstruction, under Order 21, Rule 97, C.P. Code.

2. The facts which are necessary for the disposal of this appeal are briefly as follows: The respondent filed a suit on mortgage in O.S. No. 106 of 1971 on 20-12-1971 and obtained a preliminary decree on 29.2.1973. The final decree was passed on 30.10.1973. The mortgaged property was brought to sale in execution of the said decree in court auction and the respondent purchased the same on 19.9.1973. The sale was confirmed on 29.10.1973. When the respondent came to take possession of the property on 24.12.1973, the appellant herein obstructed the same.

3. The appellant resisted deliver of possession on the ground that he filed a suit for recovery of money on 11.3.1971, in O.S. No. 180 of 1971 and an order of attachment was obtained on 12.3.1971. The suit was decreed on 26.6.1971. IN E.P. 64 of 1973 the property was brought to sale on 22.2.1973, and he purchased the same in the court auction sale and the sale was confirmed on 26.9.1973. Possession of the property was delivered to him through court on 18.10.1973.

4. The Court below allowed the application on the ground that the appellant being a money decree holder and he having purchased the property in execution of the said money decree during the pendency of the mortgage suit pendente lite, must be treated as a representative-in-interest of the judgment debtor and as such, he is bound by the mortgage decree and he is bound to give possession to the respondent, a mortgage decree holder in O.S. No. 106 of 1971.

5. Learned Counsel for the appellant relied on the decision of a single Judge of this Court reported in *Rajagopala Naicker v. Jayarama Naicker and Ors.* 1974 T.L.N.J. 455, where Ramaprasada Rao, J., as he then was, relied on the decision in *Nagendra v. Lakshmi* : AIR1933 Mad583 , and held that whoever comes first will be served first. The learned Counsel relied on the said decision and submitted that in view of the fact that the appellant herein purchased the property admittedly at the first instance and got possession through court, he is entitled to the property and the subsequent purchaser cannot ask for removal of obstruction. Further, the purchase was through court and it is not affected by the doctrine of lis pendens under Section 52 of the Transfer of Property Act. The learned Counsel for the respondent drew my attention to the earlier decision rendered by this Court in a case between the same parties in the same matter, in C.R.P. No. 3288 of 1974. Relying on the ruling in *Subba Rao v. Venkateseshacharlu* 61 L.W. 535 : A.I.R. 1949 Mad. 207 : (1948)1 M.L.J. 128, it was held that the rival contentions; between the parties ought to have been decided in the execution petition and not relegated to a separate suit in view of the amendment of Section 47, C.P.C. in *Harnandrai Badridas v. D.B. Prasad* : [1974]1SCR210 , the same view was affirmed. The learned Counsel for the respondent submitted that the decision reported in *Nagendran v. Lakshmi* 38 L.W. 169 : 65 M.L J. 108, referred to in *Rajagopala Naicker v. Jayarama Naicker and Ors.* 1974 T.L.N.J. 455 is in respect

of purchase by two different mortgagees and in that connection it was held that the deciding factor is priority in date of sales and not dates of mortgage. That is not the case between a simple money decree holder and a mortgage decree holder and the sale in pursuance of the same. The said decision was also rendered before the amendment of the Civil Procedure Code. The decision in Nagendran v. Lakshmi 38 L.W. 169 : 65 M.L.J. 198 has no application to the facts of this case, as the dispute was between two mortgagee-decree-holders and it was not brought to the notice of the single Judge of this Court while the decision was rendered in Rajagopala Naicker v. Jayarama Naicker and Anr. 1974 T.L.N.J. 435. On the other hand the learned Counsel for the respondent submitted that in the decision rendered by this Court in the above quoted C.R.P. between the same parties reliance was placed on the earlier decision of the Privy Council reported in Jadunath v. Parameswar A.I.R. 1914 P.C. 11, where it was held:

While the purchaser at an auction sale under a mere money decree gets no more than the right, title and interest of the judgment-debtor at the date of the sale, the purchaser under a mortgage decree gets the right, title and interest in the mortgaged subject which the mortgagor had at the date of mortgage and charged thereby. Buying the mortgaged property free from incumbrances he gets, as it is sometimes put, the title both of the mortgagee and of those interested in the equity of redemption....

In Subba Rao v. Venkateseshacharlu (1948) 1 M.L.J. 128 : 61 L.W. 435 : A.I.R. 1949 Mad. 207 it was held:

Where a property was sold and was purchased by A in execution of his decree during the pendency on a mortgage suit in respect of that property and A obtained possession thereof and the mortgagee in execution of the decree made in his favour in that suit purchased the property himself:

Held, that A, having purchased the property pendente lite, must be treated as a representative in interest of the judgment debtor and, therefore, a petition by the mortgagee decree holder for possession of the property purchased by him was maintainable against A.

The said decision also is applicable on all fours to the facts of this case. In view of the ratio in the decisions cited above, I am of the view that the money decree-holder being the representative in interest of the judgment debtor is bound by the mortgage decree and that he had purchased only the right of redemption of the mortgage debt.

6. Next, we have to consider the question of lis pendens. It is not in dispute that during the pendency of the suit on the mortgage, the appellant herein purchased the property. The question arises whether it is hit by the doctrine of lis pendens. Learned Counsel for the appellant relied on the decision of the Andhra Pradesh High Court in *Kambbhih v. Obulas* (1978)2 An.W.R. 78 and submitted that the sale held under the authority of the Court in execution of the decree cannot fall within the mischief of Section 52 of the Transfer of Property Act. On the other hand, the learned Counsel for the respondent drew my attention to the decision in *Samarendra Nath Singh v. Krishna Kumar* : [1967]2SCR18 wherein it was held that Section 52 T.P. Act does not strictly apply to involuntary alienations like court sales, but principle of lis pendens applies to such alienations. In *K.N. Lal v. Ganeshram* : [1970]2SCR204 it was held.

The proceedings in respect of the mortgage were pending from April 8, 1934 to July 20, 1937. The proceedings were for obtaining 'a mortgage award equivalent to a mortgage decree and not for a money decree. The fact that they were attached before judgment in D's suit does not affect the application of the doctrine of lis pendens. Attachment is only effective in preventing alienation and does not create title to property. If, in fact the property was acquired pendente lite, the acquirer is bound by the decree ultimately obtained. Therefore, D's purchase on August 13, 1934, was hit by the doctrine of lis pendens Section 52 of the Transfer of Property Act, 1882.

In *Jayarama Mudaliar v. Ayyasami* : [1973]1SCR139 their Lordships approved the decision in *Samanandrenath Singh v. Krishna Kumar* : [1967]2SCR18 , where it was held:

The purchaser pendente lite under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so must it

bind, the person deriving his right title and interest from or through him. This principle is well illustrated in *Rodhamadthuj Holder v. Manohar* 15 I.A. 97, where the facts were almost similar to those in the instant case. It is true that Section 52 strictly speaking does not apply to involuntary alienations such as court sales. But it is well established that the principle of *lis pendens* applies to such alienations. See *Nilkant v. Sureshchandre* 12 I.A. 171 and *Motilal v. Karrabuddin* 24 I.A. 170.

These observations were approved by the Supreme Court in *Kedarnath Lal v. Ganeshram* 1970 S.C. 1717 : (1970)2 S.C.R. 904. The ratio laid down in the above decisions clearly establishes that the principle of *lis pendens* applies to Court auction sales also. Hence, I am of the view that the order passed by the lower court does not suffer from any illegality or infirmity. I find that the reasoning given by the learned Sub Judge is supported by well established principles of law laid down by this Court and the Supreme Court.

7. In the result, the appeal fails and stands dismissed. However, in the circumstances of the case, there will be no order as to costs.