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Court : Kolkata

Decided On : May-26-1936

Reported in : AIR1936Cal537

Appellant : Aymamud Sarcar

Respondent : EbaruddIn Sarcar and ors.

Judgement :

R.C. Mitter, J.

1. The question raised in this appeal is whether respondent 1 can execute a mortgage decree for the full amount mentioned in the said decree, against all or any of the mortgage properties, or is he entitled to levy execution only for a proportionate amount and confine his execution to properties Nos. 2 to 4 of the mortgage decree.

2. The question is one on which the High Courts of India have taken divergent views.

3. Respondent 2, Hiralal Shaha, advanced money to the predecessor-in-interest of respondents 3 to 9 on the security of some properties, which may be called properties Nos. 1 to 4. He obtained a mortgage decree in the year 1928 on this mortgage, which decree has been assigned to respondent 1 who has applied to execute the same, limiting his execution in the first instance to property No. 1 in

pursuance of the order of the Court made on 18th January 1929 at an earlier execution. Hiralal had taken another mortgage from the same person for another loan, but that mortgage included only property No. 1. This mortgage was assigned to respondent 1 who sued upon it, obtained a decree and in execution thereof purchased the mortgaged property himself in the year 1930, that is at a date subsequent to 18th January 1929.

4. The appellant before me is a puisne mortgagee in respect of properties Nos. 2 to 4 only. He sued upon his mortgage, obtained a decree in the year 1929 and in execution thereof purchased the said properties on 14th November 1930. He was a party to Hiralal's suit, which terminated in the decree passed in the year 1928, the decree which is now under execution.

5. In 1928 respondent 1 as assignee of the said decree started execution (O. C. Execution Case 221 of 1928). The appellant filed an objection under Section 47 of the Code and on his objection the execution Court passed an order on 18th January 1929 that property No. 1 was to be put up for sale first, and if the sale proceeds be not sufficient to satisfy the decree then and then only properties Nos. 2 to 4 were to be sold, and directed a note to that effect to be inserted in the sale proclamation. That execution did not proceed further and was ultimately dismissed for default on 2nd April 1929. It is after this that respondent 1 purchased property No. 1 at a Court sale as I have stated above.

6. There was an intermediate execution in the year 1932 (Execution Case No. 39 of 1932) and the said execution was dismissed on 29th November 1932. The last order passed in that execution case has only been exhibited in this case. It runs thus:

'29th November 1932. Objection under Section 47, Civil P. C., allowed with costs. The execution be dismissed.'

7. What those objections under Section 47 were, I do not know, and it is not possible in the state of the record to find out the reasons for this order.

8. The present execution was started on 25th January 1933. Respondent 1 prayed for sale of property No. 1 in the first instance in pursuance of the order of the Court dated 18th January 1929 passed in execution Case No. 221 of 1928, and prayed for sale of properties Nos. 2 to 4 thereafter if the sale proceeds of property No. 1 did not satisfy his decree.

9. To this execution the appellant raised objections. He said that the whole decretal debt cannot be thrown on properties Nos. 2 to 4, but that the respondent 1, having himself purchased in another execution property No. 1, was bound to apportion the decretal amount and could only take out execution against properties Nos. 2 to 4 for an amount which would bear the same proportion to the whole decretal debt as the value of properties No. Section 2 to 4 bear to the total, value of properties Nos. 1 to 4. This objection was given effect to by the trial Court but has been negatived by the lower appellate Court, which has allowed execution to proceed for the whole of the decretal amount but has directed property No. 1 to be sold first. The appellant contends before me that the view taken by the trial Court is the correct view and that its order ought to be restored.

10. The point raised is a difficult one. Not only do the Allahabad and Madras High Courts support the contention of the appellant, but in this Court divergent views have been expressed. The cases of the Allahabad and Madras High Courts expressly in point are respectively Sarju Kumar Mukherjee v. Thakur Prasad 1920 All 129, and Chinniah Rowther v. A.B. Muthuraman Chettiar 1934 Mad 250. In this Court the cases in Muhamed Taki Reza v. Thomas (1906) 4 C L J 317 and Harendra Kumar Guha v. Dindayal Shaha (1906) 4 C L J 195, support the contention of the appellant, while the cases in Naffer Chandra Mandal v. Baikanto Nath Roy (1879) 4 O L R 156 and Amir Chand v. Sheo Prasad Singh (1907) 34 Cal 13 are against the appellant, the decision in the last mentioned two cases proceeding on the view that the question cannot be raised in execution proceedings but whatever equity there is must be enforced by a suit for contribution. In Amir Chand v. Sheo Prasad Singh (1907) 34 Cal 13 the Division Bench refused to refer the case to the Full Bench on the ground that the judgment in Harendra Kumar Guha v. Dindayal Shaha (1906) 4 C L J 195 proceeded upon earlier cases of this Court which did not support the proposition laid down therein.

The objection of the appellant can only be given effect to, if it comes within Section 47 of the Code, that is to say only if it can be held that the purchase of the equity of redemption of one of the properties or of a share of the properties included in the mortgage-decree by the mortgage decree-holder before his execution amounts to pro tanto satisfaction of the decree. This is the view which was formulated by Mahmud, J. in *Kudhai v. Sheo Dayal* (1888) 10 All 570, and accepted by the Full Bench of the Allahabad High Court in *Bisheshur Dial v. Ram Swarup* (1900) 22 All 284. The last mentioned case was a case of purchase by the mortgagee who had not at the date of his purchase sued upon his mortgage and the question arose not in execution but in the suit which the mortgagee brought to enforce his mortgage. This view proceeds upon the view of coalescence, the creditor becoming one of several judgment-debtors. The principle so formulated is one of the main reasons on which the decision in *Sarju Kumar Mukherjee v. Thakur Prasad* 1920 All 129 was rested.

11. In that case the mortgagee had already obtained his decree before he purchased shares in the equity of redemption in two of the mortgaged properties in execution of a simple money decree levied by a third party, and the question arose in execution of the mortgage-decree, as in the case before me. Tudball and Sulaiman, JJ. also gave another reason namely avoidance of multiplicity of proceedings, in support of their view that the mortgagee decreeholder was bound to apportion the decretal amount proportionately on the properties purchased by him and the other properties not so purchased, included in the mortgage-decree for sale. They said that where a mortgagee purchases the equity of redemption in one of such properties, he is bound to contribute to the mortgage-debt in proportion to the value of the property purchased by him, and the equities must be worked out in the execution itself for the purpose of avoiding multiplicity of suits and proceedings. If this last mentioned principle is the correct principle, in my judgment the question cannot be raised in an objection to execution having regard to the terms of Section 47 of the Code, which contemplate only three questions, the question of satisfaction and discharge either wholly or in part, of the decree being two of them which are relevant for this case before me. In my view the principle of avoidance of multiplicity of suits and proceedings is the real principle and so the objection cannot be entertained in the course of execution proceedings,

where the executing Court must execute the decree as it stands.

12. As between co-mortgagors or persons who have acquired interests in the equity of redemption in the several properties included in the mortgage security, there is the right of contribution. If one of them pays the whole of the mortgage debt or decree, or if it is realised from his property, he has the right to claim contribution rateably. If the mortgagee himself purchase the equity of redemption in one of such properties, he is also liable to contribute in his capacity as the purchaser of the equity of redemption. The mortgage security is then split up and the right accrues to those who have equity of redemption in the other properties of redeeming piecemeal (Section 60, T. P. Act). A suit to enforce piecemeal redemption in such a case is really the combination of a suit for redemption and a suit for contribution against the mortgagee. When a suit for enforcement of his mortgage by sale by such a mortgagee, who has purchased the equity of redemption in one out of many properties included in his security is brought, there cannot be any valid objection to the defendants to such a suit setting up the plea of contribution for the purpose of maintaining and preserving their right of piecemeal redemption which they have acquired so that that decree for sale to be passed may by apportioning the mortgage-debt on the different properties give effect to their aforesaid right of piecemeal redemption. The phrase 'pro tanto satisfaction' used in the judgment of the Full Bench of the Allahabad High Court, *Bisheshur Dial v. Ram Swarup* (1900) 22 All 284, should in my judgment, be taken to be a convenient expression only, but is really the expression in a terse form of the principle which I have formulated above. I accordingly follow the decision of *White and Morris, JJ. in Naffer Chandra Mandal v. Baikanto Nath Roy* (1879) 4 O L R 156 and of *Rampini and Mookherjee, JJ., in Amir Chand v. Sheo Prasad Singh* (1907) 34 Cal 13, and hold that the objection of the appellant cannot be given effect to and his remedy lies in a suit for contribution if the decree be realised wholly or partly, but in excess, from properties Nos. 2 to 4. The appeal is accordingly dismissed with costs. Leave to appeal under Section 15 of the Letters Patent prayed for is granted.