

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

R. SINGARIAH CHETTY (THIRD DEFENDANT), APPELLANT,

v.

CHINNABBI ALIAS MUNI REDDI AND FIVE OTHERS (PLAINTIFFS
AND DEFENDANTS NOS. 2, 4 AND 5), RESPONDENTS.*

Civil Procedure Code (V of 1908), O. XXI, r. 63—Mortgajee, filing claim petition—Petition dismissed—Suit to establish right dismissed—Subsequent suit by mortgagor to enforce his mortgage—Suit against mortgagor and purchasers in execution of a decree in another suit by the same creditor—Order on claim petition, whether conclusive.

An order on a claim petition which has not been set aside in a suit by the claimant under Order XXI, rule 63, Civil Procedure Code, becomes conclusive not only for the purpose of the execution of the decree in connection with which the claim was preferred, but also of the execution of other decrees, between the same parties.

The establishment of the decree-holder's right to bring property to sale free from a claimant's alleged right involves the right of the purchaser at the sale to get a title to the property free from such right. *Ramasamy Chetty v. Aligiri Chetty*, (1905) 27 I.C., 800, followed; *Umesh Chunder Roy v. Raj Bullabh Sen*, (1882) I.L.R., 8 Cal., 279, dissented from.

SECOND APPEAL against the decree of P. N. SATAGOPIA NAYUDU, Subordinate Judge of North Arcot, in Appeal Suit No. 153 of 1917 (Appeal Suit No. 364 of 1917 on the file of the District Court of North Arcot), preferred against the decree of T. ANANTA ACHARIYAR, District Munsif of Tirupati, in Original Suit No. 198 of 1916.

The facts are set out in the Judgment.

C. V. Anantakrishna Ayyar for appellant.

N. C. Vijayaraghava Achariyar, C. Padmanabha Ayyangar and *T. K. Srinivasa Tata Achariyar* for respondents.

AYLING, J.—This appeal arises out of a suit on a mortgage bond executed by the guardian of defendants Nos. 1 and 2 in favour of plaintiffs. Before its institution the mortgaged property

* Second Appeal No. 1501 of 1919.

had been brought to sale by fifth defendant in execution of a decree obtained by him against defendants 1 and 2 (Original Suit No. 69 of 1914 on the file of the District Munsif of Tirupati) and purchased by defendants 3 and 4. The latter opposed the suit alleging (1) that the suit mortgage was only a fictitious document without consideration, and (2) that the suit was otherwise not maintainable. The first defence, though successful in the court of first instance, was found against by the Subordinate Judge in Appeal: and we are not now concerned with it. The Subordinate Judge, however, in giving a decree for plaintiffs omitted to consider the objections to the maintainability of the suit: and it is with these, which have been pressed on us by Mr. Anantakrishna Ayyar on behalf of third defendant, the present appellant, that we have to deal.

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The main objection is based on Order XXI, rule 63, Civil Procedure Code, and was considered and rejected by the District Munsif on issue 2.

The facts are these—Prior to Original Suit No. 69 of 1914, fifth defendant had instituted another suit against defendants 1 and 2, Original Suit No. 872 of 1913, and had effected an attachment before judgment of the suit property under Order XXXVIII, rule 6. Plaintiffs preferred a claim based on their mortgage. This was dismissed. Thereupon, plaintiffs filed a suit, Original Suit No. 919 of 1914, for a declaration of their mortgage rights and for a declaration that these would not be affected by the attachment.

This suit (Original Suit No. 919 of 1914) was eventually dismissed. The plaintiffs were first granted leave to withdraw it conditionally on payment of the costs of defendants; but as they failed to do this within the time allowed, this suit stood dismissed.

Appellant contends that on the dismissal of this suit, the order on the claim petition became conclusive under Order XXI, rule 63; and that the result is to preclude plaintiffs from enforcing their mortgage on the suit property under any circumstances whatever.

It has been held by a Full Bench of this Court in *Prasada Nayudu v. Virayya* (1), that Order XXI, rule 63, applies to orders

(1) (1918) I.L.R., 41 Mad., 849 (F.B.).

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on claims preferred to property attached before judgment; and if appellant had purchased the property in execution of the decree in Original Suit No. 872 of 1913, there could be no room for doubt.

This is, of course, a suit to enforce the mortgage not to contest the order on the claim petition under Order XXI, rule 63. But that makes no difference. If plaintiffs are concluded from setting up their mortgage in connexion with any proceedings taken against the property in pursuance of Original Suit No. 872 of 1913, and this effect at least must be given to the word "conclusive" in rule 63, then it would be ridiculous to contend that they might nevertheless enforce it against a purchaser of the property in execution of the decree; vide SADASIVA AYYAR, J., *Velu Padayachi v. Arumugam Pillai*(1). Mr. Padmanabha Ayyangar, however, for plaintiffs, seems to distinguish the case on the ground that appellant purchased in execution of another decree altogether, and that the order on the claim petition is only conclusive as regards the parties to the same and for the purpose of the suit or execution in connexion with which the claim was preferred. The correctness of this argument of course depends on the meaning to be attached to the word "conclusive" in rule 63 of Order XXI.

On behalf of respondents, we are referred to *Umesh Chunder Roy v. Raj Bullubh Sen*(2), *Ibrahimhai v. Kabulabhai*(3), and *Kamini Kant Roy v. Ram Nath Chuckerbutty*(4). The first of these certainly appears to be authority in respondents' favour. The learned Judges say :

"The finding of the Court in the execution department that the sale was invalid only meant that the sale was invalid as against the judgment-creditor, and as against any purchaser who might purchase at a sale held in execution following that attachment "

The other two cases have no direct bearing on the point. In *Kamini Kant Roy v. Ram Nath Chuckerbutty*(4), the learned Judges only considered sections 13 and 373 of the old Civil Procedure Code—not section 283 which corresponds to Order XXI, rule 63. In the Bombay case the decision turned on the necessity of bringing a suit to contest a claim order on an attachment which was raised. So also in a case of this Court, *Gollamapalli*

(1) (1920) 88 M.L.J., 397.

(2) (1832) I.L.R., 8 Cal., 279.

(3) (1889) I.L.R., 13 Bom., 72.

(4) (1894) I.L.R., 21 Cal., 265.

Subbaya v. Shankara Venkataratnam(1). In both these cases the learned Judges may be said to discuss the matter as if the effect of the claim order did not go beyond the proceedings in connexion with which it was passed; but the dominating factor of their decision is the release or withdrawal of the attachment.

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On the other hand, we are referred to a decision of this Court, *Ramasamy Chetty v. Aligiri Chetty*(2), which is just as strong an expression of opinion as *Umesh Chunder Roy v. Raj Bullubh Sen*(3), but the other way. The learned Judges say:

“The statutory suit under Order XXI, rule 63, is to establish the right which the attaching plaintiff claims in the property in dispute. This, in our opinion, is the right to attach the property in question as the property of the defendant whenever it may be his interest to do so, and the effect of not suing would be to debar him from claiming to attach such property at any future time.”

As far as the cases go, we have therefore practically a decision of our own Court against one of the Calcutta High Court; and we should, by preference, follow the former. I think, moreover, that a consideration of the rule with reference to the facts of the present case leads to the same conclusion. The right in litigation in the claim petition and in Original Suit No. 919 of 1914 was the right of fifth defendant to treat this suit property as the property of defendants 1 and 2 in opposition to the mortgage right therein set up by plaintiffs. The dismissal of plaintiffs' claim petition followed by the dismissal of their suit, Original Suit No. 919 of 1914, had the effect of conclusively settling this question as between plaintiffs and fifth defendant. It seems to me unreasonable to suggest that the result was only conclusive as regards the particular suit (Original Suit No. 872 of 1913) out of which the decision arose and that it was open to plaintiffs in spite of this decision again to contest the same person's right of proceeding against the same property in another suit. If they could not do so, then neither could they seek to enforce their mortgage against an auction purchaser in the second suit. For, as SADASIVA AYYAR, J., has so clearly pointed out in *Velu Padayachi v. Arumugam Pillai*(4), the one is the necessary consequence of the other:

(1) (1917) M.W.N., 851.

(2) (1915) 27 I.C., 800.

(3) (1882) I.L.R., 8 Cal., 279.

(4) (1920) 38 M.L.J., 397.

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"The conclusive establishment of the decree-holder's right to bring the property to sale free from the claimant's alleged encumbrance involves the right of the purchaser at the sale to get a title to the property free from such encumbrance."

I would therefore hold that the order on plaintiffs' claim petition is conclusive and that the suit mortgage is not enforceable against the items of property dealt with therein. The decree of the lower Appellate Court should be modified accordingly. Plaintiffs should pay the costs of defendants 3, 4 and 5 throughout.

ODGERS, J.

ODGERS, J.—The facts are fully set out in the judgment of my learned brother and I agree that Mr. Anantakrishna Ayyar's contention, that the rights of the plaintiffs are now gone, must prevail by the terms of Order XXI, rule 63, Civil Procedure Code. The effect of this rule combined with the fact that the suit No. 919 of 1914 was dismissed as the plaintiffs did not pay the costs, will, in my opinion, debar the plaintiffs from re-agitating their rights again even though the proceeding be, as here, a regular suit on the mortgage. In other words, once the order became "conclusive" in the words of the rule, a suit on the mortgage is barred at any time. It is, however, strenuously contended by Mr. Padmanabha Ayyangar, for the plaintiffs, that the order is not conclusive against the auction-purchaser in another proceeding and he relies on *Umesh Chunder Roy v. Raj Bullubh Sen*(1). There, a claim was rejected in the attachment in execution of a decree for rent, the judgment-debtor paid off the decree and no sale was held. The effect of this was that the attachment ceased and any rights of the claimant became valid and she had no need to bring a suit to establish them. The learned Judges based their decision on the fact that the decree was paid off, and in fact differed on that ground from the lower Court. Were it otherwise, the case may be said to be conclusive only as to the proceedings to which it relates. Reference may here be made to the passage in the judgment of SADASIVA AYYAR, J., in *Velu Padayachi v. Arumugam Pillai*(2). He says at page 402 :

"The auction purchaser is entitled to take advantage of the order against the claimant in such a case (if it is not set aside by a suit

(1) (1882) I.L.R., 8 Calc., 279.

(2) (1920) 38 M.L.J., 397.

within one year) not because the purchaser is the representative of the decree-holder but because the order which established the right of the decree-holder to bring the property to sale against the claim of the claimant cannot be given effect to otherwise and was clearly intended by the legislature to have the effect of precluding the claimant from putting forward his claim again in opposition to the auction-purchaser at the sale held in pursuance of the order against the claimant."

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In *Ramasamy Chetty v. Alagiri Chetty*(1), it is clearly laid down by WALLIS, C.J., and SESHAGIRI AYYAR, J., that the effect of omitting to bring a suit is to bar the remedy. That was a case of attachment before judgment and the learned Judges say :

"The statutory suit under Order XXI, rule 63, is to establish the right which the attaching plaintiff claims in the property in dispute. This, in our opinion, is a right to attach the property in question as the property of the defendant, whenever it may be his interest to do so and the effect of not suing would be to debar him from claiming to attach such property at any future time. The fact that the attachment effected by him would, if it had not been raised previously, have come to an end by the dismissal of the suit does not affect his right to sue under Order XXI, rule 63."

I agree with my learned brother in preferring to follow the Madras decision, especially having regard to the grounds on which in my opinion the Calcutta decision was based. It is not necessary to discuss the point taken as to limitation and I therefore agree with the order proposed.

K.B.

(1) (1915) 27 I.C., 800.