

ANANTHA-  
NARAYANA  
AYYAR  
v.  
SANKARA-  
NARAYANA  
AYYAR.

and, in such cases, it is his duty to call upon the creditors to appear before him on a date fixed for the purpose to prove their allegations against the *bona fides* of the transaction. The Official Receiver should give every facility to the creditors to impugn the transactions of the insolvent which are ostensibly within three months of the insolvency.

The order of the District Judge is set aside and he is directed to restore the petition to file and dispose of it according to law.

The appellant's cost of this appeal will be borne by the second respondent.

K.R.

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### APPELLATE CIVIL.

*Before Mr. Justice Spencer and Mr. Justice Odgers.*

NARAYANASAMI CHETTY (PETITIONER), APPELLANT,

v.

VELLAYA PILLAI (SECOND COUNTER-PETITIONER),  
RESPONDENT.\*

*Mortgage—Decree for sale—Right of decree-holder to sell in execution any of the mortgaged properties—Subsequent vendee of one of the items, party to the suit—Mortgagee having a subsequent mortgage on other items—No suit on the second mortgage—Right of mortgagee to apply for sale of only the item purchased by vendee—Decree silent as to order of sale of items—Right of vendee to object to order of sale in execution—Legal right or Equitable discretion—Transfer of Property Act (IV of 1882), ss. 56 and 81.*

Where a mortgagee obtained a decree for sale on his mortgage impleading as a defendant in the suit a subsequent vendee of one of the items mortgaged, and it appeared that the former had obtained a subsequent mortgage on the other items but did not sue on the later mortgage, and he applied in execution for sale of only the item purchased by the vendee, on objection

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\* Civil Miscellaneous Second Appeal No. 46 of 1922.

being taken by the latter to the former seeking to sell only the item purchased by him ;

*Held*, that the mortgagee was entitled to execute his decree against any of the mortgaged properties ; *Amir Chand v. Bukshi Sheo Pershad Singh*, (1907) I.L.R., 34 Calc., 13, relied on ; and

that as the decree for sale was silent as to the order in which the items should be sold, the vendee who was a party to the suit had no legal right to demand in execution that they should be sold in any particular order ; *Appayya v. Rangayya*, (1908) I.L.R., 31 Mad., 419 (F.B.) and *Ramasawmy Chetty v. Madura Mill Company, Ltd.* (1916), 1 M.W.N., 265, distinguished.

A mortgagee is not bound to sue on both his mortgages simultaneously ; *Subramania v. Balasubramania*, (1915) I.L.R., 38 Mad., 927 (F.B.), relied on.

APPEAL against the order of the Court of the Subordinate Judge, Nellore, in Appeal No. 120 of 1921, preferred against the order of the District Munsif, Tiruvannamalai, in Execution Petition No. 798 of 1919 in Original Suit No. 273 of 1918.

The appellant was the decree-holder in a suit for sale on a mortgage executed on 19th May 1916 by the first defendant in favour of the assignor of the plaintiff. The second defendant was a vendee of item 2 of the mortgaged properties from the first defendant by a sale-deed executed subsequent to the suit mortgage. The plaintiff had obtained a second mortgage on the items other than the second item sold to the second defendant, but did not institute a suit on the latter mortgage simultaneously with the first suit or subsequent thereto. A preliminary decree was passed for sale of the mortgaged properties without specifying any order in which the items should be sold ; and a final decree was likewise passed for sale of the mortgaged properties or sufficient portion thereof. The decree-holder applied for execution of the decree by sale of only the second item of the mortgaged properties which had been purchased by the second defendant. The latter raised the objection in execution proceedings that the execution petition for

NARAYANA-  
SAMI  
CHETTY  
v.  
VELLATA  
PILLAI.

sale of the second item only should not be granted, that the other items not sold to him, which had been mortgaged to the plaintiff, under both the mortgages should be sold first and that if any balance of decree amount was payable, the second item might be sold, that the plaintiff ought to have sued on his second mortgage also, that in law and equity the second item should not be sold before the other items mortgaged subsequently to the plaintiff had been sold.

The District Munsif and the Subordinate Judge, on appeal, allowed the vendee's objections to prevail and dismissed the execution petition. The decree-holder preferred this Civil Miscellaneous Second Appeal.

*K. V. Ramachandra Ayyar* for appellant.

*C. Padmanabha Ayyangar* and *T. D. Srinivasachariar* for respondents.

The Court delivered the following

#### JUDGMENT.

The District Munsif's action in dismissing the mortgagee-decree-holder's execution petition because he sought to bring only the second item to sale cannot be supported. A decree-holder is entitled to execute his decree against any of the mortgaged properties [vide *Amir Chand v. Bukshi Sheo Pershad Singh*(1)].

Admittedly the respondent has no right to have the properties marshalled under section 81 of the Transfer of Property Act; nor has he as against the mortgagee the right that section 56 of the Act gives to a buyer against a seller when more properties than one are subject to a common charge. In *Tara Prasanna Bose v. Nilmoni Kahn*(2) which was a case falling under that section, the mortgagee had foreclosed and was therefore treated as representing the seller.

(1) (1907) I.L.R., 34 Calc., 13.

(2) (1914) I.L.R., 41 Calc., 418.

Nor is it alleged that the present is any case of fraud on the part of the mortgagee. The respondent as second defendant was a party to the suit and he did not at the time of the trial ask the Court to direct in the decree that the properties should be sold in any particular order.

*Appayya v. Rangayya*(1) and *Ram Dhan Dhan v. Mohesh Chander Chowdhry*(2) relate to the equitable discretion that Courts possess to direct at the time of deciding the suit in what order the mortgaged items shall be sold.

As the decree in this case is silent on the point the respondent has no legal right to demand that the decree-holder should execute his decree in any particular manner to suit the individual judgment-debtor.

*Ramasawmy Chetty v. Madura Mill Company, Ltd.*(3) is a case of marshalling. There is an observation of SRINIVASA AYYANGAR, J., that the Court has a discretion even at the time of execution to direct that, if the sale of one item would be sufficient to satisfy the decree, that item should be sold first. This observation is not applicable to the facts of the present case.

The learned Sub-Judge remarked that it was the mortgagee's fault that he did not sue on both his mortgages simultaneously. But in our opinion he was not bound to do so [vide *Subramania v. Balasubramania*(4)].

We reverse the orders of the lower Courts and direct the District Munsif to restore the petition to file and to pass orders for execution of the decree in the light of the foregoing remarks.

Costs in the District Munsif's Court and in this Court will be borne by the respondent.

K.R.

NARAYANA-  
SAMI  
CHETTY  
v.  
VELLAYA  
PILLAI.

(1) (1908) I.L.R., 31 Mad., 419 (F.B.). (2) (1883) I.L.R., 9 Calc., 406.

(3) (1916) 1 M.W.N., 265.

(4) (1915) I.L.R., 38 Mad., 927 (F.B.).