MUNICIPAL COUNCIL, SRIRANGAM v. ANANTHA SUBRAMANIA IYER.

In the result, we concur in the conclusion of the learned Sub-Judge, though with many of his reasons we do not agree. The order granting the injunction is confirmed and the appeal is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

1929, October 1.

GOWRI AMBAL ACHI (FIRST RESPONDENT), APPELLANT,

v.

P. A. L. V. V. R. RAMANATHAN CHETTIAR (PETITIONER), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 73 (1), provisos (a) and (b) and O. XXXIV, r. 14—Suit on a mortgage—Personal decree only passed, as mortgagor had no title to the property—Acquisition of title by mortgagor subsequent to the decree—Application by decree-holder to sell the property—Claim to a charge under sec. 43 of the Transfer of Property Act—Right of decree-holder to sell the property free of charge, claiming priority over other rateable decree-holders—Applicability of sec. 73 (1), proviso (b) where debt under the decree is same as under the charge.

In a suit for sale on a mortgage, the Court passed a money decree, as it held that the mortgagor had no title to the mortgage property. Subsequent to the decree, the mortgagor acquired title to the property. The decree-holder applied for execution of the decree, praying that that property might be sold in satisfaction of the charge claimed to have been obtained by him under section 43 of the Transfer of Property Act; and he further claimed on appeal, that the properties might be sold free of the charge under section 73 (1), proviso (*b*) of the Civil Procedure Code.

* Appeal Against Order No. 346 of 1927.

Held, that, in execution of a money decree, the judgment-debtor's property cannot be sold without its being first attached;

that, assuming that the decree-holder executing his money decree obtained a charge for his debt under section 43 of the Transfer of Property Act, the proviso (*b*) to section 73 (1) of the Civil Procedure Code, did not apply to this case, as the money decree and the charge refer to the self-same debt of the decree-holder;

that the decree-holder was entitled to attach and sell the property in execution of his money decree; and that Order XXXIV, rule 14 was no bar to such execution sale in this case.

APPEAL against the order of the District Court of West Tanjore in E.P. No. 11 of 1927 in O.S. No. 5 of 1924.

S. Panchapagesa Sastri (with him *P. J. Kuppanna Rao*) for appellant.—This appeal arises out of an application for the execution of a money decree. Subsequent to the decree, the judgment-debtor obtained an interest in the property which she had originally mortgaged; it was decided in this suit that the mortgagor had, at the time of the mortgage, no interest in the property and consequently a money decree was passed. Section 43 of the Transfer of Property Act does not apply because there was no subsisting contract of mortgage. The decree negatived the contract. In execution, a money decree cannot be converted into a mortgage decree. Section 73 (1), proviso (*a*) or (*b*), does not apply to this case, as the decree and charge relate to the same debt of the decree-holder. Order XXXIV, rule 14 is also a bar to this application. In execution of this decree, an application for sale without attachment is incompetent.

B. Sitarama Rao (with him *N. S. Srinivasa Ayyar*) for respondent.—Section 43 of the Transfer of Property Act applies to this case. The decree-holder is entitled to a charge on the property, as the judgment-debtor got an interest therein subsequent to the decree: see *Azizuddin Sahib* v. *Sheik Budan Sahib*(1). The contract of mortgage subsisted, even though a personal decree was obtained by the decree-holder. Under section 43 of the Act and under section 73, proviso (*b*) of the Civil Procedure Code, the decree-holder is entitled to sell the property free of the charge. If the decree-holder gets a charge after his decree, Order XXXIV, rule 14, is no bar to his

(1) (1895) I.L.R., 18 Mad., 492.

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enforcing it without another suit; *Official Receiver, Tanjore* v. *Nagaratna Mudaliar*(1), *Sunkunni Variar* v. *Vasudevan Nambudripad*(2), and *Ramaswami Naidu* v. *Subbaraya Tevar*(3). Order XXXIV, rule 14, Civil Procedure Code, is no bar to the realization in execution of a charge (1) created by the decree, (2) created by the parties after decree and (3) created by operation of law after the decree, as in this case. Security of property given in execution can be realized in execution without a suit under Order XXXIV, rule 14; see *Subramaniam Chettiar* v. *Raja of Ramnad*(4). Maintenance decrees can be enforced in execution without a suit, see *Sowbagia Ammal* v. *Manicka Mudaliar*(5). The previous decision in the suit was that there was a contract, but that it could not take effect on the property. The fact that a personal decree was passed does not put an end to the contract. Pending suit, after a preliminary decree and before final decree, section 43, Transfer of Property Act, was held to apply; *Muthuswami Pillai* v. *Sandana Velan*(6).

S. Panchapagesa Sastri in reply.—Section 73 (1), proviso (*b*) contemplates mortgagees or charge-holders, who have their mortgage or charge in respect of another debt not being the decree debt under execution. The decree-holder is, under the guise of executing a personal decree, getting his mortgage debt paid. Under proviso (*a*) to section 73 (1), if he sells subject to his mortgage, he will not be entitled to be paid anything for his debt. If he is selling free of his charge, and he gets paid out of the sale-proceeds in priority, he is not executing his decree.

Section 43 of the Transfer of Property Act does not apply to this case. After judgment, the contract is merged in the judgment.

In 18 Mad., 492, the contract of mortgage subsisted, but in this case the mortgage was put in suit and negatived; the contract of transfer in this case did not subsist after the decree.

Even if section 43 of the Transfer of Property Act applied to this case, the decree-holder had an option and he gave up his rights. His conduct in enforcing a personal decree amounts to a waiver of his mortgage right. See *Maharaj Bahadur Singh* v. *A. H. Forbes*(7).

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(1) (1925) 49 M.L.J., 643.
(2) (1926) 51 M.L.J., 239.
(3) (1925) 49 M.L.J., 490.
(4) (1917) I.L.R., 41 Mad., 327.
(5) (1917) 33 M.L.J., 601.
(6) (1926) 53 M.L.J., 218.
(7) (1929) 57 M.L.J., 184 (P.C.).

JUDGMENT.

VENKATASUBBA RAO, J.—This case raises a point of some novelty. The respondent filed a suit to enforce a mortgage. He impleaded as defendants Gowriambal Achi, the present appellant, her son and grandson. I extract the following passage from the judgment passed in that suit in April 1924:—

"It appears to me that, as a suit to enforce a mortgage, the suit must fail. Gowriambal Achi has no title to the property. The properties were left by will absolutely to Gowriambal's mother. It was recited that on the latter's death Gowriambal was to succeed to any of the properties which her mother had not alienated. Gowriambal's mother is still alive, and Gowriambal may never succeed to any of this property. I do not see how Gowriambal by her deed can create any charge on the property."

On this reasoning, Mr. Stodart, the District Judge, passed the following decree:—

"I give the plaintiff a decree for the sum claimed Rs. 6,500 with simple interest at the contract rate, namely, 12 per cent on Rs. 6,168 . . . This is a simple money decree against the first defendant Gowriambal alone. The suit as against the second and third defendants is wholly dismissed."

We are not now called on to construe the will referred to in the passage above, nor is it a part of the record before us. Nor are we at present concerned with the question whether the judgment is right or not; for the plaintiff submitted to it and it became final between the parties.

Subsequent to the passing of the decree, Gowriambal Achi's mother died and the plaintiff assumed (whether rightly or wrongly, it is needless to enquire) that she became absolutely entitled to the properties covered by the mortgage. In that view, he applied to execute the money decree passed in his favour by attachment and sale of those properties. The defendant (Gowriambal Achi) opposed the plaintiff's application, urging that it

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contravened the provisions of Order XXXIV, rule 14, Civil Procedure Code, and that the plaintiff's remedy was by way of a regular suit. This objection was overruled and the plaintiff was allowed to execute his decree. The order, dated 10th November 1926, then made on Gowriambal Achi's petition requesting that the plaintiff's application might be rejected, may be reproduced:

"The decree is very clear. It was held that the mortgage was not enforceable, as the mortgagor, i.e., the judgment-debtor had no right to the property mortgaged. Only a simple money decree was passed. In execution of this simple money decree, the properties which were originally mortgaged and to which the judgment-debtor became entitled by inheritance subsequently are attached and are brought to sale. Order XXXIV, rule 14 has no application. There is no mortgage subsisting and the claim did not arise out of the mortgage. Decree-holder need not file a fresh suit. Petition is dismissed with costs."

The plaintiff now conceiving that a higher right accrued to him and that he had been mistaken in applying for attachment, presented a petition to the Court stating that his execution petition was not pressed. Thereupon, the Judge recording that the petition was not pressed made an order dismissing it. This happened on the 15th January 1927.

The next step taken by the plaintiff is the one with which we are concerned. He presented Execution Petition No. 11 of 1927 on which the order under appeal was made. In column 7 of that petition, the plaintiff gives the reason for his abandoning his previous execution application:

"But the said execution petition did not correctly set out the charge which this decree-holder had obtained over the immovable properties mentioned hereunder after the death of judgment-debtor's (first defendant's) mother by virtue of section 43 of the Transfer of Property Act. So the petition was not continued."

He then prays in column 10 that the amount due to him under the money decree may "be realized by the

sale of the judgment-debtor's immovable property." He adds a further prayer, which, in truth, is the same as the first, in different words

"that the properties hereunder mentioned may be sold in satisfaction of the charge which the decree-holder has obtained over the properties since the judgment-debtor became absolutely entitled to the same."

Now, the basis of this application is the right which, under section 43 of the Transfer of Property Act, the plaintiff conceived he obtained, by reason of the power to perform the contract, subsequently acquired by Gowri Ambal Achi. The learned Judge held that execution could be granted in the form prayed for and made an order accordingly. It is this order that is attacked in this appeal.

The plaintiff's application was clearly misconceived. In execution of a money decree, the judgment-debtor's property cannot be sold without its being first attached. No doubt, the plaintiff's contention is that the mortgage in his favour can take effect as against the property acquired by the defendant subsequent to the decree. But this does not enable him to bring the property straightway to sale, when the decree he seeks to execute is an ordinary money decree. The order of the lower Court cannot therefore be sustained; nor, as I understand Mr. Sitarama Rao, the respondent's counsel, does he seriously contend that it is right.

He is therefore driven to present his case thus. He says in effect: treat my application as one for attachment but coupled with a prayer under section 73 (1), proviso (*b*) of the Civil Procedure Code. I should be disposed to comply with this request if his application was legally competent. The reason for the present course he adopts is this. If the Court makes a bare order of attachment, the respondent thinks, in the

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circumstances, it confers no benefit on him; and it is in that view he abandoned his previous execution application. The fact is, there are other creditors of the defendant who have either attached or threaten to attach these properties. That being so, the plaintiff's right, in the event of a sale taking place, is merely to share the proceeds rateably. The plaintiff, therefore, in order to obviate this result, has had to invoke the aid of section 73 (1), proviso (*b*) of the Civil Procedure Code.

The first clause of section 73 lays down the conditions for rateable distribution. Then follow two provisos:—

(*a*) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale;

(*b*) where any property liable to be sold in execution of a decree is subject to mortgage or charge, the Court may with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold.

The plaintiff puts his case thus: The property he seeks to attach has become under section 43 of the Transfer of Property Act subject to his mortgage. He agrees to its being sold free of that mortgage. In that event, his mortgage right becomes transferred to the sale-proceeds which he can then draw out from Court. The argument is ingenious, but totally unsound. In my opinion, to a case like the present, these provisos do not apply at all.

It is first contended by Mr. Panchapagesa Sastri for Gowri Ambal Achi that these rules have not been enacted as independent or substantive provisions but only as provisos, and unless, therefore, the case is one of rateable distribution under the main part of the section, these rules do not apply at all; in other words,

when there are no rival decree-holders, a case cannot arise which calls into play the rules enacted in the provisos. I doubt if this contention is correct, though I express no decisive opinion on the point. Supposing there is a single decree-holder who attaches a property, why should a person holding a mortgage upon it not be entitled to the benefit of this proviso? By enacting the rule in the form of a proviso, is it intended to deprive such a person of this right? But, as I have said, I do not propose to pursue this enquiry.

The case now arises, however, in a different form. The provisos, of course, apply when there are several decree-holders; this is not disputed. It may be granted that they also apply when there is a single decree-holder and another person who is a mortgagee. I am also prepared to assume that they are applicable when the decree-holder and the mortgagee happen to be the same person provided the decree debt and the mortgage debt are two distinct and different debts. But in this case, whether you refer the debt to the decree or to the mortgage, it is the self-same debt. To such a case, the rules in question cannot be reasonably applied. Can the application by the plaintiff be termed in any sense an execution application at all? To execute a decree is to carry that decree into effect for obtaining satisfaction of it. In this case, the plaintiff, under the guise of executing his decree, gets his mortgage satisfied. This is just a pretence of execution, for if along with the mortgage the decree also gets satisfied, the result is but fortuitous and incidental. A case of this kind is of rare occurrence. The case that most nearly resembles this is that which comes within the mischief against which Order XXXIV, rule 14, is directed. *A* mortgages his property to *B* to secure repayment of a sum of money. *B* sues *A* to recover that sum and obtains a personal

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decree against *A*. *B* then applies for attachment and sale of *A*'s interest in the mortgaged property in execution of the money decree and the sale must be refused under this rule. The abovementioned case is of the usual kind; but owing to the peculiar facts before us, as I shall show presently, that rule does not here operate as a bar and the sale can be allowed. But when the two debts are identical, in other words, when there is a single debt, does it make sense to say, that the decree-holder can sell the property either subject to his mortgage or free of it? Let us suppose that he sells the property subject to his mortgage and that it fetches say a thousand rupees at the sale. Can he touch a rupee of this money? Obviously not, for the decree debt springs from the mortgage and the sale being admittedly subject to it, he has no right to proceed against any part of the money. Let us next suppose that he sells the property free of his mortgage and that it realizes a sum which exceeds the mortgage amount. Has he any right to any part of the excess sum? The answer is again in the negative. In short, the decree-holder diverts the execution proceedings from their true object and turns them to a wrong end. This, the Courts will not permit, and I am therefore clearly of the opinion that the second proviso to section 73 (1) does not apply.

The question then remains, can the plaintiff merely attach the property and bring it to sale? As I have already pointed out, he made a previous application to that effect and it was granted. That is a decision between the parties and is binding upon them. Apart from that, Order XXXIV, rule 14, does not stand in the plaintiff's way. In the suit, it has been decided that there is no mortgage at all and it therefore follows that the decree is not "for the payment of money in satisfaction of *a claim arising under the mortgage.*" This

decision, right or wrong, binds the parties and for the present purpose it may be conclusively taken that the claim is not one that arises *under* the mortgage. This point is conceded by Mr. Panchapagesa Sastri and requires no further discussion. But the plaintiff, as I have already shown, is not satisfied with a bare order that he can attach and sell the property. But, if he is so advised, he may apply to the lower Court for such an order and as the application cannot be opposed (as Mr. Panchapagesa Sastri concedes), that Court may grant it and direct attachment and sale in the usual course.

In the result neither of the applications of the plaintiff (the one made to the lower Court or the one made to us), is competent and the appeal is allowed, but, in the circumstances, we make no order as to costs.

Before closing, I may add that, in the view I have taken, it is unnecessary to discuss whether section 43, Transfer of Property Act, applies to the facts or not. That is a point which must be left to be considered in any regular suit which the plaintiff may choose to file.

MADHAVAN NAIR, J.—I agree.

K.R.