

APPELLATE CIVIL.

Before Mr. Justice Dunkley.

O.R.M. RAMASWAMY CHETTYAR

v.

U TUN THA AND ANOTHER.*

1939

Dec. 5

Mortgage decree—Claim to mortgaged property—Denial of title of judgment-debtor—Civil Procedure Code, s. 47, O. 34—Remedy of claimant—Execution of money decree—Attachment of judgment-debtor's property—Intervention by a claimant—Execution of mortgage decree by sale—Claimant's remedy—Declaratory suit or resistance to possession.

Where a person alleges that he is the owner of a certain mortgaged property and that the mortgagor was not competent to make the mortgage, and that therefore the mortgage decree passed in the case was a decree which ought not to have been made, the question does not fall within the ambit of s. 47 of the Code of Civil Procedure as a question relating to the execution discharge or satisfaction of the decree ; it is an objection to the validity of the decree itself.

There is an essential difference between the execution of a decree for money by the sale of property and the execution of a decree for sale of property specified in the decree. In the first case any third person, or the representative of the judgment-debtor where the judgment-debtor is dead, can intervene in the execution of the decree and show that the decree could not be executed against particular property, if that property was not the property of the judgment-debtor but was the property of the person opposing. Where, however, the decree is a decree for sale under O. 34 of the Civil Procedure Code, the Court executing the decree must sell the property decreed to be sold and leave any one objecting to such remedies as he may have by way of suit or by resistance to the possession of the purchaser.

Sameal Das v. Bismillah Begam, I.L.R. 19 All. 480, followed.

Jagar Nath v. Sheo Ghulam, I.L.R. 31 All. 45 ; *Liladhar v. Chaturbhuj*, I.L.R. 21 All. 277 ; *Zamindar of Karvetnagar v. Dossji Varu*, I.L.R. 32 Mad. 429, referred to.

P. B. Sen for the appellant.

Twa Aung for 1st respondent.

DUNKLEY, J.—This second appeal arises out of a mortgage suit which was brought in the Township Court of Yesagyö. In this suit the present appellant was

* Civil 2nd Appeal No. 163 of 1939 from the judgment of the District Court of Pakökku in Civil Appeal No. 18 of 1938.

the plaintiff-mortgagee and the defendants-mortgagors were Ma Bon Lon and Ma Khin Kywe. The appellant obtained a final mortgage decree for sale of the mortgaged property on the 29th July, 1937, and on the 3rd August, 1937, he applied for the sale of the property. Before further steps could be taken Ma Bon Lon died, and her son, U Tun Tha, was then made a party as her legal representative. He is the first respondent in this appeal and Ma Khin Kywe is the second respondent. When he was made a party he presented a petition objecting to the sale of the mortgaged property under the final mortgage decree on the ground that the property belonged solely to him and that the mortgagors had no right title or interest therein. On this petition the learned Township Judge, on the 30th October, 1937, passed the following order :

“ The house was mortgaged by Ma Bon Lon and her daughter and against both the decree has been passed. U Tun Tha, the present objector, asserts title to the house. His remedy clearly lies in a declaration suit.”

This was a perfectly correct order, which, unfortunately, has been reversed on appeal to the District Court.

Following upon this order, the learned Township Judge directed that the property be proclaimed for sale and the proclamation was duly issued, and in pursuance thereof the mortgaged property was sold on the 18th December, 1937, and was purchased by the appellant. Of course, what the appellant purchased was the right title and interest of the mortgagors in the mortgaged property.

Against the learned Township Judge's order of the 30th October, 1937, an appeal was filed in the District Court, and the ground taken in the appeal was that U Tun Tha, as the legal representative of the deceased mortgagor, was the representative of a party to the suit,

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within the meaning of section 47 of the Civil Procedure Code, and this question, as to whether the mortgagors had a title to the property or whether the property belonged to him, was a question relating to the execution, discharge or satisfaction of the decree, and that consequently his objection must be determined by the Court executing the decree and a separate suit by him, as directed by the learned Township Judge, would not be maintainable. As I have said, this appeal was allowed by the learned District Judge, and he reversed the order of the learned Township Judge and directed the Township Court to hold an inquiry into the objection of the first respondent. This has now been done, and on the facts the learned Township Judge has found that the first respondent has established his title to the mortgaged property. This decision again has been taken on appeal to the District Court and has been upheld by the District Court, and it is to the last sentence of the judgment of the learned District Judge to which special attention must be directed. This sentence is :

“ The order of the Township Court should have included a direction that the sale of the properties held on the 18th December 1937 is set aside.”

Consequently, the result of these proceedings is that on the application of the first respondent the sale of the mortgaged property, as directed in the final mortgage decree, has been declared a nullity.

That is clearly an impossible situation. It is not contended that the legal representative of a deceased party is not the representative of a party, within the meaning of section 47 ; nor is it contended that any of the authorities cited by the learned District Judge in the earlier appeal have not been correctly decided. But it is urged on behalf of the appellant that these

authorities have no application to the present case, and with this contention I must agree. The learned District Judge failed to comprehend the distinction between a money decree, which is followed by attachment of property and after attachment sale of that property in execution of that decree, and a mortgage decree which itself directs that the mortgaged property shall be sold. The petition of the first respondent was to the effect that he was the owner of the mortgaged property and that the original mortgagors were not competent to make the mortgage and that therefore the mortgage decree was a decree which ought not to have been made. The question which he raised was not a question within the ambit of section 47 of the Civil Procedure Code, namely, a question relating to the execution, discharge or satisfaction of the decree, but was an objection to the validity of the decree itself.

In *Sauwal Das v. Bismillah Begam* (1) a Bench of the Allahabad High Court said this :

“ If there is one point on which we believe there is general concurrence of opinion in the High Courts of India, it is that a Court executing a decree cannot take upon itself to alter or vary that decree. Its powers are confined to construing a decree when necessary and executing a decree in its terms so long as the law allows the decree to be executed. There is an essential difference between the execution of a decree for money by the sale of the property and the execution of a decree for sale of property specified in the decree. In the first case any third person can intervene in the execution of a decree and show that the decree could not be executed against particular property, if that property was not the property of the judgment-debtor, but was the property of the person opposing. Similarly, in the case of a decree for money where the judgment-debtor dies, his representative is entitled to oppose the execution of the decree against any particular property by showing that that property was not the property of the judgment-debtor and was

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the property of the representative, as for example, that it was his self-acquired property. That course can be taken by a stranger or a representative in execution of a decree for money for this reason, that a decree for money is not based upon any adjudication that the particular property, or in fact any property, which may subsequently be brought to sale in execution of the decree, was the property of the judgment-debtor, or property which would be liable to his debts. Consequently, when such objection is taken before the Court executing a decree for money, that Court has power to inquire into and decide on any such objection taken to the execution of the decree against any particular property. Where, however, the decree is a decree for sale under the Transfer of Property Act (now replaced by Order XXXIV of the Civil Procedure Code), the Court executing the decree must sell the property decreed to be sold and leave any one objecting to the execution of the decree against that particular property to such remedy as he may have by a suit or by resistance to the possession of the purchaser."

With these observations I respectfully agree. The decisions in the cases of *Liladhar and others v. Chaturbhuj and others* (1), *Jagar Nath Singh and another v. Sheo Ghulam Singh* (2) and *Sreeman Maha Mandaleswara Katari Salva Maharaja Umade Rajah Maharaja Raje Kumara Tirumalaju Bahadur Deva Maharajulungaru, Zamindar of Karvetnagar v. Sree Mahant Dossji Varu, Trustee of Tirumalai, Tirupati, etc., Devasthanams* (3) are to the same effect.

The decision of the learned District Judge in the earlier appeal before him was therefore wrong. This decision has been canvassed before me in the present appeal and the appellant undoubtedly has a right to raise this point now, because the decision of the learned District Judge in the earlier appeal was a decision of a preliminary matter directing that the inquiry before the Township Court should proceed. The order of the learned Township Judge of the 30th October, 1937,

(1) (1898) I.L.R. 21 All. 277. (2) (1908) I.L.R. 31 All. 45.

(3) (1908) I.L.R. 32 Mad. 429, 438, 439.

directing the first respondent to his remedy by a separate suit, was a correct order.

This appeal is therefore allowed, the judgments and decrees of the District Court of Pakôkku in Civil Miscellaneous Appeals Nos. 1 and 18 of 1938 and the judgment and order of the Township Court, dated the 27th September, 1938, are set aside and the sale of the mortgaged property to the appellant, which took place on the 18th December, 1937, is confirmed. The appellant must have his costs against the first respondent in all three Courts, advocate's fee in this Court five gold mohurs. The Township Court is now directed to issue a sale certificate to the appellant and to take all other necessary steps to complete the execution of the final mortgage decree.

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