Kotrike Venkata Ramiah Chetty Vs. Chinna Pulliah and anr.

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Court : Chennai

Decided On : Jul-11-1949

Reported in : AIR1950Mad41

Judge : Raghava Rao, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 21, Rules 92, 99 and 103

Appeal No. : Second Appeal No. 1121 of 1946

Appellant : Kotrike Venkata Ramiah Chetty

Respondent : Chinna Pulliah and anr.

Advocate for Def. : K. Srinivasa Rao, Adv.

Advocate for Pet/Ap. : P. Chenchiah, ;V.S. Narasimhachari and ;N. Appu Rao, Advs.

Disposition : Appeal allowed

Judgement :

Raghava Rao, J.

1. This second appeal arises out of a suit for recovery of money on foot of failure of consideration for a transfer in favour of the father of the plaintiffs of a certain mortgage right. The defendant against whom the Courts below have decreed the suit is the transferor of the mortgage right.

2. The facts relevant to the determination, of the two questions of law which have been, argued before me lie in a short and narrow compass. One Karnam Appiah effected a simple mortgage of certain properties in favour of one Ranga Reddi in 1929, having become the owner thereof by a sale-deed from the original owner Sitaveerayya. In 1934 Ranga Reddi transferred the mortgage right to the defendant who in his turn transferred it later to the plaintiff's father, one Baliah. After Baliah's death the plaintiffs obtained a decree against the original mortgagor, Appiah, and in execution purchased the hypotheca themselves. The sale was duly confirmed and full satisfaction of the decree recorded by the execution Court. When, thereafter, the plaintiffs sought to obtain delivery, they found themselves obstructed by a third party, one Reddi Narayana Reddi, against whom they consequently filed a petition for removal of obstruction, which was, however dismissed. Thereupon they instituted the present suit to which the answer made so far as is material to this appeal was that they had a double hurdle in their way fatal to the action. Firstly, they had not pursued their remedy of suit under Order 21, Rule 103, Civil P. C. Secondly, they had not got

the order confirming the sale set aside or the order recording full satisfaction vacated. The answer did not find favour with the Courts below. The defendant therefore appeals to this Court. Mr. Chenchiah, his learned counsel, has raised the two points again here before me.

3. Mr. Srinivasa Rao for the respondents has tried to meet the first of the points by urging that the provision of Order 21, Rule 103, Civil P. C., with reference to the institution of a suit for setting aside an order made under Rule 98, 99 or 101 is only a permissive and not a mandatory provision, as the use of the word 'may' therein suggests, and that the order under Rule 99 in the present case is sufficiently efficacious to prove conclusively the absence in the defendant of the title which the latter had purported to convey to the plaintiffs' father, nonetheless and in fact the more so because of plaintiffs' failure to follow up the summary order by the statutory suit. This argument in my opinion misses the real spirit and purpose of the provision in Rule 103. The order does, no doubt, become conclusive, but only as between the parties to it, unless displaced by the result of the suit to be instituted by the party against whom the order is made. Of course, he may or may not institute the suit; but if he does not, the order becomes conclusive in favour of his adversary. That does not mean that as against persons who are not parties to the order it can be held up by the party against whom it is made, as in this case is being done by the plaintiffs, as conclusively proving the absence of any title in himself in the property in question and as affording him a cause of action on the basis of such want of title. The order relied upon by the plaintiffs is after all a summary order which the execution Court made because it was satisfied--and that was all that it had to be satisfied about--that the obstruction was occasioned by a person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account. No question of title could be gone into at that juncture nor was any such question decided by the order. In these circumstances, I should have thought it incumbent on the plaintiffs prima facie to institute the suit under Order 21, Rule 103, Civil P. C., before they could claim that the consideration paid by their father for the defendant's transfer of the mortgage right to him had failed and failed finally. But says Mr. Srinivasa Rao :

'If you looked into the summary order in the present case, you would find how futile it should have been for my clients to resort to a suit which was bound to fail in view of the very conclusive documentary evidence relied upon by the learned District Munsif in his order.'

The reference is to certain documents said to evidence an attachment of the suit properties effected as long ago as 1929 by a certain decree-holder against the original owner Sitavirayya, a claim made by Karnam Appiah in connection with that attachment, the rejection of that claim by the execution Court, and the institution by Appayya of a regular suit to have the order of rejection set aside which was eventually dismissed. It is contended by Mr. Srinivasa Rao that these documents would have created an insurmountable obstacle in his clients' way, had they filed a suit under Order 21, Rule 103, Civil P. C., and that I must accordingly hold them relieved of the obligation which they might ordinarily be under to file such a suit and hold the failure of consideration for the transfer of the mortgage right in favour of the plaintiffs' father completely established. The argument is unsound for two reasons. In the first place, the documents are not before the Court in the present litigation, and a mere reference to them or a statement of facts supposed to be proved by them in a prior judicial order, not inter partes cannot be evidence of such facts. Moreover, as the learned District Munsif who made the summary order, EX. D. 2, himself observes,

therein, the proceedings evidenced by those documents are all subsequent to the mortgage by Appayya in favour of Ranga Reddi, the rights in respect of which became the plaintiffs' eventually by progress of title through successive links and would not be binding on them. They would therefore have been open to attack by the plaintiffs in a regular suit under Order 21, Rule 103, had they filed one. They have not filed such a suit, nor have they proved conclusively enough in the present suit that Appiah had no right to effect the mortgage which they became entitled to in due course. In these circumstances I accept the first contention of Mr. Chenchiah as well founded.

4. The second contention of Mr. Chenchiah is sought to be supported by the authority of the rulings in Muthukumaraswami Pillai v. Muthuswami Thevan 50 Mad. 639 : A.I.R. 1927 Mad. 394, Keshavan v. Bipathumma : AIR1935Mad340 and Amarnath v. Chhotelal Durgaprasad : AIR1938All593 . Before I deal with the argument founded on these decisions, it may be as well to deal with a point of view founded on the Full Bench ruling of this High Court in Macha Koundan v. Kottara Koundan 59 Mad. 202 : A.I.R. (1936) Mad. 50 which met with acceptance by the Courts below as conclusive of the present case, but which in my opinion is not, strictly speaking, so. That point of view is that because, as held by the Full Bench, a stranger auction-purchaser who loses possession of the property purchased by him on account of the paramount title of a third party is entitled to recover by suit against the decree-holder the price paid at the auction on the ground of failure of consideration owing to the utter absence of any title in the judgment-debtor to the property sold in execution, it follows that the plaintiffs, the decree-holders-auction-purchasers-in the present case, are entitled to recover from the defendant in enforcement of the covenant for title in favour of their father the amount of consideration paid by their father for the defendant's transfer of the mortgage right to him which ultimately resulted in the mortgage decree and the execution sale thereunder which has become ineffective or account of obstruction to delivery of possession to them occasioned by a third party. In my opinion, there is no adequate parity of facts between the case decided by the Full Bench and the situation which fell to be dealt with by the Courts below in this case such as would attract the Full Bench decision to this case. In fact, different considerations so arise here which did not complicate the case before the Full Bench. Mr. Chenchiah has attempted to attack the Full Bench ruling as requiring re-consideration and has drawn my attention to the case reported in Amarnath v. Chhotelal Durgaprasad : AIR1938All593 in which a Full Bench of five Judges of the Allahabad High Court disapproved of this High Court's Full Bench ruling in Macha Koundan v. Kottara Koundan, 59 Mad. 202 : A. I. R. 1936 Mad. 50 after a very exhaustive discussion of the entire case-law on the point and of the juristic principle pertinent to the point. The warranty of title in a judicial sale even to the limited extent recognised in our Full Bench ruling is not accepted by the Allahabad Full Bench according to which the doctrine caveat emptor qui ignorare non debuit quod jus alienum emit--let a purchaser, who ought not to be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution -- must have unqualified operation in all cases of sales in execution held under the present Code of Civil Procedure which contains no such provision as that of Section 315 of the earlier Code. I do not propose to assess the merits of this argument of Mr. Chenchiah, firstly, because I am bound by the Full Bench decision of this Court which, I may observe, embodies undoubtedly a more equitable view than that of the fuller Bench of the Allahabad High Court, and secondly, because in my opinion the decision of the Full Bench affords on the facts here no conclusive, logical ground for the kind of analogical deduction which the Courts below have made from it.

5. Putting aside the Full Bench ruling in this view, I have to consider next the rulings in Muthukumaraswami Pillai v. Muthuswami Thevan, 50 Mad. 639 : A. I. R. 1927 Mad.394, Keshavan v. Bipathumma : AIR1935Mad340 and Amarnath v. Chhotelal Durgaprasad : AIR1938All593 which Mr. Chenchiah craves in aid of his submission that so long as the auction sale in execution of the mortgage decree stands and until it is set aside by an appropriate application made for that purpose to the execution Court, which so far has not been made, and which if made hereafter, will be beyond time under Article 166, Limitation Act, the plaintiffs cannot maintain the present action against the defendant for recovery of money which their father had paid him by way of consideration which subsequently failed, as they would have it, on account of the obstruction from a third party in the matter of delivery of possession to them pursuant to the auction-purchase. It is true that, as pointed out in the rulings relied upon by the learned counsel, as between parties to the auction purchase the sale by virtue of its confirmation becomes absolute and all matters decided in the proceedings concluded by the sale certificate, such as satisfaction of the decree are res judicata. But, does it follow that a person like the defendant who was not a party to those proceedings or even to the subsequent order under Order 21, Rule 99, Civil P. C., would either be bound by or entitled to take advantage of the result of such proceedings or of such order? In my opinion, the answer is No. The gist of the action against the defendant, which is no more and no less than that the execution sale in favour of the plaintiffs has become futile and fruitless by the effective assertion of a title paramount by a third party, entails no reopening of anything decided in the presence of the defendant by the court auction sale or the proceedings prior thereto; nor does it put the plaintiffs under the necessity to have the sale set aside which was held quite regularly, although as now transpires, without sufficient title in the judgment-debtor. There are, further, no provisions in the Civil Procedure Code which either justify or warrant any attempt on the part of the plaintiffs to have the sale set aside, of which, it may be said, they have not availed themselves.

6. In the result, accepting the first and rejecting the second of the contentions raised by the appellant, I allow the appeal and dismiss the suit with costs throughout. No leave.