
(1923) 09 MAD CK 0003

Madras High Court

Case No: None

Naraynaswami Chetti

APPELLANT

Vs

Vellaya Pillai

RESPONDENT

Date of Decision: Sept. 12, 1923

Acts Referred:

- Transfer of Property Act, 1882 - Section 81

Citation: AIR 1924 Mad 366

Judgement

1. The District Munsif's action in dismissing the mortgage decree-holder's execution petition because he sought to bring only the 2nd item to sale

cannot be supported. A decree-holder is entitled to execute his decree against any of the mortgaged properties vide Amir Chand Bukshi Sheo

Pershad Singh (1906) 34 Cal. 13.

2. Admittedly the respondent has no right to have the properties marshalled u/s 81 of the Transfer of Property Act; nor has he as against the

mortgagee the right that Section 82 of that 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 Khan (1913) 41 Cal. 418 which was a case falling under that section, the mortgagee had foreclosed and was

therefore treated as representing the seller.

3. Nor is it alleged that the present is any case of fraud on the part of the mortgagee. The respondent as 2nd defendant was a party to the suit and

he did not at the time of trial ask the Court to direct in the decree that the properties should be sold in any particular order.

4. Appayya v. Rangayya (1908) 31 Mad. 419 and Ram Dhun Dhur v. Mohesh Chunder Chowdhry (1883) 9 Cal. 406 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.

5. 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.

6. Ramaswami Chetti v. Madura Mill Co. Ltd. (1916) 1 M.W.N. 265 is a case of marshalling. There is an observation of Srinivasa Iyengar, 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.

7. The learned Subordinate 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 (1915) 38 Mad. 927.

8. 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.

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