

(1918) 08 MAD CK 0025

Madras High Court

Case No: None

T.V. Vedavyasa Aiyar

APPELLANT

Vs

The Madura Hindu
Labha Nidhi Co. Ltd.
and Others

RESPONDENT

Date of Decision: Aug. 19, 1918

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 89

Citation: (1919) ILR (Mad) 90 : (1918) 35 MLJ 639

Hon'ble Judges: Phillips, J; Kumaraswami Sastri, J

Bench: Full Bench

Judgement

Kumaraswami Sastri, J.

The 12th defendant is the appellant. Defendants 1 and 2 mortgaged certain items of property to one Naga Iyer

who filed O.S.S. No. 61 of 1910 on the file of the Court of the Principal District Munsif of Madura to recover the sum due on his mortgage. He

impleaded the puisne mortgagees, one of whom was the present plaintiff Nidhi. A decree was passed in Form 7, Appendix D of the Code of Civil

Procedure. The amounts due to the plaintiff in the suit and the puisne mortgagee defendant were declared but the sale of the mortgaged properties

was ordered only in case the defendant did not pay the amount found due to the plaintiff and" the only right given to the puisne mortgagees was to

share in the surplus if any arising out of the sale. One of the items of property was brought, to sale in execution of the decree but the. plaintiff

decree-holder was satisfied as the amount due was paid under Order XXI, Rule 89 of the CPC and the sale set aside. The property was sold by

private sale to the appellant. As he did not pay the amount found in O.S.S. No. 61 of 1910 to be due to the 1st respondent herein he sued for the

recovery of the amount due to him as his mortgagor. Various defences were raised the chief of which were (1) that the remedy of the plaintiff was

by executing the decree in O.S.S. No. 61 of 1910 and not by separate suit and (2) that the second suit was barred the matter being res judicata.

The Subordinate Judge overruled the objections raised and passed a decree which was confirmed by the District Judge.

2. I am of opinion that the decision of the lower courts is right. No. doubt the present plaintiff Nidhi was a party to O.S.S. No. 61 of 1910 as a

puisne encumbrancer and the amount due to it was ascertained. The decree however did not direct redemption of the subsequent mortgagees and

expressly authorised sale only in case the amount due to the first mortgagee was not paid within the time limited. The only right given to the puisne

encumbrancers was the right to redeem the first mortgage and on sale to share in the surplus sale proceeds in order of priority.

3. In Sarat Chandra Boy Chowdhury v. Nahapiet ILR (1910) C. 907. the effect of a decree drawn up under Form 7, Appendix D of the Code

was considered and Pugh, J. was of opinion that there was no right conferred in the mortgagee to get any relief at all if the mortgagor satisfied the

first mortgagees claim. He observed "" In my view, therefore, under the Code, second mortgagee is there simply for the purpose as indicated by

Brett and Mookerjee, JJ. in Mackintosh v. Watkins (1904) 1 Cal. L J. 31 of receiving any surplus sale proceeds or of redeeming, and that he

cannot take any independent action and treat the decree as in other respects in his favour."" Referring to Kissory Mohan Roy v. Rally Churn Ghose

ILR (1899) C. 100. the learned Judge distinguished the case on the ground that it related to a decree passed as in the Original Side of the High

Court and in *Mackintosh v. Watkins* (1904) 1 C.L.J. 31 Brett, J. took the view that the practice and procedure followed on the Original Side was

not to govern decrees passed by Courts in the mofussil which are governed by the CPC and the Transfer of Property Act.

4. In *Mackintosh v. Watkins* (1904) 1 C.L.J. 31 it was held by Brett and Mookerjee, JJ. that in a suit by a first mortgagee impleading the

mortgagor and the puisne mortgagees the mortgagor cannot be called upon to redeem the subsequent mortgagee defendants and that they are not

entitled to have the property sold for non-payment of the sutras due to them. Brett, J. observed that the object of impleading the puisne mortgagee

was to enable the property to be sold free from his encumbrance and "" not to enable him to practically obtain a decree against the principal

defendant without bringing a suit properly framed for the purpose"". The learned Judge was also of opinion that such a procedure would be

opposed to the provisions of Chapter III of the Court Fees Act. Mookerjee, J. was of opinion that Sections 86 to 89 of Transfer of Property Act

do not provide that the mortgagor may be called upon by the decrements to pay to a puisne encumbrancer who has been joined as a party

defendant, what may be found due to him on his mortgage; the mortgagor, therefore, cannot incur the liability to have his property sold by reason

of non-payment of the dues of the subsequent encumbrancer. "" He held that if the mortgagor defendant pays to the plaintiff mortgagee what may

have been found due to him the property was not liable to be sold under the decree in the suit at the instance of the second mortgagee. In

Sururjigur Begum v. Baredakant Mitter (1910) 11 C.L.J. 563 : ILR 37 Cal. 526 the same learned Judge was of opinion that if the amount due to

the first mortgagee was paid there can be no sale of the mortgaged properties and the puisne encumbrancers would obtain no relief in the suit.

5. It is contended for the appellant that in a mortgage suit when puisne encumbrancers are made parties defendants there is a decree in favour of

each of the mortgagees which can be executed by him and reliance has been placed on Govinda Taragan v. Veeran ILR (1911) M. 32. and the

unreported decision in A. A.O. No. 87 of 1917. I do not think these decisions support the broad propositions contended for. The former case

related to a suit for redemption of a mortgage and it was held that paragraph 2 of Section 93 of Transfer of Property Act did not take away the

right from the plaintiff mortgagor to apply for a sale. The learned Judge after discussing the right of the mortgagor and mortgagee and "" where a

decree is imperative there is no reason why the decree should not be regarded as passed for the benefit of all the parties to the suit. They thought

there was no reason for holding that any of the parties to the suit who would be benefited by the sale cannot apply for the enforcement of the

decree. It should be observed that the suit was between mortgagor and mortgagee and no question arose as to the rights of puisne encumbrancers.

The decree was for redemption and the only question was whether it was open to the plaintiff in a redemption suit to apply for sale under Sections

92 and 93 of the Transfer of Property Act. In the present case there is nothing in the decree directing the mortgagor to pay off the subsequent

mortgagees. The decree no doubt declared the amount due to them but this was only with the view of enabling them to share in the surplus should

the property be sold owing to non-payment of the sum due to the plaintiff who was the first mortgagee. The right of the subsequent mortgagees

under the decrees drawn up according to Form 7 Appendix D of the CPC is contingent on the property being brought to sale for non-payment of

the sum found due to the plaintiff mortgagee and the decree cannot be read as a decree directing the mortgagor to redeem each of the puisne

encumbrancers within the time limited for redeeming the first mortgagee and to entitle the puisne encumbrancer on default to bring the property to

sale for non-payment not of the sum decreed due to the first mortgagee but to each of them. The utmost that can be said is that if the first

mortgagee for some reason or other does not apply for sale in spite of the fact that he has not been paid the mortgagees can apply for sale in order

to work out the rights to share in the surplus if any. This is quite different from their applying to sell the property to discharge the amount declared

due to each of them. If the mortgagor pays off the amount for which alone a sale in default of payment was directed it is difficult to see how under

the express terms of the decree each puisne encumbrancer can come forward and ask for sale. No time is fixed in the decree for redeeming them.

There is no direction in the decree directing the mortgagee to pay them any amount and the right to share which is dependent on there being a sale

an(sic) surplus after paying off the plaintiff mortgagee cannot be enforced if for any reason the sale cannot take place at the instance of the plaintiff.

Reference has been made to the English practice as set out in *Platt v. Mendell* (1884) L.R. 27 Ch. D. 246. and *Daniell's Chancery Practice* but it

is unnecessary to consider whether having regard to the provisions of the Transfer of Property Act Courts in India can pass a decree directing

plaintiff to redeem each of the puisne mortgagees and direct a sale at the instance of each of them in case of his failure to do so. No such decree

has been passed in the present case In Appeal against Appellate Order. No. 87 of 1917 the sub-mortgagee applied to enforce the decree in

favour of his mortgagor who was the mortgagee from the owner of the property. All that was held was that he was entitled to apply for execution

and to work out his rights by the sale of the property. The sale was to be for the amount directed in the decree to be paid by the original mortgagor

to the mortgagee who in turn sub-mortgaged the property to the defendant. There is nothing in the judgment which suggests that puisne mortgagees

should be treated as decree-holders entitled to bring property to sale in default of payment of the sum declared to be due to them though the

decree contains no direction that they should be redeemed or that property should be sold in default of payment of the sums declared to be due to

the puisne mortgagees. The sub-mortgagee is an assignee of the original mortgagee and his being allowed to work out his rights by doing what his

mortgagor could have done would not confer similar rights on third parties claiming on their own right.

6. As the 1st respondent was not entitled to execute the decree in O.S.S. No. 61 of 1910, Section 47 of the Code of Civil Procedure has no

application.

7. As regards the question of res judicata the present suit is beyond the pecuniary limit of the jurisdiction of the District Munsif. O.S.S. No. 61 of

1910 which was on the file of the District Munsif's Court cannot render the present suit res judicata. Moreover as pointed out in Debendra Nath

Sen v. Mirza Abdul Samed Seraji (1909) 10 C.L.J. 150. a suit by a puisne mortgagee who is a party to a prior suit by another mortgagee can only

be barred if the puisne mortgagee is in a position to have his claim satisfied from the surplus sale proceeds realised in execution of the decree on

the prior suit.

8. The second appeal fails and is dismissed with costs.

Phillips, J.

9. I agree.