

(1963) 01 KAR CK 0006

Mysore High Court

Case No: Execution Second Appeal No. 55 of 1961

K.T. Venkata Gowda

APPELLANT

Vs

Devamma

RESPONDENT

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Date of Decision: Jan. 25, 1963

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 15, 34
- Transfer of Property Act, 1882 - Section 100

Citation: AIR 1964 Kar 40 : (1963) 1 MysLJ 582

Hon'ble Judges: A.R. Somnath Iyer, J

Bench: Single Bench

Advocate: H.L. Narasimha Murthy and M. Ramachandra Rao, for the Appellant; T. Krishna Rao, for the Respondent

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### Judgement

1. This is an execution appeal by Judgment-debtor 5 from the orders of the Court below allowing execution to proceed against the property of which he had become the purchaser in a previous execution sale.

2. The material facts are these:

In original suit No. 700 of 1953 on the file of the Munsiff, Mandya, a decree was made for the payment of maintenance in favour of the respondent Devamma, and as security for the payment at that maintenance a charge was created on her husband's share in the family properties. For the recovery of the maintenance which had accrued to her, the respondent brought her husband's share in seven items of properties to sale in Execution case No. 652 of 1954. On September 5, 1955, the appellant purchased those properties. In execution case No. 757 of 1959, the respondent again-brought those very properties to sale for recovery of maintenance which had accrued to her after the presentation of the previous execution application, and, the objection to the execution sought by the respondent was that the appellant's purchase of the properties in the previous execution proceedings

had wiped out the charge created by the decree in favour of the respondent and that the appellant was the owner of those properties free from any such charge. That contention was overruled by the Munsiff and the appeal from his decision to the Civil-Judge was also dismissed.

3. Mr. Narasimha Murthy contends that since the charge created by the decree was a compendious charge for the payment of the maintenance payable to the respondent under the decree, when the respondent brought the properties purchased by the appellant to sale for the recovery of the maintenance which had become due and those properties were purchased by the appellant, those properties could never again be brought to sale for recovery of the maintenance which had subsequently become due to her. He also contends that its any event the conduct of the respondent in bringing the properties to sale on the previous occasion without disclosing the existence of a charge on them in respect of future maintenance recoverable by the respondent, clearly estopped her from bringing the properties to sale once again.

4. Since the respondent did not enter appearance in this second appeal, I requested Mr. T. Krishna Rao to assist me which he readily agreed to do- I must, place on record my expression of thanks to him for the elucidation of the question of law arising in this case.

5. Mr. Krishna Rao contends that if a recurring charge was created for the payment of maintenance as was done in this case and the property on which a charge was so created was brought to-sale for recovery of maintenance which had become due, the sale of the property for the recovery of such maintenance cannot destroy the right of the decree-holder to enforce the charge in respect of the maintenance which subsequently became due.

6. Mr. Narasimha Murthy has contended that the principle of law applicable to a case of this kind is that which is applicable to a mortgage and that that is what is provided by Rule 15 of Order 34 of the Code of Civil Procedure. It was accordingly said that the principle that a purchaser in an execution sale for recovery of an amount due under a mortgage becomes the owner of the property free from encumbrances was equally applicable to the case of a purchaser who purchased a property in execution sale for the recovery of maintenance charge on that property.

7. It seems to me that Mr. Krishna Rao is right in contending that the provisions of Rule 15 of Order 34 of the CPC which directs that the provisions of that rule shall as far as may be apply to a charge within the meaning of Section 100 of the Transfer of Property Act. 1882, cannot assist the argument advanced by Mr. Narasimhamurthy that a charge should always be equip rated with a mortgage for all purposes. The words as far as may be occurring in that rule make it clear that not all the principles which are applicable to the enforcement of a mortgage can have application to proceedings in which a charge is sought to be enforced. A charge in a maintenance

decree which is a recurring charge is capable of enforcement on each occasion on which the maintenance payable under the decree is not paid. It would, I think, be going too far to suggest that if on any one occasion the charge is enforced for the recovery of maintenance then due, the enforcement of that charge results in the deprivation of the right of the decree-holder to bring the property to sale for the recovery of future maintenance. A purchaser in an execution sale conducted for the recovery of maintenance for the payment of which a recurring charge is created, does not take the property free from the charge which is created on it. What disappears with the purchase of the property when it is brought to sale is only the charge relating to that part of the amount which was specified in the sale proclamation. So long as the decree-holder has the right to recover future maintenance and the payment of that maintenance is secured by a recurring charge on each occasion on which the maintenance due to her is not paid, the property can be brought to sale in enforcement of that charge notwithstanding the fact that that property is in the hands of a purchaser who has purchased it in execution of the decree for maintenance on the previous occasion.

8. Any other view would lead to the extremely unreasonable result that the holder of a maintenance decree would be deprived of her right to recover maintenance which had not yet become due by reason of a sale of the property on which a charge was created, for the recovery of the amount which had become due when such sale was sought. She would be without any remedy in respect of her right to recover her future maintenance unlike the case of mortgagee who can always recover the amount of the deficiency by asking for a personal decree against the mortgagor.

9. This view which Mr. Krishna Rao has asked me to take and which I have no hesitation in thinking is the correct view, is also the view expressed in *Jnanendra Nath Roy v. Sashi Mukhi Debya* AIR 1940 Cat 60 and [Manmohan Das and Others Vs. Bahauddin and Others](#), to which my attention was drawn by Mr. Krishna Rao. If I may say so with respect, I entirely agree with the view expressed in these two cases

10. That being so, it is not possible for the appellant to contend that the properties purchased by him in the previous execution case cannot again be brought to sale by the respondent for recovery of the maintenance that had subsequently become due to her.

11. I am not impressed by the argument advanced by Mr. Narasimhamurthy that it is possible for the appellant to say that the respondent is precluded by some rule of estoppel from proceeding against the properties purchased by the appellant. Mr. Narasimhamurthy is not right when he says that there is anything in the sale proclamation on which that plea of estoppel can be founded. Although Mr. Narasimhamurthy contended that it was the duty of the respondent to state in the sale proclamation that there was a recurring charge on the properties purchased by the appellant and that there was an omission on her part to make that disclosure, it is clear from the sale proclamation that all the necessary information which had to

be disclosed to the appellant even if there was any duty to do so, had been disclosed in the sale proclamation. In the relevant part of the sale proclamation, what is stated is that the property which" was brought to sale was subject to a charge for the recovery of maintenance by the decree for maintenance made in favour of the respondent. The sale proclamation did not state that there was no recurring charge, and, on the contrary, the reference to the decree for maintenance makes it clear-that if only the "appellant, had looked into that decree, he would have found in it the creation of a recurring charge on the property for the recovery of maintenance. There was no statement made by the respondent in the sale proclamation on the faith of which the appellant could have so altered his position to his prejudice as to be able to contend that the respondent was estopped from bringing the properties purchased by him again for sale in execution of her decree.

12. This appeal, therefore, fails and is dismissed. But since the respondent has not entered appearance, I make no order as to costs.

13. Appeal dismissed.