

(1955) 05 MP CK 0003

Madhya Pradesh High Court (Indore Bench)

Case No: C. Miscellaneous Appeal No. 3 of 1955

Hemant Kumar

APPELLANT

Vs

Ayodhya Prasad

RESPONDENT

Date of Decision: May 4, 1955

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2, 151

Citation: AIR 1957 MP 95

Hon'ble Judges: S.S. Shinde, C.J; P.V. Dixit, J

Bench: Division Bench

Advocate: Waghmare, for the Appellant;

Final Decision: Dismissed

Judgement

Dixit, J.

This is an appeal from an order of The Additional District Judge of Indore rejecting the Appellant's prayer for stay of the sale of certain property in execution of a mortgage decree. The facts are that "the Respondents Ayodhya Prasad and Rameshwar Prasad obtained a mortgage decree against Madanlal When the decree was put in execution, Hemant Kumar the minor son of Madanlal instituted a suit for a declaration that the property against which the mortgage decree was passed being ancestral property the, mortgage effected by Madanlal was void and could not, therefore, be sold in execution of that decree and for an injunction restraining the Respondents from bringing to sell the property in execution of the mortgage decree obtained by them. In the alternative the Appellant claimed that in any case his interest in the property could not be sold.

The Plaintiff-Appellant alleged that the mortgage was neither for a legal necessity nor for payment of any antecedent debt. Immediately after the institution of the suit the Plaintiff-Appellant present ed an application for staying the sale of the mortgaged property in execution of the decree in favour of Ayodhya Prasad and

Rameshwar Prasad. While, opposing the application the Respondents Ayodhya Prasad and Rameshwar Prasad denied the Plaintiff's allegation that the mortgaged property was ancestral or joint family property and also pleaded that even if the property was ancestral, the mortgage of the property by Madanlal, the father of the Plaintiff was binding on his son Hemant Kumar.

The learned Additional District Judge rejected the Plaintiff's application for stay of the sale of the mortgaged property holding that the balance of convenience was in favour of the decree-holders and that when the mortgaged property was being sold in execution of the decree, it could not be maintained that the property was in danger of being wrongfully sold.

2. Having heard Mr. Waghmare learned Counsel for the Appellant I have formed the opinion that this appeal must be dismissed. It is not the case of the Plaintiff-Appellant that the debt in respect of which the mortgage was executed by his father was for an immoral or illegal purpose. That being so, even if the Appellant succeeds in showing that the mortgage was neither for legal necessity nor for an " antecedent debt, he would still be under a pious: obligation to pay the mortgage debt qua debt though I he was not a party to the mortgage suit.

The Appellant would thus be bound by the sale-of the property that may be held in execution of the-decree against his father Madanlal. Again as has been pointed out in the cases of Jaswant Singh v. Sura, Madh B LJ (1954) HCR 399 (A) and Hariram v. Mohanlal, Madh-B LJ (1953) HCR 1151 (B), No order of injunction can be made under Order 39, Rule 1 or Rule 2 or u/s 151, CPC to restrain a decree-holder from executing a decree in his favour so long as it stands, and that merely because the Plaintiff institutes a suit for a declaration that the decree is not binding on him and that he hopes to succeed in the suit, it cannot be held that the execution of the decree would amount to committing an injury.

Learned Counsel for the Appellant sought to distinguish these cases by saying that in Hariram's case (B) the decree was sought to be set aside on the ground of fraud and in Jaswant Singh's case (A) the validity of the decree was challenged on the ground that the Revenue Court had no jurisdiction to pass it. The distinction drawn by the learned Counsel in no way affects the unqualified rule laid down in the above cases.

3. For the above reasons I would dismiss this appeal.

Shinde, C.J.

4. I agree.