

(1977) 03 MAD CK 0054

Madras High Court

Case No: Second Appeal No. 1099 of 1976

Marimuthu

APPELLANT

Vs

Ambujam Ammal and Another

RESPONDENT

Date of Decision: March 6, 1977**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 65

Citation: AIR 1978 Mad 50 : (1977) 90 LW 536**Hon'ble Judges:** Sethuraman, J**Bench:** Single Bench**Final Decision:** Dismissed

Judgement

Sethuraman, J.

The plaintiff is the appellant. One Bangaru Naicker was the original owner of the suit property. He mortgaged the property in favour of the plaintiff on 9-1-1962, for a sum of Rs. 400. The plaintiff filed a suit O. S. No. 248 of 1968 on the said mortgage and obtained a preliminary decree and then a final decree. The suit property was brought to sale by the plaintiff in E. P. 328 of 1969 and with the court's permission he purchased the same in the court auction sale held on 11-2-1970. The sale was confirmed on 28-3-1970, and the plaintiff took delivery of possession of the property through court on 20-7-1970, in E. A. 1049 of 1970. The first defendant had also advanced money on a mortgage of the same property and the said mortgage was subsequent to the one in favour of the plaintiff. The first defendant filed a suit in O. S. No. 911 of 1967, against the mortgagor Bangaru Naicker and in execution of the decree, brought the property to sale. After getting permission of the court, she purchased the same in the court auction held on 7-1-1970. The sale was confirmed and the first defendant took delivery of possession of the property through court on 17-10-1970. The plaintiff brought the present suit for an injunction to restrain the defendant, their men and others from interfering with his peaceful possession and enjoyment of the suit property and for costs.

2. The first defendant resisted the suit on the ground that the court auction sale in her favour being on 7-1-1970 there was nothing that could have been sold to the plaintiff on 11-2-1970 and that as such the subsequent court auction sale in favour of the plaintiff was not binding on the first defendant. It was therefore, submitted that the plaintiff could not claim any right in pursuance of the subsequent court auction sale held on 11-2-1970. It was also stated that the plaintiff was not in possession of the suit property and that there was no cause of action for the suit.

3. The learned Additional District Munsif of Tiruchirapalli decreed the suit as prayed for with costs, holding that the plaintiff had title to the suit property by virtue of the court auction sale held on 11-2-1970, and that he had taken possession of the property through court as per the delivery athakshi Ex. A-2 and the delivery receipt Ex. A-3, on 21-7-1970. There was an appeal against this judgment by the first defendant and the appeal came before the Second Additional Subordinate Judge of Tiruchirapalli. The learned Subordinate Judge held that since the court auction sale in favour of the first defendant was earlier in point of time, though confirmed later, she alone was entitled to the suit property by virtue of the provisions of Section 65, C. P. C., and that it was the duty of the court to confirm a sale under Order 21, Rule 92, C. P. C. in the absence of any petition filed under Rr. 89 to 91 and that as such, the plaintiff could not take advantage of the fact that his sale was confirmed earlier though the sale was actually held later. He further held that merely because the plaintiff was in possession of the property he was not entitled to the relief of injunction particularly when the first defendant was the lawful owner of the suit property. He therefore allowed the appeal and set aside the judgment and decree of the trial court granting injunction in favour of the plaintiff. The plaintiff has now come on second appeal disputing the correctness of this judgment of the learned Subordinate Judge.

4. Learned counsel for the appellant submitted that the mortgage in favour of the appellant was earlier in point of time and that he had also taken delivery of the property earlier than the first respondent. According to him. he was entitled to be in possession of the property and he had no objection to redeem the second mortgage within any reasonable time. Learned counsel for the first respondent submitted that the sale in favour of the first respondent in the court auction being earlier in point of time, it is this sale which is valid and that on the date when the property was again sold at the instance of the appellant on 11-2-1970 there was nothing which could have been sold. According to him. the appellant is not entitled to the relief of injunction because the first respondent is entitled to the property subject, of course, to her discharging the mortgage in favour of the appellant.

5. The short question for consideration is whether the appellant, by reason of his prior mortgage and prior confirmation of sale, is entitled to the relief asked for. Section 65 of the Civil P. C. provides-

"Where an immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute". In [Janak Raj Vs. Gurdial Singh and Another](#), the Supreme Court pointed out--(at page 610 of AIR)

"The Civil P. C., 1908, contains elaborate provisions which have to be followed in cases of sales of property in execution of a decree. It also lays down how and in what manner such sales may be set aside. Ordinarily, if no application for setting aside a sale is made under any of the provisions of Rules 89 and 90 of Order XXI or when any application Under any of these rules is made and disallowed, the court has no choice in the matter of confirming the sale and the sale must be made absolute." It was further observed-

"Under the present Civil P. C., the court is bound to confirm the sale and direct the grant of a certificate vesting the title in the purchaser as from the date of sale when no application as is referred to in Rule 92 is made or when such application is made and disallowed." The legal position is thus clear that the relevant date for the purpose of finding out as to when the sale takes place in court auction in the course of execution of a decree is the date of sale and not the date of confirmation. In the present case, the date of sale in favour of the first respondent is 7-1-1970. The sale in her favour is anterior to the one in favour of the appellant on 11-2-1970. The result is that on 11-2-1970, when the property was sold, there was absolutely nothing that could have been sold. The sale of 11-2-1970 was thus ineffective. The confirmation of the sale in favour of the appellant on 28-3-1970 which is anterior in point of time to the confirmation of the sale in favour of the first respondent on 13-8-1970, does not carry the matter further. As pointed out by the Supreme Court and as also seen from the provisions of the Civil P. C., the date of confirmation is not the criterion. So, the result is that as soon as the sale in favour of the first respondent was confirmed, it took effect from 7-1-1970. The first respondent was thus the purchaser of the property, subject to the discharge of the prior mortgage in favour of the appellant. The circumstance that the appellant is the prior mortgagee has absolutely no relevance to the question as to whether anything could have been sold on 11-2-1970 and if anything vested in the appellant so as to entitle him to the relief prayed for, having regard to the fact that the sale had been effected earlier in favour of the first respondent. Though the appellant is in possession of the property, he cannot sue for injunction as prayed for, as he has no right to be in possession. In these circumstances, the judgment and decree of the lower appellate court are sustained and the second appeal is dismissed. There will be no order as to costs.