

Janapareddy Latchan Naidu

Vs

Janapareddy Sanyasamma

Civil Appeal No. 194 of 1961

(P. B. Gajkendragadkar, K. N. Wanchoo, J. C. Shah JJ)

11.02. 1963

JUDGMENT

HIDAYATULLAH, J.

The respondent who is the wife of the appellant obtained a decree for maintenance on August 9, 1949, by which the appellant was ordered to pay Rs. 3,000 per year to her on the 28th day of February of every year with interest at 6% per year if the payment was not made on the due date. The decree included ascertained amounts as arrears of past maintenance and other items to which detailed reference is not necessary. In addition to the personal liability the decree created a charge for past and future maintenance on three lots of properties.

The respondent filed execution petition No. 91 of 1952 for execution of the maintenance decree and sought to bring the properties charged by the decree to sale. She purchased two items of the properties for a sum of Rs. 20,200 subject to her maintenance charge after obtaining the permission of the Court. Later she filed execution No. 43 of 1955 seeking to bring to sale properties other than those purchased by her in the earlier execution. The appellant also filed an application under s. 47 of the Code of Civil Procedure to record full satisfaction of the decree on the ground that the respondent by purchasing the properties subject to her charge could not maintain a fresh application for the sale of the other properties. The Subordinate Judge of Visakhapatnam upheld the contention of the appellant and dismissed the execution petition as not maintainable. The respondent appealed to the High Court. The High Court reversed the decision of the Subordinate Judge and ordered the execution to proceed. The appellant has now appealed after obtaining special leave from this Court.

The short question is whether the decree must be held to be satisfied because the respondent purchase in an earlier execution one lot of properties subject to her charge for maintenance. Learned counsel for the appellant contends that the respondent must now look to the properties purchased by her for satisfaction of her claim in respect of maintenance past or future. In the alternative he contends that execution against the properties in his possession cannot proceed till the respondent has first proceed against the properties with her. In our opinion neither proposition is correct.

The maintenance decree passed by the Subordinate Judge of Visakhapatnam is not only a declaratory decree but also an executory decree. It provides that the appellant shall pay to the respondent Rs. 3,000 per year as maintenance on the 28th day of February of every year as long as she lives. When the first execution was levied the amounts due up to June 28, 1952, were realised by the sale of the properties of lots 1 and 2. The respondent as the auction-purchaser deposited Rs.

6,010 towards the balance of the purchase price after deducting the maintenance amount under the decree as it then stood. The present execution concerns the sum which fell due between June 28, 1952, and February 28, 1955. Included in this sum are Rs. 8,000 towards maintenance and Rs. 867-8-0 towards costs.

The contention of the appellant is that the respondent having purchased the first lot of properties subject to the charge cannot now recover this amount from the properties remaining with the appellant. In other words, the appellant contends that there is some kind of merger of the right under the maintenance decree with the right arising from the auction purchase and the respondent can enforce her right only against those properties which she has purchased and not against properties which remain with the appellant.

The argument involves a fallacy because it assumes that a charge created by a decree on a number of properties disappears when the charge-holder in execution of the charge-decree purchases one lot of properties. An executory charge-decree for maintenance becomes executable again and again as future sums become due. The executability of the decree keeps the charge alive on the remaining properties originally charged till the future amounts cease. In other words the charge subsists as long as the decree subsists. By the execution the charge is not transferred in its entirety to the properties purchased by the charge-holder. Nor is the charge divided between those properties and those which still remain with the judgment debtor. The whole of the charge continues over all the properties jointly and severally. Nor is any priority established between the properties purchased by the charge-holder and those that remain. It is not permissible to seek an analogy from the case of a mortgage. A charge is different from a mortgage. A mortgage is a transfer of an interest in property while a charge is merely a right to receive payment out of some specified property. The former is described as *jus in rem* and the latter as only a *jus ad rem*. In the case of a simple mortgage, there is a personal liability express or implied but in the case of charge there is no such personal liability and the decree, if it seeks to charge the judgment-debtor personally, has to do so in addition to the charge. This being the distinction it appears to us that the appellant's contention that the consequences of a mortgagee acquiring a share of the mortgagor in a portion of the mortgaged property obtain in the case of a charge is ill-founded. The charge can be enforced against all the properties or severally.

In the present case the respondent could proceed at her option to recover the arrears of maintenance as they fell due from any of the properties which were the subject of the charge, that is to say, those which were in the possession and ownership of the appellant and those in the possession and ownership as auction-purchaser. There is nothing in law which requires the respondent to proceed against the properties which she had earlier purchased. There is no question of marshalling of these properties. It is true that the Court may decide which of the properties charged should be sold and in what order and the Court does choose between different properties when ordering sale. To that extent the Court can assist a judgment-debtor. But this can only be in respect of the properties which the judgment-debtor holds and against which the charge-holder wants to proceed. But the Court cannot say to the charge-holder that he must exhaust his remedies over and over again against the properties purchased by him in execution of his charge-decree and subject to his own charge. Therefore, between the appellant and the respondent the Court cannot order the respondent to proceed against properties in her possession even though it can make an election on behalf of the appellant and enforce the charge against one item in preference to another belonging to him.

In our opinion the respondent was entitled to proceed against the remaining properties in the hands of the appellant which continued charged. The executing court may, of course, sell only such items as may be sufficient to meet the present dues under the decree but the appellant cannot insist that the

respondent should proceed against the properties acquired by her under the first sale. We express no opinion on the question whether the decree can be personally executed against the appellant because that question did not arise here. The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

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