

Kabidi Venku Sah

Vs

Syed Abdul Hai and Another

Civil Appeal No. 1833 (N) of 1970

(D. A. Desai, A. Varadarajan, O. Chinnappa Reddy JJ)

28.09.1983

JUDGMENT

VARADARAJAN, J. -

1. This appeal by special leave is directed against the Order dated April 17, 1970 of a learned single Judge of the erstwhile Mysore High Court (now Karnataka High Court) in CRP 1255 of 1969 which was filed against an Order dated March 3, 1969 of the Principal Civil Judge, Bangalore in Misc. Case 6 of 1969, filed by Kabidi Venku Sah who was the first respondent in the civil revision petition and is the appellant in this civil appeal. The Principal Civil Judge allowed the Misc. Case which was filed under Order 21 Rule 58 of the Code of Civil Procedure for raising an attachment over the house property effected at the instance of Syed Abdul Hai who was the petitioner before the High Court in the civil revision petition and is the first respondent in this civil appeal. The house property belonged originally to one Vittal Sah who was the husband of the second respondent Sharada Bai. Vittal Sah had executed a simple mortgage over the property in favour of the appellant on July 31, 1948. The appellant obtained a decree on the mortgage on September 4, 1967 in O.S. 217 of 1966 on the file of the Principal Civil Judge and brought the property to sale in execution of that decree and purchased it himself on July 24, 1968 after obtaining the necessary leave of the Court to bid and set-off. The sale was confirmed on August 28, 1968 and the appellant took delivery of the property on November 28, 1968 in Misc. Case 95 of 1968 as the court auction purchaser.

2. The first respondent Syed Abdul Hai obtained a money decree against Vittal Sah on March 30, 1967 in O.S. 386 of 1964 on the foot of a promissory note executed in 1961 for a sum of Rs. 20,000. He obtained attachment before judgment over the same house property on September 24, 1964 on the same day on which he filed that suit in the Court of the Principal Civil Judge, Bangalore. He filed E.P. 31 of 1968 for realising the money due under the decree by bringing the house property to sale pursuant to the attachment before judgment effected on September 24, 1964. Thereupon the appellant Venku Sah filed Misc. Case 6 of 1969 under Order 21 Rule 58 of the Code of Civil Procedure for getting the attachment raised, alleging that the second respondent Sharada Bai had no saleable interest in the property on the date of the attachment and that the first respondent's simple money decree cannot prevail over his mortgage decree and the sale of the property obtained in his favour in execution of that decree.

3. The first respondent Syed Abdul Hai opposed the claim petition, contending that the court proceedings referred to in the claim petition are collusive and fraudulent and that the delivery alleged by the appellant is only a paper delivery and possession continued to be with the second respondent.

4. The Principal Civil Judge found that the mortgage decree, execution sale and delivery of the property to the appellant cannot be questioned in the first respondent's claim petition as being collusive and could be questioned only in a separate suit. He also found that there was no material on record to show that the second respondent continued to be in possession of the property after its delivery to the appellant pursuant to the court auction sale in his favour. He rejected the contention that the appellant was not entitled to file any claim petition under Order 21 Rule 58 of the Code of Civil Procedure for raising the attachment before judgment effected under Order 38 Rule 5 and held that there is nothing on record to show that the appellant was aware of the attachment and therefore there was no delay in filing the claim petition and that the claim petition could be filed under Order 21 Rule 58 even in the case of attachment before judgment in view of the provisions of Order 38 of Rule 8 which says that when any claim is preferred to property which has been attached before judgment, such claim shall be adjudicated upon in the manner provided for the adjudication of claims to property attached in execution of a decree for payment of money. The Principal Civil Judge rejected the first respondent's contention that the appellant had no interest in the equity of redemption even if the mortgage in his favour is true and that only the equity of redemption was attached on September 24, 1964 and held that what was attached is the entire property and not the equity of redemption alone. In this view, he allowed the claim petition.

5. Before the High Court it was contended for the first respondent that the appellant should show not only that he had an interest in the property attached on the date of the attachment but also possession thereof on that date before he could get the attachment before judgment raised and that the property belonged to the second respondent's husband and was in his possession on the date of the attachment and therefore the Principal Civil Judge could not have allowed the claim petition. The appellant refuted that contention by peculiarly contending that he, a simple mortgagee, was in constructive possession of the property through the mortgagor.

6. The learned Judge of the High Court rightly rejected the contention that a simple mortgagee could be in possession of the mortgaged property constructively through the mortgagor and held that the appellant (claimant) should show that he had some interest in the property attached on September 24, 1964 and was in actual or constructive possession thereof. He observed that the Principal Civil Judge has not recorded any finding on the question of the appellant's possession of the property on the date of the attachment and that he has thereby wrongly exercised jurisdiction and acted with material irregularity in allowing the claim petition. He found that the appellant had failed to prove that he had an interest in the property on the date of the attachment and was in possession of the property, either actual or constructive, on that date and held that he was therefore not entitled to have the attachment raised.

7. The matter is quite simple but has unfortunately dragged on for nearly 15 years on account of a wrong and ill advised step taken by the appellant. The learned Principal Civil Judge erred in observing that what was attached before judgment on September 24, 1964 is not the equity of redemption alone but the entire property. It is rightly held that in the claim petition the question of the mortgage of 1948, the mortgage decree, the court auction sale and delivery of possession of the property to the appellant pursuant to that sale cannot be contended to be collusive and observed that the first respondent could, if at all, challenge them only in a separate suit. That being so, undoubtedly the mortgage of 1948 in favour of the appellant was there and what remained with the mortgagor was only the equity of redemption until it was brought to an end by the sale in execution of the mortgage decree confirmed by the Court on August 28, 1968. Therefore, there could be no doubt whatsoever that on September 24, 1964 when the property was attached before the judgment long after the mortgage dated July 31, 1948 and two years before the suit on the mortgage was filed

in 1966, the mortgagor had the equity of the redemption and that what could have been attached in law on September 24, 1964 was the equity of redemption alone and not the entire interest in the property. There should have been no difficulty for the learned Judge of the High Court holding that the appellant could not have been in the possession of the property, actual or constructive, for he was only a simple mortgagee who had nothing to do with the possession until he got delivery of the property through the court as a decree holder-court auction purchaser on April 28, 1968 as noticed by the learned Judge in his judgment. The appellant had no doubt an interest in the property as mortgagee, but he could not have been in possession of the property as he was only as simple mortgagee. The appellant was a secured creditor as he had a mortgage in his favour, and any attachment effected after the date of the mortgage and during its subsistence can be only subject to that mortgage. He had no interest in the equity of redemption on the date of the attachment and could not therefore have had any objection to that right of the mortgagor being attached by the first respondent. Therefore he was not a person who could in law file any claim petition under Order 21 Rule 58 objecting to the attachment of the equity of redemption. We may notice here what Order 21 Rule 58(1) says and it is this :

Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained.

8. The attaching creditor can bring the property to sale only subject to the mortgage so long as it is subsisting. That is to say he could bring only the mortgagor's equity of redemption to sale if it had not already been extinguished by its sale in execution of any decree obtained on that mortgage. But if the equity of redemption has already been sold after the date of the attachment the attaching decree holder could proceed only against the balance, if any, of the sale price left after satisfying the mortgagee decree holder's claim under the decree. The mortgagee's right is thus not affected at all. Therefore it is as we had observed earlier that the appellant had taken a wrong and ill advised step in coming forward with the claim petition which has resulted in the matter dragging on for over 14 years from January 15, 1969. The appellant could not object to the attachment of the equity of redemption. The appeal fails and is dismissed, but under the circumstances of the case without costs.

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