

BOMBAY HIGH COURT

Dareppa Alagouda

Vs.

Mallappa Shivalingappa

(Lokur, J.)

13.03.1946

JUDGMENT

Lokur, J.

1. The facts out of which this appeal arises are not in dispute. The plaintiff's father Shidramappa mortgaged his two lands, Survey Nos. 383/1 and 383/1A, to the defendant Dareppa for ₹ 400/- on 24-6-1929. Out of these two lands, Survey NO. 383/1A was rayatawa and Survey No. 383/1 was watan inam which could not be alienated beyond the lifetime of Shidramappa. The defendant filed suit No. 359 of 1935 against the mortgagor Shidramappa to recover the amount due on the mortgage by sale of the two mortgaged lands. During the pendency of the suit, Shidramappa died and the plaintiff was brought on record as his legal representative on 26-10-1926. The suit ended in a decree for ₹ 706/- with costs and future interest payable by installments, and it directed that in case of default the mortgaged lands or a sufficient portion thereof should be sold and the amount realized. On a default in the payment of the installments, the defendant executed the decree and both the lands were sold by auction and purchased by the defendant himself. In the execution proceedings the plaintiff contended that his father could not mortgage the watan land beyond his lifetime and that after his death the mortgage became void to that extent. But it was held that the executing Court could not go behind the decree and as the decree ordered the sale of both the watan and non-watan lands, the plaintiff's objection was not tenable. He was referred to a separate suit, and he, therefore, filed this suit for a declaration that the decree in suit No. 359 of 1935 was void and not binding against him so far as it affected the watan land and for a declaration that the sale of the watan land was illegal and did not confer any title on the defendant who had purchased it at the auction. The plaintiff also asked for an injunction restraining the defendant from taking possession of the suit land. The defendant contended that he was a watandar of the same watan to which the land in dispute belonged, that, therefore, the mortgage by the plaintiff's father in his favor beyond his lifetime was valid, that the plaintiff was a party to the suit in which the decree was passed and therefore the decree was binding on him, that the plaintiff's contention was barred as res judicata and that the suit in the

present form was barred under Section 47, Civil Procedure Code, 1908. Both the Courts below held that the defendant was not a watandar of the same watan, and that being a finding of fact, the question does not arise in this second appeal. The trial Court further held that the mortgage of the watan land was void after the death of the plaintiff's father, that the plaintiff as his father's legal representative could not raise that contention in suit No. 359 of 1935, that therefore his present contention was not barred as res judicata and that the present suit was not barred under Section 47, Civil Procedure Code It, therefore, gave the plaintiff a decree declaring that the decree in suit No. 359 of 1935 was null and void as regards the watan land and that the sale of that land in execution of that decree was also null and void and not binding on the plaintiff. The defendant was restrained from executing the said decree against the said watan land or from taking possession thereof from the plaintiff. In granting the declaration the trial Court held that the Court which, tried the mortgage suit had no jurisdiction to pass a mortgage decree against the watan land and therefore it declared the decree itself to be null and void. But the learned First Class Subordinate Judge (with appellate powers) did not think the decree to be null and void, but held that it was not binding on the plaintiff. All the other findings recorded by the trial Court were confirmed and instead of the declaration granted by the trial Court, he granted a declaration that the auction sale in execution of the mortgage decree did not affect the plaintiff's own independent interest in the watan land in suit and did not convey to the defendant that interest from the plaintiff. In other respects, the decree of the trial Court was confirmed. The defendant has now come in second appeal.

2. The principal contention urged on behalf of the appellant is that the plaintiff as the legal representative of his father in suit No. 359 of 1935 should have raised the contention that on his father's death the mortgage of the watan land became ineffective and therefore no decree for its sale could be passed against him. It is, however, obvious that the plaintiff was not a party to that suit in his individual or personal capacity, but he was impleaded only as a legal representative of his father to proceed with the suit under Order 22, Rule 4, Civil Procedure Code Sub-rule (2) of that rule says:

Any person so made a party may make any defense appropriate to his character as legal representative of the deceased defendant.

3. This obviously means that he can make a defense only in his capacity as a legal representative of the deceased defendant. As observed in 4 Lah. 721 when a party to a suit dies, his legal representatives are appointed merely in order that the suit might proceed, and a decision be arrived at. It is the rights and disabilities of the original parties that have to be considered and not those of the legal representatives themselves. All that the legal representatives can, therefore, do is to take up the suit at the stage at which it was left when the original party died land to continue it. It is not open to them to assert their own individual or hostile title to the suit. It follows, therefore, that if any defense to the suit was not open to the deceased defendant, his legal representative would not be at liberty to plead that defense. If, for instance, the deceased

defendant was estopped from putting forward any defense, his legal representatives, though not themselves similarly estopped, would not be at liberty to put forward that defense. That would be allowing the legal representatives to set up or agitate a new or individual right, and it is not open to them to put forward any personal defense. As held in A.I.R. 1935 Mad. 522 if a legal representative wants to raise any new point which the deceased party could not have raised, he must get himself impleaded in his personal capacity, or he must challenge the decree in a separate suit. The same view was taken by a Full Bench of the Allahabad High Court in I.L.R. (1940) All. 153.

4. Applying this principle to the facts of the present case, it is obvious that the plaintiff's father could not have contended in the mortgagee's suit that he had no right to mortgage the watan land as he had not obtained the permission of the Provincial Government as required by Section 5, Bombay Hereditary Offices Act, It is well settled that a mortgagor cannot question his own right to mortgage the property mortgaged by him 5 Bom. L.R. 652.4 . The plaintiff's father did not state in his mortgage deed, Ex. 7, passed in favor of the defendant that he was mortgaging only his own life interest in the watan land, but he purported to mortgage the entire land as if it was his non-watan property. If he was estopped from challenging his own right to mortgage the watan land beyond his lifetime, the defense which the plaintiff as his legal representative could put forward was also subject to the same disability and he could not plead that his father could not mortgage the watan land beyond his lifetime. If he wanted to dispute his father's capacity to mortgage the watan land, he should have got himself impleaded independently as a co-defendant. But he was not made a party to the suit in his personal capacity, and as he could not then raise the question that after his father's death the mortgage of the watan land came to an end, the question cannot be said to have been constructively in issue in that suit. The present suit to have that question decided is, therefore, not barred as res judicata.

5. It follows from this that there can be no bar of Section 47, Civil Procedure Code, to the present suit. In fact, in the execution proceedings, the plaintiff did raise the same question which he has raised in the present suit and it was rightly held that the executing Court could not go behind the decree, and if the plaintiff wanted to challenge the validity of the decree he must do so by a separate suit. Once a decree was passed ordering the sale of the mortgaged property for the satisfaction of the mortgage debt, any claim by the judgment-debtor or his legal representative that the property or any part of it was not liable for sale in execution of the decree would be a claim challenging the validity of the decree, and, as held in A.I.R. 1939 Lah. 178 such a claim even though based on the, legal representative's own independent title could not be entertained by the executing Court under Section 47, but must be put forward by means of a separate suit. A similar view was taken in 36 Bom. L.R. 1231 where it was held that when once a decree was made against certain property, the judgment-debtor could not contend in execution that the property decreed against could not be so treated and executed against. "An executing Court cannot inquire into the legality of a decree; otherwise there will be no end to litigation, and it would be acting as an appellate Court." I, therefore, agree with the view taken by the lower

Courts that the present suit is not barred under Section 47, Civil Procedure Code.

6. The result is that the plaintiff can now contend that the decree in Suit No. 359 of 1935 is not binding on him in so far as it directs the sale of the watan land. It is admitted that no permission of the Provincial Government was taken by the plaintiff's father for mortgaging the watan land, and therefore, the mortgage of that land did not enure after his death for the mortgagee's benefit. As held by Fawcett J. in 23 Bom. L.R. 1037 any decree based on such a mortgage is, after the mortgagor's death, void as against the mortgagor's heirs: "Such a decree cannot be put on any higher footing than the transaction of mortgage on which it is based." And as the mortgage became void after the mortgagor's death, the decree also must be treated as void so far as the mortgaged watan land is concerned. Hence the sale of the watan land in execution of such a decree is also void and not binding on the plaintiff. I agree with the view taken by the lower appellate Court that the Court which decided Suit No. 359 of 1935 cannot be said to have no jurisdiction to try the suit, but that part of the decree which ordered the sale of the watan land after the death of the watandar mortgagor is not binding on the mortgagor's heirs, and hence the plaintiff is entitled to the reliefs granted to him by the lower appellate Court. I dismiss the appeal with costs.

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