

PETITIONER:
S. SIVAPRAKASAM

Vs.

RESPONDENT:
B.V. MUNIRAJ & ORS.

DATE OF JUDGMENT: 03/04/1997

BENCH:
K. RAMASWAMY, D.P. WADHWA

ACT:

HEADNOTE:

JUDGMENT:
present:

Hon'ble Mr. Justice K. Ramaswamy
Hon'ble Mr. Justice D.P. Wadhwa

S. Balakrishnan and S. Prasad, Advs. for the appellant
(Tripurari Ray,) Adv. for Vineet Kumar, Yatish Mohan, Advs
for the Respondents

The following order of the court was delivered:

O R D E R

This appeal by special leave arises from the judgment of the learned single Judge of the Madras High Court, made on September 23, 1975 in CRP No. 4307/84. The facts are little complicated, but to clear the clogs, they are as under:

The Catholic Syrian Bank Ltd. was the mortgagee and Manickam Mudaliar was the mortgagor in respect of the plaint schedule property. To foreclose the mortgage O.S. No.340/1951 was filed by the Bank. Preliminary decree was passed on December 20, 1951 and final decree came to be passed on August 28, 1952. When objections were raised against the passing of final decree pending those proceedings and later execution thereof, one Palaniammal, a simple money creditor filed OS No.321/1958 against manickam Mudaliar and obtained a money decree. In execution of the decree, the self-same property was brought to sale in which one Kandaswamy had purchased the property in court auction on September 4, 1963. Admittedly, the same came to be confirmed and possession was taken under the said decree. Kandaswamy transferred the property in favour of B.V. Muniraj and B.V. Rangaraj, respondent Nos.1 and 2. Subsequently, the proceedings went on between the parties with which we are not concerned. Respondent Nos.1 and 2 filed the application under order XXXIV, Rule 5 CPC for passing a final decree in terms of sub-rule (1) of Rule 4 of order XXXIV. That order came to be passed. Orders passed on objections and the orders passed by the executing court under order XXXIV, Rule 5 were the subject matter of the revision and were dealt with together. The learned single Judge has upheld the action of the Court below in passing the final decree in favour of the subsequent court purchasers B.V. Muniraj and B.V. Rangaraj, Pending revision,

they, in turn, sold the property to one S. Palaniswamy, who is the fifth respondent herein. Thus, the question arises whether the appellant-purchaser of the property in the mortgage decree has a precedence over the purchaser in money decree in getting the final decree passed in the mortgage suit.

Order XXXIV, Rule 5, CPC provides as under

"5. Final decree in suit for sale-

(1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of Rule 4, the Court shall, on application made by the defendant in his behalf, pass a final decree or, if such decree has been passed, an order -

- (a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary,-
- (b) ordering him to transfer the mortgaged property as directed in the said decree, and also, if necessary,-
- (c) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property of part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the court shall not pass an order under Sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase-money paid into court by the purchaser.

Where, such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into court by him, together with a sum equal to five per cent thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the court shall, on application made by the plaintiff in this behalf, pass a final property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of Rule 4."

Later two clauses are not relevant for the purpose of this case.

A reading of the above would clearly indicate that

where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of Rule 5 of order XXXIV, the defendant makes payment into court of all amounts due from him under sub-rule (1) of Rule 4, the court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order ordering the plaintiff to deliver the documents referred to in the preliminary decree, and if necessary, ordering him to transfer the mortgaged property as directed in the said decree and also, if necessary, ordering him to put the defendant in possession of the property. The question, therefore, is whether respondent Nos.1 and 2, whose release deed by the auction purchaser Kandaswamy was accepted by the executing court, are entitled to make the application under Order XXXIV, Rule 5, CPC?

It is seen that since the simple money decree had been duly executed through the court and the self-same property had been brought to sale, was duly confirmed and possession taken in execution thereof, the auction purchasers of the said property in the money decree stepped into the shoes of the judgment-debtor, Manickam Mudaliar. Consequently, they got transposed themselves to be defendants in the mortgage decree. Therefore, before the confirmation of the final decree, they are entitled to make an application under order XXXIV, Rule 5 depositing all the decretal amount and request the court to pass a final decree and directing the mortgagee, Catholic Syrian Bank Ltd., to deliver all the documents to them duly endorsing that the decree stands discharged. Thereby having had the right thus fructified, the subrogation, eclipsed right of the purchaser in the mortgage decree. Thus, his right stands nullified by operation of order XXXIV, Rule 5, CPC. Thus, the appellant did not get any right, though he was a successful auction-purchaser.

Shri S. Balakrishnan, learned counsel for the appellant, seeks to contend that under order XXI, Rule 92, CPC as soon objections have been raised and rejected, the court is required to confirm the sale and in this case the act of confirmation being the ministerial act, that does not defeat the right of the auction purchaser nor confer any right on the subsequent purchaser under a simple money decree. The doctrine of lis pendence applies. We find on force in the contention. Section 52 of the Transfer of property Act has no application to the facts. The procedure under order XXXIV is entirely distinct and different from the procedure prescribed under order XXI. Order XXI deals with execution of decrees and orders and objections therein other than those relating to the property covered in mortgage decree. Order XXXIV is a special procedure prescribed relating to mortgages. Therefore, the procedure prescribed under Order XXI, Rule 92 has no application as regards the passing of final decree under order XXXIV, Rule 5, CPC. Thus considered, we hold that the action taken by the executing court is not vitiated by any error of law, warranting interference.

The appeal is accordingly dismissed. No costs.