K Muthuswami Gounder vs N. Palaniappa Gounder on 31 August, 1998

Equivalent citations: AIR 1998 SUPREME COURT 3118, 1998 (7) SCC 327, 1998 AIR SCW 3031, 1999 SCFBRC 25, 1999 (1) ALL CJ 115, 1998 (5) SCALE 17, (1998) 6 JT 174 (SC), (1999) 1 LANDLR 162, (1999) 1 MAD LJ 41, (1999) 1 MAD LW 23, (1998) 7 SUPREME 59, (1998) 4 RECCIVR 259, (1998) 5 SCALE 17, (1999) 1 CALLT 1, (1998) 3 CURCC 192, (1999) 1 BOM CR 508

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Bench: S.C. Agrawal, B.N. Kirpal, S. Rajendra Babu

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           CASE NO.:
Appeal (civil)  1860-61 of 1981

PETITIONER:
K MUTHUSWAMI GOUNDER

RESPONDENT:
N. PALANIAPPA GOUNDER

DATE OF JUDGMENT: 31/08/1998

BENCH:
S.C. AGRAWAL & B.N. KIRPAL & S. RAJENDRA BABU

JUDGMENT:
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JUDGMENT 1998 Supp(1) SCR 206 The Judgment of the Court was delivered by S RAJENDRA BABU, J. These appeal arise out of dispute between two competing court auction purchasers on the basis that the rights derived by each of them is superior to the other emerging out of alleged hypotheca-tion of such property. Respondent filed a suit b O.S. 12 of 1967 on the files of II subordinate Judge, Tiruchirappalli to restrain the appellant herein from interfering with respondents possession of the suit property. The appellant filed in the same courts a suit in O.S. 211 of 1967 for redemption of the suit land, and recovery of possession thereof The undisputed facts leading to the two suits are as under : The suit land belonged to one Ganesan who executed a registered security bond on 18.12.1950 for a sum of Rs. 3,000 hypothecating the suit property and also executed a promissory note in favour of one Vairavan Chettiar and bor-rowed moneys, Vairavan Chettiar obtained a decree on the foot of the Security Bond and in execution thereof brought the suit property to sale. Respondent purchased the suit property in the said court auction sale on 6.2.1957 and the same was confirmed on 15.3.1957. Respondent took delivery of the property through court. Sandanam Mudaliar and Company filed O.S. No, 108 of 1950 for recovery of a sum of Rs 6,493,10 against Ganesan. In that suit the plaintiffs got certain amounts due to Ganesan from the South

Indian Railway attached before judgment. Ganesan filed I A. No. 811 of 1950 in the said suit seeking for raising the attachment before judgment of the amount and it was ordered subject to his furnishing of security, Ganesan executed on 12.4.1950 a registered deed in respect of the said property for Rs. 7,000, costs of the suit and subsequent interest. In this said deed recitals were made referring to the security bond dated 18.2.1950, executed in favour of Vairavan Chettiar as a prior encumbrance. O.S. No. 108 of 1950 filed by Sandanam Mudaliar & Co. was decreed on 25.1.1956. Sandanam Mudallar and Company in execution of the decree obtained by them brought the property to sale on 15.9.1962 and the original Appellant Muthuswami Gounder purchased the property on 14.12.1966 for Rs. 12,250 which sale was confirmed on 19.1,1967.

The suit filed by appellant and the suit filed by Respondent were ordered to be tried jointly. One of the questions raised in the suit is whether the deed dated 12.4.1950 executed by Ganesan in O.S. 108/50 on the file of the court of Subordinate Judge Coimbatore original of Exhibit A6 creates any charge or was it only an undertaking not to alienate the suit property. On this question the trial court held at paras 13 and 14 as follows :

> "13. As said already, the document is named as a security deed Exhibit A6 shows that non-judicial stamps for the value of Rs. 105 had been affixed. If it was merely a document for giving an undertaking not to alienate there was no necessity to affix stamps for Rs. 105, which is the correct value of stamps for the sum of Rs. 7,000. In the document a specific immovable property (i.e.), suit property, is noted. It is specifically stated that for Rs. 7,000 and subsequent interest and costs this security bond is written. Even the prior encumbrance in favour of Vairavan Chettiar in respect of this property is noted. It is signed by Ganesan and attested by two witnesses. Taking all these factors found in Exhibit A6, taken along with the fact that the security was given as per order of Court in a petition to raise the attachment of the amount of Ganesan in the South Indian Railway, it is evident that the suit property was intended to be and was as a matter of fact, given as a security for the payment of the sum of Rs. 7,000 costs and interest in the case.
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> 14. It is thus evident that under Exhibit A6 a charge of a peculiar nature is created and "that here is an unquestioned liability and there must be some mode of enforcing it (in the words of their Lordships of the Privy Council in the ruling quoted supra). Exhibit A6 is therefore not a mere undertaking not to alienate but it creates a charge and a liability which could be forced as per law."

The trial court by its judgment dated 27.11.1967 held that the Respondent is the ultimale Owner of the final equity of redemption subject to the right of the appellant to redeem the first mortgage. The trial court also held that the appellant was not entitled to redeem entire property including the final equity of redemption and, therefore, passed a decree for redemption of the first mortgage in favour of the appellant, but held that he was not entitled to claim possession of the properly and granted the respondent the relief of injunction in suit O.S, No. 12 of 1967 filed by him.

The appeals filed by the appellant against the said decrees were dismissed by the First Appellate Court holding that the relief of injunction was correctly granted to the respondent. The appellate court also con-firmed the decree for redemption but enhanced the amount payable from Rs. 1501 to Rs. 5,000. The appeal of the respondent against non-awarding of costs in the injunction suit by the trial court was dismissed. The appellate court on the nature of document at Exhibit A6 observed as follows : "The lower court in paragraphs 12 to 15 has clearly explained that Exhibit A6 contains all the characteristics of a mortgage. I agree with the conclusion. Further, as pointed out by the lower court merely because the petitioner decrees-holder in E.P. No. 305/62 (Exhibit A9) altered the prayer into one of attachment and sale from one of pure sale at the instance of the court, it cannot be said the decree-holder had given up his charge. Therefore, the attachment of charged property does not invalidate claim in pur-suance of the charge. Therefore, the purchaser in such a sale gets the rights to the mortgage."

On second appeal preferred to the High Court by the Appellant, the matter was referred to a Division Bench of the High Court in view of the important questions of law arising for determination. The High Court considered several questions but ultimately held that the facts available in the case would run counter to the conclusion that the appellant is a puisne mortgagee. It was observed that :

> "the claim of the appellant that he holds the status of a second mortgagee is based on security bond Ex A6 coupled with the auction-sate held on 14th December, 1966. That sale is no doubt there, but then the security bond does not amount to a mortgage. By it no property was conveyed to the court in whose favour it was executed nor was any charge created on the land in suit. All that Ganesan undertook by it was not to alienate the land till the discharge of the decree passed in suit No. 108 of 1950. As soon as that decree was passed the security bond became void and of no effect.
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> It was also held by the High Court that Muthuswami Gounder could possibly claim the status of a puisne mortgagee only if he had purchased the property in a sale arising out of execution of a decree based on a mortgage. No such decree was passed in suit No. 108 of 1950. On the other hand, the decree was a simple money- decree in execution of which the land in suit was first attached and then sold. In this view of the matter also the High Court concluded against the claim of Muthuswami Gounder that he held the status of a puisne mortgagee.
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> Having negatived the claim that the appellant ever become a mortgagee the sheet anchor of his case was lost. The High Court having noticed that there was no appeal by respondent against the decree passed in favour of the appellant considered that it was art appropriate case where powers under Order XLI Rule 33 of the Code of Civil Procedure should he exercised and thus dismissed the suit filed by him in the trial court.

Aggrieved by the order made by the High Court, these appeals have been preferred before this court by special leave.

Shri K. Parasaran, learned Senior Advocate appearing for the appel-lant contended that the judgment of the trial court granting a decree for redemption became final and operated as res judicata by not having been appealed against and the High Court could not dismiss the suit by setting aside the decree for redemption in the absence of an appeal by the defendant in the redemption suit; that the decree for redcmption passed by the trial court having attained finality in the absence of an appeal to the first appellate court by the defendant, the High Court even in exercise of powers under Order XLI Rule,33 could exercise its powers only against the judgment of the First Appellate Court and not as against the judgment of the trial court and destroy the Finality of "that part of the trial court judgment which was not appealed against; that Order XLI Rule 33 Was not attracted to the facts arising in the present case, Elaborating this contention Shri Parasaran submitted that before the First Appellate Court the respondent not only did not appeal against the decree for redemption but prayed for invocation of power under Order XLI Rule 33 of the Code of Civil Procedure in acceptance of the decree for redemption but only sought for enhancement of the redemption amount on the ground that it was a mistake which called for rectification. Having opted for praying for enhancement of amount by accepting the decree for redemption he was precluded by the principle that a party cannot ap-probate and reprobate and seek for setting aside the decree for redemption at the second appeal stage.

Sri G.L. Sanghi, learned senior advocate for respondents. submitted that it is certainly open to the respondents to challenge the findings regarding the nature of the document Exhibit A6 in conferring the status of puisne mortgagee and in order to sustain the decree for injunction granted in his favour he could support the same by resort to Order XLI Rule 33 CPC and ensure that the appellant does not get any decree contrary to it. In doing so, he contended the High Court could examine the matter under Order XLI Rule 33 CPC and set aside the decree in favour of the appellant. The High Court took the view that while it is true that no appeal against the decree passed in favour of the appellant was filed by respondent but it was a fit case in which interference under Order XLI Rule 33 C.P.C. Was called for. In exercise of that power set aside the decree passed in favour of the appellant.

There are three objections raised to this course adopted by the High Court. Firstly, that the respondent had not filed any appeal against that part of the decree in favour of the appellant for redemption of the last mortgage and he cannot be allowed to blow hot and cold. Secondly, the finding that the document Exhibit A6 was a charge had become final and could not be re- opened. Thirdly, that the said finding operates as res judicata as the respondent has not filed any appeal against the same.

Order XLI Rule 33 enables the appellate court to pass any decree or order which ought to have been made and to make such further order or decree as the case may be in favour of all or any of the parties even though (i) the appeal is as to part only of the decree; and (ii) such party or parties may not have filed art appeal. The necessary condition for exercising the power under the Rule is that the parties to the proceeding are before the court and the question raised properly arises one of the judgment of the lower court and in that event the appellate court could consider any objection to any part of the order or decree of the court and set it right. We are fortified in this view by the decision of this Court in AIR 1988 S.C. 54. No hard and fast rule can be laid down as to the circumstances under which the power can be exercised under Order XLI Rule 33 C.P.C. and each case must depend upon its own facts. The rule enables the appellate court to pass any order/decree which ought to have been passed. The general principle is that a decree is binding on the parties to it until it is set aside in appropriate proceedings, ordinarily the appellate court must not vary Or reverse a decree/order in favour of a party who has not preferred any appeal and this rule holds good notwithstanding Order XLI Rule 33 C.P.C.. However, in exceptional cases the rule enables the appellate court to pass such decree or order as ought to have been passed even if such decree would be in favour of parties who have not filed any appeal. The power though discretionary should not be declined to be exercised merely on the ground that the party has not filed any appeals. We are not impressed with argument that the finding as to the nature of Exhibit A6 the Security Deed has become final as the finding operates as res judicata. When the entire matter was still in appeal and any part of the finding could be varied by the appellate court it is idle to contend that the same had become final. So also when the matter had not attained finality and still in dispute the principle of res judicata could not arise. In some case finding recorded at an earlier stage will operate a res judicata if such finding had become final. In the present case that was not the position. The High Court had to find out the rights of the parties arising out of the deed under Exhibit A6 and necessarily had to give a finding one way or the other to determine the status of the appellant as puisne mortgagee. In doing so the High Court decided that the document Exhibit A6 did not amount to a charge and therefore, the appellant did hot derive any rights of puisne mortgagee thereunder, The High Court having so held proceeded further to upset the decree as otherwise if the decree for redemption remained in the face of the finding of non-existence of a charge with the consequent right as puisne mortgagee, the position would be anomalous if not absurd. And so, the High Court in the special circumstances arising in this case exercised the discretion vested in it under Order XLI Rule 33 C.P.C. It cannot be said that such a question was not germane to the determination of the matter in issue. To defend the finding in his favour the respondent could contend that the appellant could not claim to be a puisne mortgagee as no charge arises from Ex. A6, In that event it cannot be said that there is any inconsistency in the stand of respondent. Therefore, we find that there is no merit in the contention of the appellant and the same is rejected Shri Parasaran next contended that on a proper interpretation, the document Exhibit A6 in O.S. 108/50 dated 12.4.1950 creates a charge over property; that the language of

the document made it clear that it was offered by way of security to the Court and a document executed in favour of the court under the orders of the Court should be given equal efficacy as a security bond and such a document creates a charge by operation of law.

In reply Shri Sanghi submitted that what was granted by Exhibit A6 was only an undertaking, which would not amount to a charge. The deed of security executed in the case in O.S- No. 108 of 1950 between Messers, Sandanam Mudaliar and Co. v. Ganesan Pillai reads as follows :

"Deed of security executed this the 12th day of April 1950 in favour of Coimbatore Sub-Court by M. Ganesan son of Magudapathi Gounder, Businessman & Agriculturist residing at Gowripuram, Karur Taluk Dt. The aforesaid plaintiff A.M. Sundara Mudaliar has filed the suit against me for recovery of Rs. 6,493.13 Annas with subsequent interest and costs. He has also obtained an order for attachment before judgment of the monies payable to me from South India Railway. In order to vacate the order of the aforesaid order for attachment before judgment I have filed an application LA. No. 811 of 1950 in the said suit O.S. 108 of 1950.

As- per the order of this Hon'ble Court I have executed this deed of security in the sum of Rs. 7000 and subsequent interest and cost over my self acquired properties in my possession and properties which are nanja lands and are described in the schedule. In the event of a decree being passed in the suit I will not alienate the properties till the decree is discharged. The properties set out hereunder belong to me under right of purchase dated 14.10.46. There is already a prior mortgage over the properties for a Sum of Rs. 3,000 in favour of one Viravan Chettiar. These properties are capable of being ploted into house sites and therefore their present value is about,- Rs. 15,000. I hercby affirm that there is no kind of encumbrance whatsoever over the properties except the one mentioned above."

A perusal of this document will indicate that there was an attachment before judgment for money payable to Ganesan by South India Railway and those monies stood attached to satisfy the decree to be passed in the said O.S. No. 108 of 1950. An application was filed by Ganesan to vacate the order of attachment in I.A. No. 811 of 1950 in O.S. No. 108 of 1950. In compliance with the order of the Court he had executed a deed of security for a sum of Rs. 7,000 and subsequent interest and costs over his self acquired properties in his possession described in the schedule. He stated that in the event of a decree being passed in the suit, he will not alienate the properties till the decree is discharged and, therefore, he describes the prior encumbrances in respect of the properties as on the date of the execution of the security bond, A charge is an obligation to make payment out of the property specified. In the present case there is no clear recital in the document of having created an obligation to make payment of the decrectal amount out of the property in question.

The document Exhibit A6 Security Bond does not in substance offer suit property by way of security. Even giving the most liberal construction to the document we cannot say that a charge as such has

been created in respect of the suit property for money to be decreed in the suit. All that it states is that in the event of decree being passed not to alienate the property till the decree is discharged, which is a mere undertaking without creating a charge. Therefore, we agree with the finding of the High Court that the document at Exhibit A-6 is not a charge. If that is so the suit filed by the appellant has got to be dismissed.

There is yet another reason as to why the High Court held that the appellant cannot claim any rights under Exhibit A-6 the alleged Security Bond executed in O.S. 108/50. The decree obtained in that suit Was a simple money decree and not a decree on a charge or mortgage with the result the appellant who purchased the property in execution of that decree did not acquire the rights under the said document Ex. A-6. This finding appears to be correct. The decree holder sought to execute the decree in E.P. 305/62 to order sale of the suit properly staling that the same is secured in the bond Ex, A-6. However, the executing court did not proceed on that basis and raised objections .thereto. Thereafter, the decree holder sought for attachment of the suit property independent of the so-called charge under Ex. A-6. If really the decree holder in the proceedings wanted to proceed on the basis of the security arising out of charge under Ex. A-6. The requirement of attachment was superfluous. Whether the claim under Ex. A-6 arising out of charge Was given up or not what was pursued is the execution proceeding was only to attach the suit property without recourse to charge under Ex. A-6. Therefore, the appellant could not have acquired any rights of mortgagee under Ex. A-6, the Security Bond. For this reason also appellant's suit is liable to be dismissed and the finding of the High Court, therefore, stands affirmed. The other question raised and elaborately argued do not assume any importance in the view we have taken. Hence we do not propose to answer them.

In the result the appeals stand dismissed and in the circumstances of the case shall be no order as to costs.