

Kurien Chacko Vs. Varkey Varkey

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Court : Kerala

Decided On : Feb-28-1953

Reported in : 1953CriLJ1827

Judge : Kumara Pillai, J.

Appellant : Kurien Chacko

Respondent : Varkey Varkey

Judgement :

ORDER

Kumara Pillai, J.

1. The facts which have given rise to this Cr. Revn. Petition are as follows: In 1097 the petitioner executed a sale deed in favour of his younger brother for a portion of a property-belonging to him. Subsequently, the younger brother hypothecated it to another person who sued him thereon and obtained a decree. When the auction purchaser, who bought the property in execution of that decree, sought to get delivery of possession, the petitioner filed an obstruction petition contending that the sale deed executed by him was a sham document brought into existence for the purpose of screening the property from his creditors and that he and not his brother who was the judgment-debtor, was in possession of the property. He contended that the property was not liable to be sold in execution of the said decree and that as he was in possession of it in his own right the possession could

not be delivered over to the auction purchaser in pursuance of the execution sale.

While the obstruction petition was being enquired into by the execution court, the petitioner also caused the property to be attached by the Division First Class Magistrate of Chengannur in M.C. 10 of 1950 on the file of that court, alleging that there was a dispute about its possession between himself and the sons of his younger brother in whose name a sale deed was executed by him. In M.C. 10 of 1950, which was initiated on his application under Section 143, Criminal P.C., (Travancore), the petitioner contended, as in the obstruction petition, that the sale deed was a sham document brought into existence for the purpose of Screening the property from his creditors and that he, and not his brother's sons, was in possession of the property. After the property was attached, the First Class Magistrate passed an order on the 31st of March 1951 directing the continuance of the attachment of the property and vesting its possession in the hands of a receiver, under Section 144(1) and (2), Criminal P.C., (Travancore) until the civil Court determined the rights of the parties thereto.

Subsequently the obstruction petition filed by the petitioner in the civil Court was dismissed on 18.6.1951. Thereupon the counter-petitioner in M.C. 10 of 1950 produced a copy of the civil court's order before the First Class Magistrate and applied for discharging the receiver and handing over possession of the property to him; and the Magistrate allowed his application on 13.7.1951, discharged the receiver and directed possession of the property to be given back to him. Alleging that the order of 13.7.1951 was passed without notice to him, the petitioner applied again to the First Class Magistrate to take back the property into the receiver's possession and also to call back the amounts drawn from the criminal court by the counter-petitioner on the strength of the civil court's order on the obstruction petition. The Magistrate dismissed this petition on 19.7.1951, The Criminal Revision Petition has been filed against the said order of 19.7.1951.

2. So far as the merits of the case are concerned, it has to be observed that, in the order of 31st March 1951, the Magistrate had specifically referred to the fact that the obstruction petition filed by the petitioner was being enquired into by the civil court, and he stated therein that the attachment and the receiver were to continue

only until the civil Court had made a pronouncement on the question of possession in the enquiry on the obstruction petition. It is admitted that the obstruction petition was dismissed by the Munsiffs Court. A revision petition, C.R.P. No. 575 of 1951, filed in This court by this petitioner against the dismissal of the obstruction petition was heard by me and has just been dismissed. Therefore, the petitioner has no right to remain in possession of the property and the criminal court has also no jurisdiction to continue the attachment on the property and possession of the same with the receiver. The criminal court can continue the attachment only until a competent court has determined the rights of the parties or the person entitled to possession of the property.

Commenting on Section 146, Indian Criminal P.C. which corresponds to Section 144, Travancore Criminal P. C., Chitale says in his book on the Code of Criminal Procedure (1949 edition), Volume I, page 831 that, where a competent court has determined the rights of the parties to the subject of dispute or its possession the Magistrate ceases to have authority to retain control of the property and that he should withdraw the attachment and deliver possession on the basis of such a judgment, and he cites - *Madhorao v. Amirkhan* AIR 1943 Nag 246 (A), - *Mg. Tha Zan v. Mg. Ba Gale* AIR 1914 Low Bur 218 (B) and - *Jurawan v. Ramsarekh Singh* AIR 1933 Pat 224 (C) in support of the above proposition.

3. It was contended by the revision petitioner's counsel that, even though the attachment and the receiver's possession were liable to be determined on the rejection of the obstruction petition, the First Class Magistrate has acted wrongly in withdrawing the attachment and ordering possession to be handed over to the counter-petitioner on the latter's application without notice thereon being issued to the petitioner. Since the attachment and the receiver's possession were liable to be determined on the disposal of the obstruction petition and the counter-petitioner was clearly entitled to possession of the property on the strength of the order on the obstruction petition, the failure to issue notice to the petitioner is at worst only an irregularity. It does not vitiate or render void the Magistrate's order withdrawing the attachment and directing the receiver to hand over possession of the property to the counter-petitioner. In - *AIR 1943 Nag 246 (A)* it has been held:

The power of a criminal court to hand over possession to the successful party on the decision of a civil court is not to be attributed to the exercise of any judicial function under Section 146. The judicial possession based on attachment under Section 146 ends when the order of a competent civil court has been pronounced, but the possession of the court on behalf of the successful party, which originated by the judicial act of attachment, may properly continue even though the right to attach under Section 146 has come to an end. Henceforward, the court can remain in lawful possession on behalf of the successful party and hand over its possession to it.

4. In the circumstances, I hold that this Criminal Revision Petition is without any substance and dismiss the same.

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