

Devendra Nainar Vs. Badrabagu Nainar and ors.

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Court : Chennai

Decided On : Dec-21-1984

Reported in : (1985)2MLJ311

Appellant : Devendra Nainar

Respondent : Badrabagu Nainar and ors.

Judgement :

ORDER

M.A. Sathar Sayeed, J.

1. The plaintiff, who has lost in both the Courts below has filed the above second appeal.
2. The facts of the case are discussed in detail by the Courts below and it is unnecessary for me again to go in detail about the same in this second appeal. For the disposal of this appeal, the following facts are sufficient.
3. O.S.No. 31 of 1951 was filed by one Chandalankara Nainar against Chandranatha Nainar, Baradaraju Nainar, Badrabagu Nainar and one Vasantharai Ammal, for the recovery of the amount due on a promissory note executed in his favour. The suit was decreed. In the present suit O.S.No. 3 of 1971, against which the above second appeal arises, Badrabagu Nainar to the first defendant and his mother Vasantharai Ammal is the second defendant. Defendants 1 and 2 in that

suit are brothers. The first defendant herein is the son of the first defendant in O.S.No. 31 of 1951. Defendants 3 and 4 herein are the sons of the first defendant herein and all of them constituted members of a Hindu joint family. Badraraju Nainar the second defendant in that suit died and his heirs who are defendants 5 and 6 are impleaded herein.

4. In pursuance of the decree obtained by Chandalankara Nainar in O.S.No. 31 of 1951, E.P.No. 170 of 1955 was filed by the plaintiff in that suit and the suit property was brought to sale. The appellant in this second appeal is a Court auction purchaser. Subsequent to the Court auction purchase, the appellant filed E.A.No. 449 of 1963 on 19.8.1963 seeking delivery of possession of the suit property, but the same was dismissed. It is only to recover possession of the suit property, which is in the possession of defendants, the plaintiff, who is a Court auction purchaser, has filed the present suit O.S.No. 3 of 1971 against which the above second appeal arises.

5. The suit was resisted by defendants 1, 3, 4 and 6, From the averments in the written statement, the defence raised by the defendant was, that the appellant herein is not the real purchaser, but only a benamidar for the decree-holder who purchased the suit item in Court auction. The court sale is not binding because there was no valid attachment and the persons interested in the property were not impleaded in the execution petition and no notice was issued to the judgment-debtors under Order 21, Rule 66, C.P.C. There was no proper publication of the sale proclamation and the property worth about Rs. 30,000/- was sold for a very low price of Rs. 5,000/- and odd. The suit is barred by limitation and also barred under the provisions of Section 47, C.P.C.

6. The trial Court held, that the plaintiff was not a benamidar for the decree-holder nor the Court sale is invalid. The trial Court further held that the suit is barred by the provisions contained in Section 47, C.P.C. Thus the trial Court dismissed the suit on the sole ground that the present suit as prayed for does not lie in view of the provisions under Section 47, C.P.C.

7. On appeal by the plaintiff, the low(SIC) appellate Court, on the question whether the plaintiff was a benamidar for the decree-holder in purchasing the suit ite(SIC)

in court auction, gave a finding that the plaintiff is not a benamidar. On the question of validity of the sale, the lower appellate Court has held that the sale is not vitiated for any of the reasons mentioned in the written statement. On the question whether the suit is barred by the provisions of Section 47, C.P.C. the lower appellate Court, on an elaborate discussion, came to the conclusion that the plaintiff's right to apply for possession arose only, on the date on which the sale was confirmed on which date the appellant became a party to the suit as per the amended provision of Section 47, C.P.C. and that the suit is barred by the provisions of Section 47, C.P.C., and thus dismissed the appeal confirming the judgment and decree of the trial Court. It is against this dismissal of A.S.No. 296 of 1976, the above second appeal is filed.

8. The question that was argued before me by the learned Counsel appearing for the appellant is, that the dismissal of the suit filed by the plaintiff by the Courts below holding that the suit is not maintainable under Section 47, C.P.C. is illegal and unsustainable. On the other hand, the contention of the learned Counsel for the respondent is, that steps ought to have been taken by the plaintiff to take possession of the property as provided under Order 21, C.P.C. and since he has not done so, the present suit filed by the plaintiff for declaration and recovery of possession is barred under Section 47, C.P.C. In other words, the contention of the respondent's Counsel is that the plaintiff/Court-auction-purchaser represents the interest of a decree-holder, and his representative not having pursued his remedy to take delivery of possession and having allowed the dismissal of E.A.No. 449 of 1963 on 23.10.1967, the present suit filed by the plaintiff is barred by the provisions of Section 47, C.P.C. His further argument is that the plaintiff as the representative of the decree-holder after the amendment of the Civil Procedure Code, has become a party to the suit as representative-in-interest of the decree-holder. When he has thus become a party to the suit, the question of taking delivery of possession from the defendants is one falling under execution, satisfaction or discharge of the decree and so he is barred from filing a separate suit. To this argument, learned Counsel appearing for the plaintiff/appellant contends that on the facts of this case, the court auction purchaser, namely, the appellant herein, was not a party to the suit as per the wording of the explanation to Section 47, C.P.C. as it stood then and, therefore, the amendment of the

Explanation coming into-force in 1956 will not affect the right of the plaintiff to file a separate suit for possession. According to the learned Counsel, the right to file a suit accrued to the plaintiff for possession as on the date of the Court sale and it is a substantial right and this substantial right of the plaintiff for filing a suit for delivery of possession cannot be taken away by a subsequent amendment to Section 47, C.P.C since the amendment has come into force in 1956 and is not retrospective in effect. As far as this point is concerned, no direct and effective ruling has been brought to my notice by the learned Counsel appearing for the appellant.

9. For this purpose, let us now consider the relevant dates. O.S.No. 31 of 1951 was filed by Chandalankara Nainar against the first defendant and his mother Vasantharai Ammal and the said suit was decreed on 24.12.1951. The plaintiff filed E.P.No. 197 of 1951 for the execution of the decree, but that was dismissed on 31.1.1952. Another E.P.No. 116 of 1952 was filed by the plaintiff, but the same was dismissed as not pressed on 16.2.1953. Further execution petitions, i.e. E.P.Nos. 77 of 1953, 62 of 1955 and 170 of 1955 filed by the plaintiff in the earlier suit O.S.No. 31 of 1951 were dismissed on 27.11.1953, 16.4.1955 and 29.7.1955 respectively. However, the suit property was brought to sale by the plaintiff in O.S.No. 31 of 1951 and the sale was held on 5.4.1956 and the property was purchased by the present plaintiff on 5.4.1956. This has led the defendants to file E.A.No. 509 of 1956 to set aside the sale on several grounds, namely, that the decree-holder has knocked down the property for a very low price and that there was no proper and valid service of notice, no proper publication of the sale proclamation and that the sale was in violation of Order 21, Rules 54, 66 and 72, C.P.C. It is at this stage necessary to mention that a joint endorsement was made by the parties on 2.12.1958, that the court sale would be set aside, if the decree amount is paid in two instalments. The first instalment was said to have been paid on 2.1.1959 and the second instalment was due on 2.2.1959. E.A.No. 147 of 1959 was filed on 3.2.1959 by the defendants to extend the time to pay the second instalment by one day. This application was dismissed on 10.3.1959 and the sale was confirmed. This has led to the filing of C.R.P.No. 1079 of 1959 against the order of dismissal in E.A.No. 147 of 1959. The said civil revision petition was dismissed by this Court on 26.8.1969. Thereafter, E.A.No. 449 of 1963 was filed

by the present plaintiff for delivery of possession on 19.8.1963. Delivery was ordered on 16.7.1965. It is against this order of delivery, the defendants preferred C.R.P.No. 1351 of 1961 before this Court and the same was dismissed on 16.2.1967. Thereafter, E.A.No. 449 of 1963, which was already filed by the present plaintiff for delivery, was dismissed for non-payment of batta on 23.10.1967. To restore set aside the dismissal of E.A.No. 449 of 1963, E.A.No. 255 of 1968 was filed by the present plaintiff on 14.2.1968. This execution application was dismissed as not pressed on 15.10.1968. Thereafter, the plaintiff has filed the present suit on 16.12.1970 against which the above second appeal arises.

10. The question that requires consideration is, whether the present suit under Section 47, C.P.C. for possession after the amendment of the section in 1956, is maintainable or whether the plaintiff should have taken steps for recovery of possession resorting to the provisions of Order 21, C.P.C.

11. Section 47, C.P.C. as it stood on the date of the Court sale (5.4.1956), reads as follows:

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of additional court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation: For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit.

The Explanation was substituted by Section 5 of Act 66 of 1956 which came into force on 2.12.1956. After the amendment, the Explanation to Section 47, C.P.C. reads as follows:

For the purposes of this section, a plaintiff whose suit has been dismissed, a defendant against whom a suit has been dismissed and a purchaser at a sale in execution of the decree are parties to the suit.

In this case, the Court auction sale took place on 5.4.1956 and the sale was confirmed on 10.3.1959. The present suit was filed by the plaintiff on 16.12.1970. It must be noted that an auction purchaser becoming a party to the suit in Section 47, C.P.C. was not there at the time, when there was a Court sale (5.4.1956), but this has been incorporated in the Explanation to Section 47, C.P.C. after the sale was confirmed, i.e. 10.3.1959. It has been held in several rulings that after amendment of the Explanation to Section 47, C.P.C. there will be a bar for filing an independent and separate suit even by a stranger Court auction-purchaser for possession of the property.

12. In *H. Badridas v. D.B. Prasad* : [1974]1SCR210 it has been held as follows:

Section 47 in our view should be construed liberally. As far back in *Prosunno Coomar Sunyal v. Kalidas Sunyal*, the Privy Council spoke strongly in favour of putting a liberal construction on Section 244 of the Code of Civil Procedure of 1882, which corresponded to present Section 47 of the Civil Procedure Code of 1908. The Privy Council reiterated this in *Ganapathy v. Krishnamachariar*, I.L.R.41 Mad.403 : (1918) 45 I.A.54 : 34 M.L.J.463 : A.I.R. 1917 P.C.121. If a liberal construction be put upon Section 47, it is difficult to understand why a decree-holder who has been party to the decree will shed his character as such party merely upon purchasing the property at the execution sale. After all, a decree-holder purchases the property in execution of his decree with the permission of the Court. There is no reason why he should not retain his character of a party to the suit until the delivery of possession to him of the property purchased by him. Having regard to this consideration, if any question is raised by the judgment-debtor at the time of delivery of possession concerning the nature of the rights purchased and if the judgment-debtor offers any resistance to delivery of

possession the question must be one which in our view relates to the execution, discharge and satisfaction of the decree and arises between the parties to this suit.

13. In *Kailash Chandra Tarafdar v. Gopal Chandra Poddar* : AIR1926 Cal798 , the question that came for consideration was, whether a stranger auction-purchaser has got a right of suit apart from an application under Order 21, Rule 95, C.P.C. and whether delivery of possession to the auction purchaser will also come within the meaning of execution, discharge and satisfaction. This decision was also considered by the Supreme Court in *H. Badridas v. D.B. Prasad* : [1974]1SCR210 mentioned supra wherein it has been observed at page 199 as follows: We find ourselves in agreement with the opinion of the Full Bench of the Calcutta High Court in *Kailash Tarafdar's Case* : AIR1926 Cal798 If a confirmation of the sale would finally terminate all questions as to execution of the decree it is difficult to appreciate why the legislature would frame such rules as Rules 95 to 102 under Order 21 of the Code of Civil Procedure. We are in respectful agreement with G.K. Mitter, J. that the legislature must have thought that the duty of the. executing Court should not end with the confirmation of the sale and it is because the legislature thought 'that the auction-purchaser should have the right of applying, for possession under the provisions of Rule 95 and Rule 96 that proceedings for obtaining possession were included in the catena of rules relating to the execution of the decree.

The other decisions on this point are, *Harnandrai v. Debidutt* : [1974]1SCR210 and *Govindaswamy v. Venkatarathna*, I.L.R. (1967)3 Mad.408 and they were followed by Mohan, J. in S.A.No. 1561 of 1971 dated 22.8.1975 which was confirmed in *Muthaiah Chettiar v. Krishnaswami Gounder* : (1981)1MLJ103 . In short, after the amendment of Section 47, C.P.C. in 1956, no suit will lie by an auction-purchaser for delivery of possession. Central Act 104 of 1976 has led to the further amendment of Section 47, C.P.C. Explanation II of Section 47, C.P.C. speaks, that, not only a purchaser of property at a sale in execution of the decree is deemed to be a party to the suit in which the decree was passed, but all questions relating to delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to execution, discharge or

satisfaction of the decree within the meaning of this section. Thus a reading of the 1976 amendment to Section 47, C.P.C. shows, that no separate suit will lie by an auction-purchaser for delivery of possession.

14. In the case on hand, the sale was held on 5.4.1956 and the sale was confirmed on 10.3.1959. It is argued by the Counsel for the appellant that the law before the amendment of 1956 will apply. The right to recover possession by the auction-purchaser can arise only after the confirmation of sale and not before, but it should be seen that Section 65, C.P.C. introduces a legal fiction by vesting title in the purchaser retrospectively after confirmation. In the present case, the question of title is not in dispute, but the question is, whether the plaintiff has the right to recover possession after the amendment. That right of the plaintiff to recover possession in the instant case accrued only on 10.3.1959 the date of confirmation of sale and, therefore, it has to be held that the cause of action for the plaintiff arose only on 10.3.1959. This point is well laid down in *Raghunandan v. Commissioner, Income-tax*, L.R. . As per this decision, a right to possession for an auction-purchaser arises only after the confirmation of the sale. The same is the view expressed by this Court in *Radhakrishna Chettiar v. Ramaswami Ayyar* (1954)2 M.L.J.610. A reading of this decision shows that the remedy of the auction-purchaser arises from the date of confirmation of the sale. In the present case, the only substantive relief claimed in the plaint is for possession. That accrued on 10.3.1959 and hence it has to be held that the amended Section 47, C.P.C. under Act 66 of 1956 alone is applicable. A decision reported in *V.S.M. Iyer v. Azhakan* : AIR1972 Ker135 was relied on by the appellant's Counsel to prove the contra. But that was a case which dealt with a case of confirmation of sale before the amendment and the suit in that case was filed after the amendment. Under those circumstances, the learned Judge has held that the right of suit, which accrued before the amendment, is not taken away by the amendment, since it is substantive right. In the present case, as stated already, the right to recover possession accrued only after the amendment of Section 47, C.P.C. in the year 1956 and in pursuance of the said amendment, the auction-purchaser, the present plaintiff, was made as a party to the suit O.S.No. 31 of 1951. His remedy is only to approach the executing court by an application for delivery of possession and not by a separate suit as it has been done. The contention of the appellant's Counsel

that the sale took place after the amendment is of no relevancy. The remedy of the plaintiff to recover possession became available only on the date of confirmation of sale.

15. This leads us to the next question, i.e. can the suit be converted into an application for delivery? Section 47(2), C.P.C. is deleted by the amending Act 104 of 1976 and under Explanation to Sub-section (3)(II)(b), all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section. The argument of the counsel for the appellant is, that the trial Court ought to have converted the present suit into an application under Section 47, C.P.C. No such application was ever made before the trial Court nor any request was made for such conversion. Even the trial Court cannot convert the suit into an application in view of the prayer in the suit and in view of Sub-section (3) of Section 47, C.P.C. Further, it should be seen that at one stage, E.A.No. 449 of 1963 was filed by the plaintiff seeking delivery of possession. After contest, delivery was ordered on 16.2.1967. But, however, the said execution application was dismissed on 23.10.67 for non-payment of batta-vide Ex.B-5. Thereafter, the plaintiff filed an application, E.A.No. 255 of 1968 to restore E.A.No. 449 of 1963. This execution application (E.A.No. 255 of 1968) was dismissed on 15.10.1968 as not pressed. Hence having filed an application for delivery and allowing it to be dismissed wantonly without prosecuting it again, there cannot be a second application for delivery nor can the present suit be converted into an application in the absence of such prayer before Court. This position is made clear in *Machamma v. Kanakamma* : AIR1935 Mad923 and *Govindaswami v. Venkatarathna* I.L.R. (1967) Mad.408.

16. The next question, is, whether the conversion of the suit is possible. It can be done only under the old Civil Procedure Code, subject to the law of limitation. Under Article 180 of the old Limitation Act, the period for recovery of possession is three years when the sale become absolute. But under Article 134 of the new Limitation Act, the period for recovery of possession is one year. Even that cannot be done in the present suit. The decision cited by the appellant's Counsel in *Perumal v. Ramachandra Padayachi* : (1982)1MLJ65 has no relevancy to the facts

of this case and has no application in question. The order 'deliver' in E.A.No. 449 of 1963 cannot exist in the eye of law beyond the period of the final disposal of E.A.No. 449 of 1963, since it was dismissed for non-payment of batta on 23.10.1967. Thus, the original order of delivery gets merged in the final order. In *Sree Rajah Vadrevu Viswasundara Rao Bahadur v. Vannam Paidigadu* : (1926)50MLJ72 it is observed that where owing to the default or laches of the auction-purchaser delivery of possession could not be effected, the Court would be justified in dismissing the application for delivery of possession even though an order for delivery has been made. That apart, the only Article that is applicable to an auction-purchaser to take delivery of possession is Article 134 of the Limitation Act. This is very clear from the judgment of Mohan, J. in S.A.No. 1561 of 1971 dated 22.8.1975 which was confirmed on appeal by a Division Bench in *Muthiah Chettiar v. Krishnaswami Gounder* : (1981)1MLJ103 . Taking all these facts into consideration, I am of the view, as pointed out by the Courts below, that even though declaration of title has been asked for in the present suit by the plaintiff, the substantial and the main relief is only for recovery of possession, which cannot be granted in the present suit filed by the plaintiff. After perusing the judgments and decrees of the Courts below, I do not find any merits in this second appeal. Hence this second appeal is dismissed. There will be no order as to costs.