

Syamakumar Vs. Jayapalan Nair and Others

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Court : Kerala

Decided On : Jan-19-2012

Judge : Thomas P. Joseph

Appeal No. : Ex.S.A.No. 21 of 2011

Appellant : Syamakumar

Respondent : Jayapalan Nair and Others

Judgement :

Thomas P. Joseph, J.

1. Petitioner in E.A. No.798 of 2009 in E.P. No.84 of 2000 in O.S.No.615 of 1994 of the court of learned II Additional Munsiff, Thiruvananthapuram is the appellant before, me. Respondents 1 to 4 obtained a decree for redemption of mortgage and on depositing the mortgage money, sought delivery of possession in E.P.No. 84 of 2000. Delivery was ordered on 27.10.2009. At that stage appellant came with E.A.No.798 of 2009 resisting delivery under Rule 97 of Order XXI of the Code of Civil Procedure (for short, "the Code"). He claimed that he has obtained assignment of the property mentioned in E.A.No.798 of 2009 from the 1st judgment debtor as per Ext.A1, assignment deed No.3509 of 2007. It is his case that the said property was obtained by the 1st judgment debtor by way of kudikidappu in OA No. 187 of 1999. Ext.A3 is the purchase certificate. Exts.A2, A4 and A5 are receipts produced by the appellant for payment of revenue. To show

that appellant is a bonafide purchaser, he produced Ext.A7, encumbrance certificate. To contend that the property covered by E.A.No.798 of 2009 is not the decree schedule property, appellant produced Exts.A6 and A8, certificate of possession and copy of survey plan.

2. The application (E.A.No.798 of 2009) was resisted by respondents 1 to 4 who contended that attempt of appellant is to prolong litigation at the instance of 1st judgment debtor. Executing court dismissed E.A.No.798 of 2009. Appellant challenged that order before learned I Additional District Judge, Thiruvananthapuram in A.S. No.162 of 2011. That appeal was dismissed. Judgment and decree of the learned Additional District Judge are under challenge in this Second Appeal raising the following as substantial questions of law;

i. In consideration of an independent claim by an obstructer does not the enquiry should be to find out whether the decree holder has sufficient title beyond the scope of the decree, to eject the obstructer?

ii. Should not such an enquiry be as to whether the person who seeks to dispossess the person who is admittedly found In possession has sufficient title on the person in possession so as to eject him from the property?

iii. Without ascertaining identity of the property sought to be evicted and the decree schedule property as one and the same, is it not illegal to allow the decree holder to dispossess the obstructer?

3. It is, contended by learned counsel for appellant that identity of properties is not ascertained by the courts below. Further contention is that appellant is a bonafide purchaser for consideration without notice of pending suit and hence is entitled to resist delivery proceedings

4. So far as dispute regarding identity is concerned, I do not find much merit In that contention, for, if delivery proceedings do not concern the property over which appellant is now laying hands, there was no necessity at all for the appellant to resist delivery proceedings. Therefore, it is certain that delivery ordered and sought to be effected is with respect to the property over which appellant is

claiming right, title and possession. Learned Additional District Judge has observed that in Ext.A1, assignment deed in favour of appellant the old survey number of property is mentioned as 420/A1, re-survey as 129 and block number as 3 while the decree schedule property is comprised in survey No.420/A1-1. Learned Additional District Judge has pointed out that the only difference is that sub division number is separately given for the decree schedule property. As regards the slight difference in the boundaries, it is pointed out that since the suit was filed in the year, 1994 and Ext.A1 is in the year, 2007 some change in the boundary of property is quite normal. In the above circumstances, contention raised as regards lack of identity of property does not merit consideration not does involve any substantial operation of law.

5. So far as claim of appellant is concerned, it is seen that in Ext.A3, purchase certificate extent of property is stated as three cents while in Ext.A1, assignment deed extent mentioned is 1.60 Ares (which is about four cents), in other words, it would appear that by Ext.A1, 1st Judgment debtor has attempted to transfer something what she herself had.

6. The further fact which I should bear in mind is that the Land Tribunal issued the purchase certificate (Ext.A3) in favour of 1st judgment debtor and the judgment debtor assigned the property to the appellant while the suit was pending in the civil court. The suit as aforesaid was instituted in the “year, 1994 while, 1st Judgment debtor filed the application for purchase of Kudlkidappur in the year, 1999. When the matter was pending consideration before the civil court, the Land Tribunal could not have issued a purchase certificate and even if an application had been preferred to it, tht application should have been kept pending awaiting decision of the civil court. That is because rule of lis pendens under Sec. 52 of the Transfer of Property Act (for short “the TP Act”) is applicable to proceeding before the Land Tribunal as well. Hence Ext.A3, purchase certificate issued in favour of the 1st judgment debtor is hit by Sec.52 of the TP Act.

7. It is contended by learned counsel that suit for redemption of mortgage Instituted by respondents 1 to 4 was not noted In Ext.A7, encumbrance certificate and that unaware of pendency of suit, appellant purchased the property.

8. For the application of Sec. 52 of the TP Act notice of pendency of the suit is not required. The rule is based not on the doctrine of notice but on expediency, ie, necessity for final adjudication. Sec 52 enacts the doctrine of the pendens which is expressed in the maxim 'ut lite pendent nihil Innovertur'. Turrner, C.J., said in Bellamy. V. Sabina (1857)-1 De G. and J. 566):

"It is, as I think, a doctrine common to the courts both of Law and Equity, and rests as I apprehend, upon this foundation-that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceeding."

On the question how far notice is material in the application of the rule, Lord Cranworth said in the above decision:

"It is scarcely correct to speak of lis pendens its affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party."

The above decision was quoted and followed by the Privy Council in Faiyaz Hussaln Khan v. prag Narain, (1907) 29 ALL. 389, Mukharjee, J. said in Johar Lal Bhutra v. Bhupendra Nath, (1922) 49 Cal.495 that where jurisdiction of the court had once attached, if it could be ousted by the transfer of defendant interest, there would be no end of litigation and justice would be defeated. In Rajendar Singh v. Santa Singh, AIR 1973 SC 2537 the Supreme Court said that the doctrine of lis pendens is intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court in which the dispute as rights or Interests In immovable property is pending by private dealings that may remove the subject matter of litigation from the ambit of the power of the court to decide a pending dispute or which may frustrate its decree. Thus it is immaterial whether the alienee pendent lite had, or had not, notice of the pending proceeding. As per English Law, the

doctrine affects only transactions pendens lite if the lis has been duly registered. Based on Secs. 2 and 3 of the Land Charges Act, 1925 (England) and the recommendations made by Jenkins, C.J. In *Krishnappa v. Shivappa*, (1907) 31 Bombay 393, Sec. 52 was amended in Bombay by Bombay Act 4 of 1939 as per which for the application of lis pendens it is necessary that "a notice of pendency of such suit or proceeding. Is registered under Sec. 18 of the Indian Registration Act, 1908" and the transfer is made "after notice is so registered". Sub-sec (2) of Sec. 52 as amended by the Bombay Act 4 of 1939 states what details notice of pendency of suit or proceeding referred to in Sub-sec (1) of Sec. 52 should contain. (The Bombay Act 57 of 1959 declared amendment to Sec. 52 to be in force in the whole of the then reorganized State of Bombay). As the principle of lis pendens is based on public policy, no amount of good faith or bonafides also would save the situation. But, persons acting bonafide and in good faith may become unfortunate victims of the Rule. It is appropriate that the State Government thought of making suitable amendment to Sec. 52 of the TP Act as in the Land Charges Act, 1925 (England) or the Bombay Act 4 of 1939 so that a bonafide purchaser could get information from the registering authority as to the pendency of any suit in which right-to immovable property is directly and specifically in question.

Suit in which right-to immovable property is directly and specifically in question.

9. Having regard to the circumstances stated above, I do not find any substantial question of law involved in this appeal so as to entertain it.

10. Learned counsel for appellant has requested time to vacate the suit property. It is requested that appellant may be granted six months time to vacate the suit property. On that matter I have heard Advocate B. Jayasurya who has appeared for respondents 1 to 4 (caveators). Learned counsel for caveators submits that the execution petition is posted on 23.01.2012 for delivery.

11. Having heard learned counsel for appellant and counsel for caveators on the above aspect and having regard to the circumstances stated by learned counsel for appellant, I am inclined to grant two months time from this day to the appellant to vacate the suit property.

Resultantly the Second Appeal Is dismissed. But, appellant Is granted time till 19.03.2012 to vacate the suit property subject to the following conditions:

- i. Appellant shall file an affidavit in the executing court on or before 23.01.2012 undertaking to vacate the suit property by 19.03.2012 without “ putting forth any claim or objection on any account whatsoever.
- ii. Appellant shall not during the said time create any document or induct third parties into posses of the sit property.
- iii. If any of the above conditions is violated, it is open to the executing court to proceed with execution proceedings.
- iv. Registry Is directed to communicate the gist of judgment of learned II Additional Munsiff, Thiruvananthapuram for necessary action.

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