

(1935) 02 MAD CK 0067
In the Madras High Court

Abdul Aziz Sahib and Others

APPELLANT

Vs

Chokkan Chettiar and Another

RESPONDENT

Date of Decision : 08-02-1935

Acts Referred:

Limitation Act, 1963 — Article 180, 182

Citation : AIR 1935 Mad 803 : 159 Ind. Cas. 279

Hon'ble Judges : Beasley, C.J;Ramesam, J;King, J

Bench : Full Bench

Judgement

Ramesam, J.—The facts out of which this reference of Full Bench arises may be shortly stated. The respondent in the High Court obtained a decree in O.S. No 128 of 1921 and in execution of the decree brought certain properties of the judgment-debtors to sale and purchased the properties. The sale was confirmed in his favour on March 11, 1924, after the dismissal of an application by the judgment-debtors to set aside the sale. There was an appeal and also a revision to the High Court. The revision petition was dismissed on October 12, 1927. It is conceded by all the parties that October 12, 1927, may be taken to be the date when the sale became absolute. Within three years of the High Court's order, i.e., September 1, 1930, the decree-holder by M.P. No. 561 of 1930 applied for delivery of possession of the properties purchased. The properties purchased comprised a house and certain lands. The house was item No. 2 of the application. When the Amin proceeded to deliver possession of the house, one Abdul Gaffar Sahib claiming that his wife Amina Bi has a share in the house bolted the outer door from inside and locked the same and prevented the Amin and the auction-purchaser from going inside. Afraid of a disturbance the Amin returned and sent his report on September 11, 1930. Nothing is stated by the Amin as to the delivery of possession of the lands. When the matter came up before the District Munsif, he passed the following order "possession was not given on account of obstruction. Petition dismissed." This is dated September 26, 1930, i.e., four days before the end of the quarter.

2. It is our duty to point out that this order is a very improper order. In the first place nothing was done by the Amin as to the other item, viz., the lands. Even as to house, the obstruction was by a person claiming a share in it. It is true that the house is probably not divided by metes and bounds and it is difficult to deliver physical possession of the remaining share as to which there was no obstruction. But in such a case the Court ought to deliver such possession as the intangible interest may be capable of. Instead of doing this the District Munsif simply says that the petition is dismissed. One thing is noticeable that throughout, i.e., at the time of the attempted delivery and at the time of the order there was no obstruction or opposition on the part of the judgment-debtors. When there was no opposition by the judgment-debtors and the obstruction was only by a third person to a limited extent, there is no reason why the portion as to which there was no obstruction by the third person and no opposition by the judgment-debtors should not be delivered. And it is also clear that the District Munsif never meant to refuse such a relief. The order is passed in a mechanical way without adverting to the details of the matter before him, the desire obviously being to close the petition and to show that it was not pending at the end of the quarter. It has again and again been held that such a disposal is not a judicial disposal on the merits. It cannot be regarded that any relief claimed by the petitioner was refused to him so as to compel him to appeal to an Appellate Court.

3. The decree-holder again filed a petition on October 13, 1930, obviously under Order XXI, Rule 97. The third person who made the obstruction on the former occasion objected to this petition on the ground that it was filed more than 30 days after the date of the obstruction. The petition was accordingly dismissed. So far as the obstructor is concerned, the decree-holder's remedy is only by a regular suit. But again it is noticeable that there was no objection by the judgment-debtors and the obstructor's objection was always only as to a share. The decree-holders then filed the present petition on March 13, 1931, against the judgment-debtors for delivery of possession. The petition can be regarded as a petition for the delivery of only the remaining share in the house as to which there never was an obstruction and also for possession of the lands.

4. Nothing was said about the lands up to now, there was no obstruction; nor opposition by the judgment debtors nor even an attempt to deliver. So far therefore as the lands and the share of the house as to which there was no obstruction are concerned, this is merely a continuation of the first petition which was never legally disposed of on the merits but only closed for statistical purposes. Objection is now taken that this is barred by limitation as being more than three years after the right to delivery accrued. The District Munsif dismissed the petition. On appeal the District Judge held that it was not barred by limitation or res judicata and sent back the petition for disposal according to law. The judgment-debtors have filed this appeal. The matter originally came on before our brother Madhavan Nair, J. Before him the objection that the decree-holder's petition was barred under Article 180 was repeated. The respondent relied on

Article 182. After noticing the conflict in the decisions our brother referred the matter to a Bench of two Judges who then referred to a Pull Bench the question whether the present application by the decree-holder is barred by limitation.

5. On the bare question whether Article 180 or Article 182, Limitation Act, applies to this case, the matter admits of very little difficulty. In *Muthia v. Appasami* 13 M. 504, it was held that an application by a decree-holder-purchaser for delivery of possession was governed by Article 179 which corresponds to Article 182 of the present Act. In *Lakshmanan Chettiar v. Kannammal* 24 M. 185, a decree-holder-purchaser applied for delivery. Some of the properties purchased were delivered. He afterwards applied for the delivery of the remaining properties. It was held that the second application was an application taken as a step-in-aid of execution and was not barred though it was more than three years after the purchase. In *Sultan Sahib Maracayar v. Chidambaram Chettiar* 32 M. 136 : 1 Ind. Cas. 998 : 19 M.L.J. 224, it was held that an application by a decree-holder-purchaser for delivery of property does not fall within Article 179 but within Article 178 which was the residuary Article in the old Act corresponding to Article 181 in the present Act. There is no need to differ from the reasoning in these cases at the present day, for under the present Act, besides Article 182 which provides for applications for execution and Article 181 which is the residuary article providing for applications not otherwise provided for, we have got a new Article--Article 180--providing for application for possession by a purchaser. No such article existed under the old Act. The meaning of this Article is plain because the word "purchaser" in this Article includes cases of a decree holder purchaser and a purchaser who is not a decree-holder.

6. The respondent refers to Article 138 as to which it has been held by the Court that the word "purchaser" means only a non-decree-purchaser for a decree-holder-purchaser cannot bring such a suit according to the decisions of some of the High Courts. In such cases the word "purchaser" is to be confined to non-decree-holder-purchaser. But there is no analogy between that Article and Article 180, for it has never been held that a decree-holder-purchaser cannot apply for delivery of possession. Article 180 therefore applies to both kinds of purchasers. The attempt of the respondent to confine Article 180 to non-decree-holder-purchasers therefore fails. And if Article 180 applies, the residuary Article 181 does not apply. Nor can the application for delivery be regarded as an application for execution. So, Article 182 cannot apply. Article 180 being the more specific Article must therefore apply. But this conclusion does not dispose of this case. We have yet to decide whether the petition of March 13, 1931, is barred by limitation, that being the question referred to us. I have already observed in the opening of this judgment that the decree-holder's application so far as the items other than the house are concerned, has never been considered, and has never been decided against him and it is impossible to regard the order on the first petition of September 1930 as an order refusing to deliver the properties to him in such a way as to make it incumbent on him to appeal. It was an order passed

only for statistical purposes. The present application of March 1931 must, therefore, be regarded in the circumstances of the case as a continuation of the petition of September 1930 for delivery of possession of the lands.

7. Similar considerations apply so far as the share of the house as to which there was no obstruction is concerned. As to both these items there never having been any objection by the judgment-debtors and there never having been any adverse order against the decree-holder and there never having been any valid disposal of the petition, the present petition must be regarded either as a continuation of the petition of September 1930 or as a reminder to the Court to take up that matter again. In this view the application of the decree-holder for delivery of possession of such items as are still with the judgment debtors and have got to be delivered is not barred by limitation. So far as the obstructor's share is concerned, the execution is complete and the decree-holder has no remedy in execution. His only remedy is by a regular suit. At this stage it would be desirable to make some remarks as to the procedure to be observed when a decree-holder-purchaser seeks delivery of possession of the properties purchased. Unless the executing Courts do their work very carefully, there is great danger of serious miscarriage of justice in such cases. Where a decree-holder-purchaser seeks delivery of possession of an item of property and if the judgment-debtor obstructs, the decree holder should make a complaint under Order XXI, Rule 97, Civil Procedure Code, and the matter must be disposed of in execution. If the judgment-debtor and a third party both obstruct, the decree-holder-purchaser has to complain against the judgment-debtor and, if he chooses, against the third party also under Order XXI, Rule 97 and the complaint can then be disposed of. But if the judgment debtor is quiescent, raises no objection and makes no opposition either before the Amin or before the Court, it is clear that so far as he is concerned, there is no objection to the delivery. But in such a case the third party may object and on account of the third party's objection physical possession of the property cannot be given. In such a case it is the duty of the Court to note the fact, and to order delivery of such possession as the matter may then be capable of so far as the judgment-debtor is concerned.

8. It is always better that this formal procedure is observed otherwise; in a regular suit which the purchaser has to bring against the obstructor, the suit being necessitated by his obstruction only, the judgment-debtor may have to be made a formal party and then objection may be raised that so far as he is concerned, a regular suit does not lie, execution not being complete against him. The obvious reply is that delivery could not be completed not on account of any obstruction by him but on account of the obstruction by the third party. So far as he is concerned, there is nothing more remaining with him to be delivered and therefore the execution proceedings are complete and there is no bar to a regular suit. This is what myself and Cornish, J., held in Appeal No. 372 of 1926. But lest it should be said that such a conclusion can only be arrived at after a certain amount of straining in favour of the decree-holder, the proper thing is for the Courts to record that there being no obstruction by the judgment-debtor,

delivery is completed so far as he is concerned, and leave the purchaser to take proceedings against the obstructor. On such a view in the present case it may be said that so far as the other share of the house is concerned, there was a delivery so far as the judgment-debtor is concerned. But even if it is so one ought to make a note of it in that form. But on the view we take of the nature of the present petition of September and the manner in which it was disposed of, it is unnecessary to resort to this. The lower Courts will now proceed to make a note that so far as the share of the house to which objection is raised is concerned, the delivery is complete as against the judgment-debtors and also direct delivery of the share as to which there is no obstruction, i.e., such delivery as it is capable of unless there is some other matter to be considered. And so far as the lands are concerned, another order for actual delivery should be made provided there is no further matter to be considered. I am therefore of the opinion that the present petition is not barred by limitation and the order of the District Judge directing a remand should stand. The case will go back to the Bench with this opinion.

Beasley, C.J.

9. I agree.

King, J.

10. I agree.

11. Having regard to the opinion of the Full Bench, the appeal is dismissed with costs.