

(1954) 03 KL CK 0001

In the High Court Of Kerala

Case No : A.S. No's. 614 and 676 of 1950

Annie Marie Fernandez and others

APPELLANT

Vs

Mathevan Madhavi and others

RESPONDENT

Date of Decision : 23-03-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47, 50

Citation : AIR 1954 Ker 92

Hon'ble Judges : Sankaran, J; Kumara Pillai, J

Bench : Division Bench

Advocate : N.K. Narayana Pillai in A.S. No. 614/50 and S. Narayanan Potti in A.S. No. 676/50, for the Appellant; P. Govindan Nair and S. Narayanan Potti in A.S. No. 614/50 and N.K. Narayana Pillai in A.S. No. 676/50, for the Respondent

Judgement

Sankaran, J.—Both these appeals are directed against the decree in O.S. No. 21 of 1121 on the file of the Trivandrum District Court. Defendant 1 along with her assignee has preferred A.S. No. 614 challenging the correctness of the decree so far as it is against defendant 1. The plaintiff has preferred A.S. 676 against that portion of the decree which is against her.

2. The plaint schedule properties belonged to one Gomez and they had been hypothecated in favour of defendant 1 on 28-8-1094 for a consideration of Rs. 2200/-. On the death of Gomez these properties were partitioned by his three sons and each of them took the properties separately as shown in Schedules A, B and C, subject to the liability to discharge the subsisting debts. John George Gomez, to whose share the A schedule properties were allotted, had been directed to pay off the hypothecation debt due to defendant 1.

For a few years he continued to pay the interest due on that debt, and thereafter he sold the A schedule properties to his son-in-law Elias Fernandez with a direction to discharge the entire debt. The vendee failed to comply with that direction and accordingly defendant 1 sued on her hypothecation bond and obtained the decree in O.S. No. 82 of 1107 for realisation of the debt charged on

the entire properties covered by Schedules A, B and C. By that time the ownership of these properties had passed on to other persons.

The purchaser of A Schedule properties was therefore impleaded as defendant 17 and the purchaser of the B and C schedule properties was impleaded as defendant 16, in O.S. 82 of 1107. It was with these persons on record that the decree in that case was obtained by the present defendant 1. In execution of that decree all these properties were sold in court auction and were purchased by defendant 1 on 1-5-1120 in satisfaction of the decree amount due to her.

3. The present plaintiff claims title to these properties under the sale deeds, Exs. E, F and G, taken from defendants 17 and 16 in O.S. 82 of 1107. Ex. E is the sale deed executed in her favour by defendant 17 in respect of the A schedule properties. Exs. F and G are the sale deeds executed in her favour by defendant 16, who is her own husband, in respect of the B and C schedule properties. All these three sale deeds came into existence after the commencement of the litigation in O.S. 82 of 1107.

On the strength of the title thus acquired by the plaintiff, she has instituted the present. Suit to set aside the decree and the execution proceedings in O.S. 82 of 1107 and for a declaration that they are not binding on her or her interest in the plaintiff schedule properties. The question of damages, representing the consideration paid by the plaintiff under Exs. E, F and G which she had claimed by way of alternative relief, has not been raised in the present appeals, and hence it is unnecessary to deal with that question. The decree in O.S. 82 of 1107 is impeached mainly on three grounds, viz.,

(i) In the copy of the plaint served on defendant 17 in that case his name and address had been wrongly given with a fraudulent intention and as a result of the fraud thus perpetrated defendant 17 could not appear and contest the suit.

(ii) The present defendant 1 had accepted and acquiesced in the arrangement made in the partition deed executed by the three sons of the original owner of the properties and also in the arrangement made in the sale deed executed by John George Gomez in respect of the A schedule properties in favour of Elias Fernandez, regarding the manner of discharging the hypothecation debt due to her and by accepting such arrangements she had waived her claim over the B and C schedule properties. It was after a fraudulent suppression of all these facts that she obtained the decree in O.S. 82 of 1107.

(iii) The claim she had put forward in that suit was for an amount very much larger than that was legally due to her.

Coming to the execution proceedings, the main ground of attack is that the court sale was conducted after the death of defendant 17 in that case and without impleading his heirs at law to represent his estate. It is also contended that the decree-holder fraudulently represented to the Court that defendant 16 was in possession of all these items even though as a matter of fact the title and

possession had already passed on to the present plaintiff.

The sale was conducted without disclosing the fact that very valuable improvements had been effected by the plaintiff in these properties. It is also stated that interest on the decree amount had been wrongly calculated with the result that the sale was for an amount which could not be legally claimed or recovered. The sale of the A schedule properties is stated to have been held without jurisdiction. It is also contended that the void nature of the sale of the A schedule properties has rendered the sale of B and C schedule properties also void.

4. Defendant 1 who resisted the suit denied all the aforesaid allegations against the validity of the decree and the execution proceedings and maintained that the decree was properly obtained and the properties were sold in court auction in execution of that decree after complying with the requirements of law and procedure. It was also contended that the suit was barred by limitation and also by res judicata on account of the decision in O.S. 82 of 1107.

As for the allegation that nobody had been brought on record to represent the estate of defendant (sic) at the time of the court sale, the position taken up by defendant 1 was that it was not necessary (sic) implead defendant 17's legal representatives in execution. The sale deeds Exs. E, F and G in the name of the plaintiff were stated to be only benami documents taken for the benefit of her husband defendant 16 who alone was stated to have been in possession of the properties at the time of the execution proceedings.

5. The lower court upheld defendant 1's plea regarding the validity of the decree in O.S. 82 of 1107 but accepted the plaintiff's contention that the auction sales in respect of the A, B and C schedule properties are void and inoperative. To that extent a decree was passed in favour of the plaintiff.

6. A.S. No. 676 of 1950, which is the appeal preferred by the plaintiff against that portion, of the decree disallowing her prayer to have the decree in O.S. 82 of 1107 set aside, may be disposed of first. Ex. M is copy of the decree in O.S. 82 of 1107 and it shows that the decree was passed on 12-11-1114. The present suit was filed only on 15-2-1121 and as such it is prima facie out of time so far as the prayer for setting aside Ex. M is concerned. The plaintiff's predecessors-in-interest were parties to that decree as defendants 16 and 17.

The sale deeds Exs. E, F and G having been brought into existence "pendente lite" the plaintiff, the vendee under these documents, is bound by the decree in that case and she cannot have any better or larger rights than defendants 16 and 17. Defendant 16 is seen to have participated in the trial of the suit and also in the execution proceedings right up to the sale and even subsequently by attempting to have the sale set aside. Defendant 17 died only on 20-3-1118 and he appears to have had no complaint about the validity of the decree Ex. M.

In order to get over the bar brought about by all these circumstances, the

plaintiff has put forward a case of fraud practised by the present defendant 1 in the conduct of the suit O.S. 82 of 1107 and has contended that on account of such fraud defendant 17 was kept ignorant of that suit altogether. There is only the slender item of evidence furnished by Ex. H to substantiate such an allegation of active fraud attributed to defendant 1. According to the plaintiff Ex. H is the copy of the plaint served on defendant 17 along with the summons issued to him from court in Ex. M case and the argument advanced is that the name and the house name of defendant 17 had been wrongly given in Ex. H so as to induce him not to appear and contest the suit.

No doubt the name and address of defendant 17 as given in Ex. H are seen to be incorrect. But there is nothing to show that defendant 1 was responsible for such an incorrect description or that Ex. H is the copy of the plaint which had been actually served on defendant 17. P.W. 1 who is the only witness examined in the case could not have any direct knowledge about these facts and hence his evidence is not of any help in proving the fraud attributed to defendant 1. By putting forward a case that a copy like Ex. H was served on defendant 17, the plaintiff virtually admitted that the summons issued from court in respect of Ex. M suit was duly served on defendant 17 and that he had knowledge of the suit.

This admission has practically knocked the bottom of the contention that defendant 1 had practised a fraud on defendant 17 and kept him ignorant of the suit. Ex. H is copy of the summons issued to defendant 17 together with the process server's endorsement on it as to how it was served. That endorsement states that defendant 17 refused to accept and sign the summons for the reason that since he had sold away the properties he had no more interest in that litigation. The truth of the correctness of this endorsement stands un rebutted.

From the attitude seen to have been adopted by defendant 17 when the summons was taken to him, it is abundantly clear that he fully understood the nature of Ex. H suit to which he was also made a party. Even if Ex. H is taken to be the copy of the plaint which had been handed over to him, the particulars as contained in the body of that copy were such as to give him a clear idea of the nature of the claim put forward in that suit. Under these circumstances it cannot be said that the wrong description of his address and name in Ex. H could have in any way misled him or were responsible for his failure to appear and to contest the suit.

The case of fraud attributed to defendant 1 in the conduct of Ex. H suit was therefore properly ruled out by the lower court. In view of such a failure of the basis of the attack against Ex. M decree, it has to be accepted as a valid decree binding on all these who are parties to it. The plaintiff, who is a "pendente lite" purchaser of the properties involved in that suit, is not entitled to impeach that decree in a separate suit like the present one, by setting up contentions which could have been raised by her predecessors-in-interest in the earlier suit itself. It follows, therefore, that A.S. 676 of 1950 has no merit in it and has only to be dismissed.

7. Coming to the appeal A.S. No. 614 of 1950 the main point urged on behalf of the appellant is that when the A schedule property was sold in execution of the decree Ex. H, defendant 17 was already dead, and no one had been brought on record to represent his estate. The finding of the lower court that defendant 17 died on 20-3-1118 is not challenged in this appeal. That finding is supported by the evidence given by P.W. 1 and also by the document Ex. N produced by him. Ex. N is a registered release deed executed by the heirs of defendant 17 in Ex. M case in favour of P.W. 1, and therein they have given the date of his death as 20-3-1118 and it is in support of the finding recorded by the lower court.

There cannot be any doubt that defendant 17 had been made a party to that suit merely for the purpose of getting an effective decree against the present A schedule property the title to which had by that time become vested in him. The present defendant 1 who was the plaintiff in that suit could not at a later stage back out from such a position. In the present suit defendant 1 had put forward a case that Ex. E sale deed executed in favour of the plaintiff by defendant 17 in Ex. M suit was only a benami sale for the benefit of defendant 16, who, in his turn, had executed Exs. F and G in favour of the plaintiff.

Beyond making such an allegation, defendant 1 did not care to adduce any evidence to substantiate the same. Defendant 1 herself has not gone into the box to give at least formal evidence in support of such a theory of benami. Even at the trial stage of Ex. M suit defendant 16 had expressly drawn the attention of the present defendant 1 to the transfer of defendant 17's interest in the A schedule property to the present plaintiff. Ex. L is copy of the written statement of defendant 16 in that case. In para 14 of Ex. L specific reference was made to the aforesaid sale deed in favour of the present plaintiff and it was stated that as the transferee of defendant 17 the present plaintiff should also be impleaded in that suit.

No doubt the plaintiff was not bound to recognise such a transfer effected after the institution of that suit and to bring on record the transferee also, so long as the transferor was already a defendant in the case. By the final judgment in that case it was also found that defendant 16 had no possession or title in respect of the properties which belonged to defendant 17. Ex. W is copy of that judgment and towards the closing portion of para 8 of that judgment reference is made to those properties and it is stated that they did not come into the possession of defendant 16 and that as such he could not claim to have effected any improvements on the properties.

8. From these facts it is clear that defendant 17 and his legal representatives alone could represent the present. A schedule property in Ex. M case. He was on record to represent that property when the decree was passed, But there was no one to represent the property when it was sold in execution of that decree In fact the sale is seen to have been conducted without the issue of any notice to defendant 17 or to anybody else in whom his estate vested after his death. The omission to issue such notice appears to have been deliberate.

Ex. Q is copy of an affidavit which the present defendant 1 had filed on 15-11-1118 in connection with the execution of that decree and therein she has stated that the properties proclaimed for sale were all in the possession of defendant 16 and notice need be issued to him alone. Ex. O which is copy of the Execution Diary in that case shows that on 20-3-1119 the decree-holder had filed another affidavit to the same effect. It was on the strength of such representation that the execution proceedings were conducted and the properties sold without the issue of any notice to defendant 17 or to his representatives-in-interest.

On 1-5-1120 the properties were sold in two lots as per the direction in the decree and item 1 (which is the same as the A schedule property in the present suit) was purchased by the decree-holder for 22,240 fanams and item 2 (which in the same as the present B and C schedule properties) was also purchased by the decree-holder for 28,000 fanams. These facts are evident from Ex. O. When the sale thus took place, defendant 16 was on the party array to represent item 2, but there was none to represent item 1.

9. The question is whether the aforesaid sale of item 1 (same as the present A schedule property) is a void sale or is only voidable. There appears to be no scope for such controversy on this question. In order that the court could get jurisdiction to pass a decree against a particular item of property and also to sell that property in execution of the decree, it is essential that the person or persons having title to and interest in that property must be brought on record. Any decree or order passed without such representation will have no legal effect at all.

In the present case the court had jurisdiction to pass a decree against the A schedule property also because defendant 17, in whom the title to the property vested at the time of the suit, was (sic) the party array even on the date of the decree. The executing court had also jurisdiction to enforce the decree against the property so long as defendant 17 was alive. But on the date of his death such jurisdiction also came to an end and it could revive only after others in whom the property vested are brought on record to represent the estate.

Apart from these general principles governing the subject, there is also the imperative procedure prescribed by S. 50, Civil P.C. in respect of the same matter. Clause 1 of that section states that

where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representatives of the deceased.

Clause 2 specifies the extent to which the legal representatives can be made answerable for the debt. The expression "may apply" as used in Cl. 1 cannot be considered to mean that the matter of bringing on record the legal representatives of the deceased judgment-debtor is left to the discretion of the decree-holder. That expression only indicates that it is for the decree-holder to elect whether he should or should not execute the decree against the legal

representatives of the deceased judgment-debtor. If he chooses to execute the decree against such legal representatives it is obvious that he has to bring them on record and to proceed with the execution after the issue of notice to them as contemplated by R. 22 of O. 21 of the Code.

10. On the strength of certain provisions contained in R. 22 of O. 21, Civil P.C. an argument is advanced that the court sale held without bringing the legal representatives of the deceased judgment-debtor on record, has to be deemed to be only a voidable sale. Clause 2 of the Rule states that the court may issue process in execution in certain cases after dispensing with the notice contemplated by the rule for reasons to be recorded. The Proviso to Cl. 2 of the Rule states that no order for the execution of the decree shall be invalid on account of the omission of the court to record the reasons contemplated by Cl. 2 unless the judgment-debtor has sustained substantial injury as a result of such omission.

These provisions cannot be taken to control S. (sic) of the Code. Where the judgment-debtor is dead the question of issuing notice to his legal representative can arise only when the application for execution is against such legal representatives, as is made clear by Cl. 1(b) of R. 22. Clause 1 of S. 50 of the Code also makes it obligatory on the part of the decree-holder to file the execution application against such legal representatives in case he wants to execute the decree even after the death of the judgment-debtor.

Where some of the legal representatives are left out from such an execution application, the question may arise whether the decree-holder has been acting in good faith and with due diligence and whether the estate of the deceased is substantially and effectively represented by those already brought on record. Even such a consideration will not arise when no one of the legal representatives is on record to represent the estate of the deceased debtor. In such a situation there is a complete lack of representation resulting in an absence of jurisdiction for the court to proceed against such estate.

Such was the situation in the present case when the executing court sold the A schedule property. The executing court having acted without jurisdiction in selling this property without anybody on record to represent the interest of defendant 17 in that property, the sale has to be treated as a void sale, under which no rights passed to the auction-purchaser. This position is now fairly well-settled. In - Kanchamalai Pathar Vs. Ry. Shahaji Rajah Sahib (deceased) and Others, a Full Bench of five Judges of the Madras High Court had occasion to consider the question whether such a court sale held without bringing on record the legal representative of the deceased judgment-debtor is void or is only voidable.

After an exhaustive discussion of all the relevant aspects of the question, the Full Bench came to the unanimous conclusion that such a sale has to be treated as void. The decisions in - Faizaddi Taluqdar Vs. Rezia Begum and Others, ; - "Pashupatinath Malia v. Ushapati Misra", AIR 1949 Cal 299 (C) and in - Ajab Lal

Dubey and Another Vs. Hari Charan Tewari @ Hari Tewari and Others, are also to the same effect. The lower court was, therefore right in upholding the plaintiff's contention that the court sale held in execution of Ex. M decree in respect of the plaintiff A schedule property is absolutely void and that by virtue of that sale defendant 1 who is the auction-purchaser, has not acquired any title to or interest in that property.

11. Having found that the court sale of the A schedule property is a void sale, the next aspect to be considered is whether the void nature of that sale has the effect of rendering the court sale of the B and C schedule properties also void. The decree directing the sale of the B and C schedule properties also for recovery of the decree amount, has already been found to be a valid decree. This decree was obtained with defendant 16 on record and he was the owner of these properties at the time of the institution of the suit. He continued to be on the party array right throughout the execution proceedings also which were all conducted with notice to him.

In fact he is seen to have been resisting the execution of the decree at the different stages. All these circumstances are definitely in favour of the validity of the sale of the B and C schedule properties. All the same the lower court has come to the conclusion that the sale of these properties is also bad in view of the fact that the sale of the A schedule property has been ineffective. The reason stated is that the entire sale proceedings must be deemed to have been conducted in violation of the express directions contained in the decree copy of which is Ex. M. The decree has treated the 2/3 share which defendant 16 claimed out of the entire property, as separate and distinct from the remaining 1/3 share.

It is this 1/3 share that is included in the present A schedule, the other 2/3 share being included in the B and C schedules. The decree directed that the 1/3 share must be sold in the first instance and that only for the balance amount that may be still due under the decree, the other 2/3 share should be sold. The argument advanced on behalf of the plaintiff is that since the sale of the 1/3 share has been found to be void, it has to be taken that there was no sale at all in respect of that 1/3 share. The result of accepting that contention will be that the other 2/3 share happened to be sold before the sale of the 1/3 share. Such a sale held in violation of the express directions of the decree is contended to be void.

The decisions in - "Mansa Ram Paria v. Nagendra Nath Sahu Roy", 16 Ind Cas 235 (Cal) (E); - Ammakutti Achi Vs. Doraiswami Aiyar and Another, and in - M.R.M. Murugappa Chettiar and Others Vs. S.M. Chengalvaraya Chettiar and Others, are relied on in support of this position. In the first of these cases the item which the decree directed to sell last, happened to be sold first. Even though the sale was set aside on the ground that it was held in contravention of the directions in the decree, it was not definitely ruled in that case that the sale was void or that the executing court has no jurisdiction to conduct the sale. There was no discussion of this aspect of the matter, but, on the other hand, it was simply stated that the

sale must be treated as held, if not without jurisdiction, at any rate, with material irregularity in the exercise of the jurisdiction of the Court.

In the second case also there has not been any ruling that the sale held in contravention of the direction in the decree will be absolutely void. The point raised in that case was one of limitation and it was held that as an application to set aside the sale on the ground that it was not in conformity with the decree, was an application falling under S. 47, Civil P.C. and that such applications are governed by Art. 166, Limitation Act then in force. In the third case referred to above, however, the view taken was that by the sale having been held not in conformity with the order provided in the decree, the executing court was varying the terms of the decree, and in so doing it was acting without jurisdiction.

With all respect, it has to be stated that this view appears to be not correct. It cannot be said that in putting the different items to auction in a wrong order the executing court is modifying or varying the terms of the decree. At best it could be said that in conducting the sale in such a manner a serious irregularity has been committed. The party prejudiced by such sale would be entitled to have the sale avoided. In other words, it would only be a voidable sale and not a void sale. Since the decree authorises the executing court to realise the decree amount by the sale of all the items, the executing court will be well within its jurisdiction in selling all or any of those items. Even if such a sale happens to be in an order different from that specified in the decree, it cannot be said that the executing court is acting without jurisdiction.

So far as the present case is concerned, it is clear that there is no basis for the complaint that the executing court conducted the sale in violation of the directions in the decree. On the other hand the direction was strictly complied with and the 1/3 share of the property was sold in the first instance and the amount realised was adjusted towards the decree debt. It was only for the balance amount still due that the remaining 2/3 of the property was sold. No doubt as the result of the present litigation there has been a declaration several years after the date of the sale that the sale in respect of the 1/3 share, i.e., of the present A schedule property, is void.

Such a consequence cannot determine the jurisdiction of the executing court at the time of the court sale. That court could not anticipate such future contingencies and refuse to exercise its jurisdiction and proceed to sell the property in accordance with the terms of the decree. Since the execution proceedings were being conducted in accordance with the terms of the decree, the executing court was perfectly justified in selling the 1/3 share in the first instance and then the remaining 2/3 share. It follows, therefore, that there is no force in the contention that the sale of the 2/3 share, i.e., of the B and C schedule properties, is a void sale.

It cannot also be said that defendant 16, for whose benefit the direction that these properties should be sold last had been made, has sustained any

substantial injury as a consequence of the sale as it actually took place. Even though the sale of the A schedule property has turned out to be void, that does not in any way enhance the liability on the B and C schedule properties. There is no basis for the allegation that if the sale of the A schedule property had been conducted after bringing on record the present plaintiff in place of defendant 17, the sale of the A schedule property would have fetched an amount higher than that actually realised at the time of the sale.

There is no evidence to sustain an inference in that direction. No such inference can be drawn as a result of speculations or surmises. The party who is really affected by the declaration that the sale of the A schedule property is void is defendant 1 who happened to be the auction-purchaser. She has to take her chance by attempting to bring the property once again to sale. So far as defendant 16 in the prior suit is concerned, he is seen to have exhausted all remedies open to him to have the sale set aside for the alleged irregularities.

All such attempts proved futile is disclosed by the execution diary Ex. O. The adverse orders passed against him in such proceedings are binding on the present plaintiff also who is a "pendente lite" purchaser of the B and C schedule properties from defendant 16. The plaintiff is concluded by such orders. She cannot also succeed on the plea that the sale of the B and C schedule properties is void. Her suit must fail in respect of these items.

12. In the result A.S. No. 614 of 1950 is allowed and defendant 1's title to the B and C schedule properties on the strength of the auction-purchase in her favour in O.S. 82 of 1107 of the Trivandrum District Court is upheld. To this extent the decree of the lower court is reversed and the plaintiff's suit is dismissed so far as it is directed against these items. In other respects A.S. 614 of 1950 is dismissed and the lower court's decree allowing the plaintiff's suit in respect of the A schedule property is confirmed. The parties will bear their own costs in respect of A.S. 614 of 1950.

13. A.S. No. 676 of 1950 having been already found to be devoid of any merit, is dismissed with costs.