

(1957) 07 KL CK 0014

In the High Court Of Kerala

Case No : Second Appeal No. 867 of 1954

Ayisumma and Others

APPELLANT

Vs

Kunhammayan

RESPONDENT

Date of Decision : 29-07-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144, 144(2), 151, 47

Citation : AIR 1958 Ker 84

Hon'ble Judges : Varadaraja Iyengar, J

Bench : Single Bench

Advocate : V.P. Gopalan Nambiar, for the Appellant; B. Packer, for the Respondent

Final Decision : Dismissed

Judgement

Varadaraja Iyengar, J.—This appeal is by the defendants in a suit to recover back possession of property and filed in the following circumstances.

2. The plaintiff had a Kudi Jenmom interest in the property concerned. He demised the same under Ext. A-1 kanom in 1927 in favour of Noorayan who was the husband of the 1st defendant and took a lease-back under Ext. A-2. For arrears of rent due under the lease-back Noorayan obtained decree in O. S. 313 of 1934 with provision also to enforce the statutory charge over the tenancy right of the plaintiff in the property and in execution brought the tenancy right to sole and purchased it himself and in due course took delivery of the property on 14-3-1938.

On the Madras Agriculturists' Belief Act, 1938 coming into force, the plaintiff applied for and obtained orders dated 13-7-1938 setting aside the execution sale aforesaid u/s 23 of that Act. He filed this suit subsequently on 24-12-1949 for recovery of possession of his tenancy right in the property with mesne Profits on the ground that Noorayan or his donee the 1st defendant was not entitled to be in possession after the execution sale had been set aside. The 2nd defendant

daughter and the 3rd defendant son-in-law of the 1st defendant were impleaded as persons who had , obtained certain derivative interest in the property from the first defendant. The suit was contested by all the defendants mainly on the footing of bar under Ss, 47 and 144 of the Civil P. C.

Any relief which enured to the plaintiff in. consequence of the reversal of the sale u/s 23, it was submitted, should be sought only by means of a petition filed within three years of the date of the reversal and not by a separate suit on title, as here. The Courts below have concurrently overruled the objection raised by the defendants and decreed the suit. Hence this special appeal.

3. Learned counsel for the special appellant does not seriously seek to support before me the contention raised in the Courts below on the basis of Section 144. C.P.C. Even otherwise there is no substance in such a ground. For there is no question of any decree being varied or reversed by any Court within the meaning of Section 144, C.P.C., when an execution sale is set aside by reason of relief given to an agriculturist u/s 23 of the Madras Agriculturists' Relief Act. Section 144 defines the procedure in one case only requiring restitution, viz., where the decree is varied or reversed on appeal or under revision or even In a separate suit. But there may be other cases where the injury done has to be repaired consequent on the variation or reversal by other means. In such cases the Court has inherent jurisdiction to proceed u/s 151, C.P.C., and the bar of suit u/s 144(2) would not then arise See Puthiya Veetil Chandanathil Mukkayi and Others Vs. Thottathi Parambil Pathavumma and Others,

4. Coming next to the bar u/s 47, C.P.C., it may be that the order setting aside the sale u/s 23 of the Madras Agriculturists' Relief Act may be a decree so far as the question arose in execution of a decree and it also related to the discharge or satisfaction of the decree. But there are no provisions contained in the CPC under which a party could obtain redelivery except under circumstances where Section 151 of the CPC could be invoked and Section 151 to the extent it applied does not imply a bar of a fresh suit. Dealing with this same question, Krishnaswami Nayuddu J., in the case just cited (S) Puthiya Veetil Chandanathil Mukkayi and Others Vs. Thottathi Parambil Pathavumma and Others, observed:

"A proceeding to recover back possession of property in the possession of the decree-holder-purchaser, which sale in his favour was set aside u/s 23, Madras Agriculturists' Relief Act, is not a proceeding relating to execution, discharge, or satisfaction of the decree. The decree-holder-purchaser having obtained delivery of possession there is nothing that remains to be done in furtherance of the execution of the decree Further where an execution sale in pursuance of a mortgage decree is set aside u/s 23 of the said Madras Act the effect of such a setting aside of a sale is that the sale shall be deemed not to have taken place at all. And a proceeding for recovering back possession cannot be considered to be a proceeding in execution, or in execution of the decree since the application for recovery of possession is not in pursuance of any execution of the decree."

That is to say, the execution sale, the order for delivery and the delivery effected through court, all became completely effected. The title acquired by the 1st defendant's husband also vanished and further possession on foot thereof by him or his representatives became a trespass in law which could be relieved against by suit filed within 12 years of the delivery. In this view, there could be no bar for this separate suit.

5. The appeal therefore fails and is dismissed with costs.