

(1998) 12 KL CK 0039
In the High Court Of Kerala
Case No : E.S.A. No. 21 of 1998

Ayyappa

APPELLANT

Vs

Ananda

RESPONDENT

Date of Decision : 03-12-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100, Order 21 Rule 100(J), Order 21 Rule 101, Order 21 Rule 95, Order 21 Rule 99

Citation : (1999) 1 CivCC 418

Hon'ble Judges : S. Krishnan Unni, J

Bench : Single Bench

Advocate : P.B. Krishnan, for the Appellant; E.V. Nayanar and Mr. Suresh Kumar, for the Respondent

Judgement

S. Krishnan Unni, J.—Petitioner in E. A.No.8 of 1971 in R.E.A.No.477 of 1971 in R.E.P. No 552 of 1965 in O.S.No.94 of 1954 on the file of Munsiff, Kasaragod is the appellant. O.S.94 of 1954 was a suit filed by Srimath Anantheswar Temple against one Achu for recovery of possession of plaint schedule properties with mesne profits. The properties are situated in R.S.No.90 and Ext.A61 suit Register gives details of the properties sought to be recovered. O.S.No.94 of 1954 was decreed ex parte on 15.11.1954, suit property was delivered and execution petition was closed on 10.3.1955. Thereafter, plaintiff filed R.E.P.No.552 of 1965 for recovery of an amount Rs.2,244.26 from the judgment-debtor(Achu). They attached 3 items of properties, viz.34 cants in R.S.88/5,16 cents in R.S.90/1 and 1.25 acres in R.S.90/7. The properties were brought to sale and bid in auction by one Ananda who is none other than the son of Achu, the judgment-debtor. A sale certificates was issued on 18.11.1970. Thereafter, the auction-purchaser filed R.E.A.No.477 of 1970 for delivery of the properties purchased by him. On 28.11.1970 the execution court passed an order to deliver the properties subject to standing crops. The Amin visited the property on 24.12.1970 and delivered the property except two houses therein. Ext.C2 is the report filed by the Amin on 28.12.1970. On 6.1.1971 the present appellant filed E.A.8 of 1971 under O. 21

R. 99 CPC to reject the report of the Amin, contending that he is in possession of 16 cants in."R.S.90/1 and that it is correct to state that Achu was ever in possession of the properties. An objection was taken in the counter statement that such a petition is not maintainable, the prayer was amended as one for re-delivery under O. 21, Rr. 100 and 101 CPC. Subsequently on 24.10.1973, while, the petition was pending, the judgment-debtor died and his morumakkathayee heirs were impleaded.

2. Exts.A1 to A61 and B1 to B7 were marked. Petitioner was examined as P.W.I.; On behalf of respondents, one Ballya Bellunga Belchappada (respondent No.8 in the E. A.) was examined as R.W. t. The auction-purchaser was examined as R W.2. The Amin who effected delivery was examined as a court-witness, C.W. 1. The sale certificate and delivery receipts were marked as Exts. CI to C3. The execution purchaser held that neither the petitioner Ayyappa nor the 1st respondent Ananda had established any title to the property. It also held that the claimant had failed to prove that he was in possession of 16 cants except the house which was not delivered, and consequently dismissed the petition. Aggrieved by it, A.S.96 of 1982 was filed before Sub Court, Kasaragod. The learned Sub Judge concurred with the above findings because there was no documentary evidence to prove that appellant got possession or title over 16 cents of property. Consequently the appeal was dismissed. The said judgment is challenged in this appeal.

3. The case of the appellant is that the property belongs to his tarwad and his uncle Achu (judgment-debtor) had no exclusive interest in the same. The Amin reported that there were 4 houses in the 3 items of properties attached; there was resistance with regard to the two houses which were not delivered. One house was occupied by the judgment-debtor himself. It is not disputed that appellant-claimant is residing in a house located in R.S.90/1, The 16.cents claimed by him lies around his house. According to him, it is his tarwad property. He relies on Ext.B7, copy of Survey and Settlement register standing in the name of Bellunga Belchapada. The appellant's argument is that Bellunga Belchapada belonged to his family. For this purpose, he has examined RW I, another Belchapada who has given supporting evidence to that effect. He has also spoken about the relationship. Apart from Ext.B7, the appellant has not produced any other documentary evidence to show that his family dealt with these properties or members of family or himself paid revenue to the Government.

4. The case of the auction-purchaser who claims under the Judgment-debtor is that the properties exclusively belonged to the judgment-debtor, that he obtained the same from Anantheswar Temple as per a lease and that he was in exclusive possession. In spite of the long protracted litigation between the parties, not a single documentary evidence is produced to establish that the properties belonged to the said Devaswom or it was registered in their name or a lease was granted by the Devaswom to Achu. No attempt was made to prove the abovesaid facts; nor had the auction-purchaser produced any document to show

that Achu was paying revenue of this disputed land. The oral evidence adduced is that of the petitioner examined as PW. 1 and the 1st respondent, as RW2. They being parties who are closely related and litigating for a long time, their oral testimony cannot and should not alter a others regarding the aspects on which better evidence can be adduced. We have only the Amin's report and delivery accounts (Exts.C1 to C3) and the evidence of the Amin himself examined as CW 1. Ext.C2 report submitted by the Amin to the following effect; On 24.12.1970 the Amin went with the petitioner to the suit properties situated in Adakathbail Village, read out the order of the judgment-debtor Achu who was occupying a thatched house bearing No. 17/281 and out-house No. 17/282. He vacated the house and the out-house and went out of the property, taking away all the movable. Similarly, one Hassainar who was occupying thatched house No. 17/244 also vacated and went out. One Aisabi who was occupying house No. 17/283 refused to vacate and did not give a written obstruction statement. Similarly Ayyappa (appellant) was occupying tiled house No. 17/221 in the suit property. The Amin has stated:

"The said Ayyappa also refused to vacate the house and also refused to give a written statement. As he also was not a party in the proceedings I Could not deliver the tiled house No. 17/221. Thus I delivered the entire property with vacant thatched house No. 17/244,17/281 and thatched out-house No. 17/282 to the possession of the petitioners from the possession of the respondents under O.21 R. 95 CPC. Two tiled houses are 17/221 and 17/283 not delivered due to oral destruction of third party occupants".

5. There were heated arguments regarding possession of the property at the time of delivery. The appellant maintains that 16 cants around his house was never delivered by Amin from his possession. According to the 1st respondent, Achu was in possession of that property and it was delivered. The Amin's report Ext.C2 no doubt states that barring two tiled houses, the entire properties were delivered from possession of Achu. But at the same time, it is made clear that there were two obstructers among whom one was the appellant. Whether the possession of the entire property was delivered and from whom possession was delivered are disputed questions arising for decision in this litigation. The Amin examined as CW1 stated as follows:

"I do not remember the petitioner told me that he was in possession of the house as well as the garden measuring 0.16 cants. Because the petitioner did not give written obstruction I cannot say whether he has stated that he was in possession of the garden also."

CW. 1 further stated as follows:-

"He might have told me orally. But I do not remember. I did not enquire with the neighbours as to who is possession of the properties. The witness adds that he do not remember. The J.D. did not obstruct the delivery so the delivery was recorded."

Still later he made a statement that if Ayyappa had offered obstruction, he would not have delivered the properties. The delivery was effected on 24.12.1970 and E. A. 8 of 197" Urom-which this appeal arises was filed on 6.1.1971. As I mentioned earlier, the first version of the obstructer was that the property was never delivered and the prayer was 10 set-aside the Amin's report Ext.C2, subsequently the prayer was altered as one for redelivery of possession only because that was the procedure contemplated under law.

6. I have summed up the evidence regarding title as well as possession adduced by both sides. It is not as if they could not have produced any documents. For example, the auction-purchaser could have clearly established that the disputed property belonged to Anantheswar Devaswom and that it was leased to Achu and he was paying rent to them. Similarly, he could have been produced documents to prove his possession or at least receipts for payment of the property. This is not done. Similarly, the appellant also could have been produced documents to prove that the property belonged to his tarwad. But Ext.B7 stands in the name of one Belchapada and the evidence of RW1 is that this Belchapada belonged to his family. No doubt, this is disputed by the auction-purchaser. But he should have adduced better evidence by putting his father Achu in the box to deny that evidence. Similarly, he has also not adduced any evidence possession. In these circumstances, what remains is only the Amin's report and evidence. The courts below appear to have been greatly influenced by the fact that Amin being officer of the court must be presumed to have discharged his duty in the regular course and invoked the presumption under S. 114 of the Evidence Act that all official acts have been regularly performed. I have referred to the evidence of the Amin who states that he never made enquiries regarding actual possession of the properties to the neighbours. He does not remember whether the obstruction by appellant was to the house only or to the surrounding compound. Immediately he would say that he does not remember about it. In the background of this evidence, it is too difficult for any court to presume that he did make enquiries about possession of the property and it was delivered by him from the exclusive possession of Achu to the auction-purchaser. It is true that there is no concrete evidence regarding/the actual exclusive possession of appellant. But one cannot rule out the possibility that the appellant, cud obstruct the delivery of the property and not merely the house. The Amin's very evasive on that aspect. Within one week the appellant had moved the court to say Uuy the Amin's report is false on that aspect and he amended the prayer as one for re-delivery only because that was the remedy provided under law for an obstructor.

7. The question as to forth of the evidence of Amin is such cases has been considered by this Court in M.Midkutty Vs. Karthiyani (1967 KLT 667). The decision sported in fciayiindh Ku1upVs.Statc(1953 KLT 31) rendered by Koshi CJ contains certain observations regarding the effect of Amin's report regarding possession Commenting on that Madhavan Nair, J., stated in para 5 as follows:

"I am afraid the dictum in the above passage has been laid too broadly. It may

be justified in the circumstances of that case where the mortgagee resisted an action in redemption urging penalty false pleas on behalf of his tarwad, got worsted in all the Courts and was at least ousted, and then his sister picked up the string and instituted a fresh suit for cancellation of the decree and execution proceedings urging the identical contentions and trespassed on the property with her people and began to reap the error thereon heedless of the protest made by the owner to whom the property had been delivered by Court. A fight ensued in which the mortgagee also joined; and the question was who took the law unlawfully into his or her hands. The Court held the act of the mortgagee and his sister, niece and nephew-in-law to be unwarranted. The evidence in the case was clear that the owner had been put in physical possession of the property by Court, that the mortgagee and his tarwad had no right in the property after redemption and that the mortgagee's relations when they began to harvest the crop were defying the law and rightful possession of land by its real owner. It was in these circumstances that the aforesaid observations were made by their Lordships in the Kurup's case (1953 KLT 31). If judicial observation are to be understood *secundum subjectam materiam* (with reference to the subject-matter), "the other persons" bound by the possession proceedings are the members of the family of the judgment-debtor who urge no right in the property independent of that advanced by the judgment debtor unsuccessfully in all the Courts in the hierarchy. But if the general expression in the quote is taken to mean that in every case a delivery proceeding would bind not only the judgment-debtor but any and every in the world it would be an astounding proposition. Rights in immovable property cannot be left to the mercy of an Amin deputed to carry-out a delivery order of the Court. They can be effected only by judicial determinations."

It was unequivocally pointed out that whatever is recorded by the Amin will not be binding on the obstructor who is not a party to the proceeding.

8. Similarly in Ganapathy Koundan Vs. Komarasami Koundan (1972 KLT 1028), a Division Bench of this Court considered the effect of the decision in 1953 KLT 31 as well as 1967 KLT 667 and pointed out that there is no conflict at all between the two decisions. It was observed:

"There is no conflict at all in the decision of this Court on this question. If in execution of a decree property has been delivered as a matter of fact even from the possession of the persons who are not parties to the decree and who are not bound by the same they have to resort to the court for getting back possession of the property. The provision of O. 21, R. 100(J) CPC is based on the principle that when a stranger to an execution proceeding is dispossessed cannot take the law into his own hand and trespass on the property actually delivered. In the instant case the District Judge is wrong in holding that the delivery proceedings are conclusive against the defendants."

9. In the present case, both courts appear to have been influenced considerably by the fact that the appellant has failed to prove title and possession over the

disputed property. On that basis his application was dismissed. I may also pointed out that the orders of the courts below did not reveal that it laid any importance on the fact that the auction-purchaser of the judgment-debtor has also equally failed to prove exclusive possession or title to the property. O. 21 R. 101 CPC reads:

"101. Question to be determined.- All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under R.97 or R.99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time in force, be deemed to have jurisdiction to decide such questions."

Under the above rules, all questions relating to right, title or interest in the property arising between the parties to a proceeding on an application under R.97 or R.99 shall be determined by the Court dealing with the application. The provision contained in the above Rules does not admit of any ambiguity and the execution court is required to go into the question of right, title and interest in the property not only of the claimants but of the judgment-debtor or auction-purchaser also, because the expression used is "arising between the parties to a proceeding". That would mean that the execution court will have to go into the question of title of both parties. In other words, the auction-purchaser cannot take advantage of the weakness of the claimant's case alone. He is entitled to get possession of the property or what has been (sic) by him in auction. In this case, the sale certificate has only conveyed to him the right, title and interest of the judgment-debtor Achu. Therefore, he can claim delivery of the said property which belongs to the judgment-debtor and which was in his possession. He is bound to prove that the disputed property belonged to Achu and it was in his exclusive possession. I have already referred to the observations of Madhavan Nair, J. that this is a matter of judicial determination and it cannot be left to the magical hands of an Amin of the Court. I have already discussed the Amin's wavering and unsatisfactory evidence on this aspect. Therefore, unless the auction-purchaser is able to establish that he is entitled to retain possession of this property pursuant to delivery, it must be delivered back to the appellant. The argument that the appellant did not raise obstruction to the 16 cents cannot stand for a moment if we consider the natural human conduct and the course of events. The Amin is not very assertive on this aspect as to whether the obstructor claimed the entire 16 cents. We find that the claimant approached the Court with the case that what is reported by Amin is incorrect. The most logical inference would be that the obstructor did raise such an obstruction to delivery of the entire 16 cents lying around his house. The fact that it was delivered and it was in the possession of the Achu (Judgment-debtor) before delivery is an aspect to be established by the auction-purchaser. The appellant also is bound to prove that he was in actual possession of the property. R. 101 though arising in execution envisages a wider enquiry as to the title and possession of the parties

and the courts below committed an error in 1) disposing of the case on the theory of burden of proof; and 2) failing to consider the evidence on title and possession of the auction-purchaser.

10. It was argued that the question of possession is one of fact and there being concurrent finding on fact, this Court cannot interfere with the same in Second Appeal. In *Orient Distributors Vs. Bank of India Ltd. and Others*, the Supreme Court held that the question depended upon the inference to be drawn from the facts and surrounding circumstances obtaining at that time, and that in that particular case the Madras High Court was justified in taking the view that the question was not purely a factual one but one relating to the property of the legal conclusion that could be drawn on the basis of proved facts and that such question amounted to substantial questions of law. In the present case I have been taken pains to point out the evidence adduced by both sides on title as well as on possession, which is virtually nil. The only other evidence in the report of the Amin which, read with the evidence as CW.1 does not add anything to answer the disputed questions in this case. As I stated earlier, the courts below appear to have relied on the theory of burden of proof, without taking into consideration the evidence added by both parties on title and possession. This is a legal inference that flows from the proved facts and evidence which has vitiated the judgments of the courts below and involves substantial question of law warranting interference at the hands of this Court.

11. The next question is the course to be adopted for the disposal of the case. As I ventured to point out, this is a matter where better evidence could have been adduced, especially by the 1st respondent who alleges that the property belonged to Anantheswar Devaswom and it was leased to Achu. There will be records in the Devaswom regarding the ownership, lease to Achu and payment of rent. Similarly, the appellant can produce previous case that it belonged to his tarwad by showing that the Karnavan was paying the revenue of this disputed land. The Village records must clearly reveal who was paying the basic tax for this disputed property. No attempt has been made by either parties to get those documents produced. Therefore, the matter will have to be remanded to the execution court for reconsideration of the issue after allowing parties to adduce fresh evidence.

In the result, the E.S.A. is allowed, the judgment and decree of the Sub Court, Kasaragod and the order of the execution Court are set aside and the matter is remanded to the execution Court for fresh disposal in accordance with law. The parties will appear in the execution Court on 8.1.1999.