

(1949) 03 MAD CK 0042
In the Madras High Court
Case No : A.A.A.O. No. 109 of 1947

Kandi Parambath Elaya Nayan Veetil Talakurussi Atchuthan APPELLANT
Nair

Vs

Vellilapalli Gopalan Nair RESPONDENT

Date of Decision : 16-03-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144

Citation : AIR 1950 Mad 199

Hon'ble Judges : Rajagopalan, J

Bench : Single Bench

Advocate : D.H. Nambudripad, for the Appellant; K. Kuttikrishna Menon, for the Respondent

Final Decision : Dismissed

Judgement

Rajagopalan, J.—On 11th August 1936, there was a preliminary decree to enforce the mortgage deed dated 15th March 1933 executed by

the defendant appellant in favour of the plaintiff-respondent in second appeal. There was a final decree on 17th March 1937 for the sale of the

hypotheca. The defendant subsequently applied to have the decree debt scaled down under the provisions of the Madras Agriculturists' Relief Act

(IV [4] of 1938). That application was allowed by the trial Court on 27th December 1938 and the decree debt was scaled down to Rs. 427-3.

Against that order the decree-holder filed A. S. No. 190 of 1939 to the District Judge who held that the decree debt ought to be scaled down to

Rs. 751-9-8. This was on 22nd March 1938. Against the decree of the appellate Court in A. S. No. 190 of 1939 the defendant filed a second

appeal. On 13th July 1942 the High Court set aside the decree of the lower

appellate Court in A. S. No. 190 of 1939 on the ground that the appellate Court had no jurisdiction to entertain the appeal against the order of the District Munsif scaling down the debt to Rs. 427-3. Subsequent to that, the plaintiff appealed against the amended decree: A. S. No. 181 of 1942. Eventually, after the remand by the High Court, that appeal, A. S. No. 181 of 1942, was allowed, and the Court held that the amount due to the decree-holder under the decree was Rs. 751-9-8, the very sum that the appellate Court held in the infructuous A. S. no. 190 of 1939 to be due to the decree-holder.

2. Pending the disposal of A. S. No. 181 of 1942, in execution of the decree as it was amended by the decree in A. S. No. 190 of 1939, the decree-holder brought the property to sale on 12th August 1940 and purchased it himself. The sale was confirmed on 19th September 1940 and possession of the property was delivered to the plaintiff on 20th October 1940.

3. It will be remembered that the decree in A. S. No. 190 of 1939 was set aside by the High Court in second appeal on 13th July 1942. The defendant followed it up with an application for restitution, out of which this second appeal has arisen. That application was filed on 4th September 1942. The learned District Munsif dismissed that application and with that decision the learned Subordinate Judge, to whom the matter was taken on appeal, concurred. Hence this second appeal.

4. The application for restitution was dismissed by the trial Court on 11th August 1945, that is after the final disposal of A. S. No. 181 of 1942, which held that the correct amount due to the decree-holder under the decree was Rs. 751-9-8, the very sum that was declared to be due to the decree-holder even in the decree in A. S. No. 190 of 1939.

5. In para. 3 of his judgment, the learned District Munsif observed:

""There is one more difficulty which has cropped up in this case for the reason that admittedly after the respondent took possession of these properties the superior jenmi of the properties brought a suit O. S. No. 57 of 1941 of this Court for sale of the properties for arrears of michavaram due to him and in execution of the decree in the said suit the properties have been sold and purchased by a third party who has dispossessed the respondent.

This aspect of the case does not appear to have been considered by the learned Subordinate Judge. It is clear that in any event the defendant

cannot get restitution as such, in the sense that he can recover possession of the properties from the plaintiff-respondent. On the date the

application came up for orders the plaintiff-respondent himself had lost possession, and it was a person with title superior both to the plaintiff and

defendant in this suit that obtained the decree under which the respondent lost possession.

6. In the application which the defendant filed, in addition to the re-delivery of properties which he sought he asked for mesne profits. The main

basis for liability for mesne profits should be that possession was unlawful. Here it was under a sale in execution of the decree as it was amended

by the decree in A. S. No. 190 of 1939 that the plaintiff obtained possession on 20th October 1940. The decree in A. S. No. 190 of 1939 was

set aside; but that still left intact a decree for Rs. 427-3 which was the amount to which the decree debt in O. S. No. 132 of 1936 was scaled

down by the learned District Munsif. There was thus a decree for which execution could be levied, though in the application that the decree-holder

filed he claimed the larger amount of Rs. 751-9-8. As events eventually turned out he was all along entitled to this sum of Rs. 751-9-8.

7. The learned Advocate for the appellant referred to the decision in Shivbai Babya Swami Vs. Yesu Cheoo Nayakin, . In that case, in 1906 a

decree was passed ex parte against the defendant and in execution of that decree, the defendant's house was sold and purchased by the plaintiff

decree-holder in 1910. Subsequently, the decree that had been passed ex parte was set aside. After a retrial the plaintiff obtained a decree in

1914 for about the same sum which had been decreed by the decree ex parte in 1906. In the meantime, the defendant applied to have the sale of

the house which had been conducted in execution of the decree that had been passed ex parte set aside. The learned Judges held that the previous

sale of the house in execution under the previous decree which had been set aside should itself be set aside as being no longer based on any solid

foundation, but the learned Judges imposed the condition in the circumstances of that case that the defendant should pay up the amount due from

her under the second decree before restitution could be effected.

8. The learned advocate for the respondent in appeal reiterated the arguments based on the decision in Abdul Rasak Rowther Vs. Abdul Rahim

Rowther and Another, , which found acceptance in the Courts below in this case. The facts of that case were that a decree in a suit for contribution

as it originally stood provided for payment to the decree-holder of a considerably larger sum than that payable under the decree as amended in

pursuance of an appellate order passed on an application u/s 19, Madras Act IV [4] of 1938. The application had been filed by a purchaser of the

properties covered by the decree who had been as such impleaded in the suit as defendant 6. On its dismissal the judgment-debtor filed a revision

petition to the High Court and an appeal to the Sub Court. The appeal was allowed and the scaling down was directed. The appeal, however, was

incompetent and the effect of the amendment was to introduce an illegal curtailment of the decree-holder's claim. Pending proceedings in the High

Court as to the validity of the scaling down, the decree-holder took out execution on the amended decree. A sale was held under this execution

petition and it appeared that of the original decree, a sufficient amount remained to give legal support to the sale which was held under the

amended decree. The High Court set aside the appellate order but allowed the judgment-debtor's revision petition, with the result that the decree

was again amended, the same figures being restored which had been substituted as a result of the incompetent amendment. It was under these

circumstances that Wadsworth and Patanjali Sastri JJ., held that the execution sale could not be held to be a nullity.

9. The decision in Shivbai Babya Swami Vs. Yesu Cheoo Nayakin, , cannot really help in determining the real question now, whether the plaintiff is

liable for the mesne profits claimed. If the principles laid down in Shivbai Babya Swami Vs. Yesu Cheoo Nayakin, , are to be followed, there

could be a conditional order, that is, an order for redelivery of property on condition that the defendant judgment-debtor paid up the amount due

under the amended decree in O. S. No. 182 of 1936. If such a condition had been imposed, possession of the decree-holder auction purchaser

could not be unlawful till the defendant discharged his obligations by payment. If possession was not un-lawful, there could be no question of any

liability for mesne profits.

10. Apart from the inapplicability of the principles laid down in Shivbai Babya Swami Vs. Yesu Cheoo Nayakin, , to the facts of this case, I think

the Courts below were right in applying the principles laid down by this Court in Abdul Rasak Rowther Vs. Abdul Rahim Rowther and Another, .

There was a decree in O. S. No. 132 of 1936 under which the defendant had to pay. What that amount was, was ascertained on 27th December

1938 to be Rs. 427-3-0. That was not correct should be obvious, because in competent proceedings the Court finally held that the amount due

was really Rs. 751-9-8. That at an intermediate stage the same figure was arrived at by the decree in O. S. No. 190 of 1939 does not really affect

the rights and liabilities of the parties, at any rate in determining the question whether the possession of the plaintiff decree-holder obtained on 20th

October 1940 was unlawful. True, on the date the property was sold on 12th August 1940 the decree in A. S. No. 190 of 1939 was not lawful in

the sense the Court had no jurisdiction, but the liability of the judgment debtor was still there to pay the amount of Rs. 427-3-0 to which figure the

decree debt was scaled down on 27th December 1938. Even without taking into account at this stage the factor that the amount really due under

the decree was finally fixed again at Rs. 751-9-8, it should be obvious that at least for a portion of the amount for the recovery of which the

decree-holder brought the property to sale on 12th August 1940 he had the right to levy execution. From this point of view again, it would be

difficult to hold that the possession which the decree-holder eventually obtained on 20th October 1940 was unlawful, though the decree in A. S.

No. 190 of 1939 was eventually set aside, Except that in Abdul Rasak Rowther Vs. Abdul Rahim Rowther and Another, , the decree-holder

brought the property to sale for realising an amount smaller than what was eventually found to be due to him -- in this case the decree-holder

sought recovery of an amount which was eventually found to be due to him -- there seems to be no distinction in the principles which should

govern a claim for restitution with the consequential relief of mesne profits.

11. To reiterate, apart from the question of restitution, when the material on record does not establish that the possession of the plaintiff decree-

holder obtained on 20th October 1940 was unlawful the defendant cannot claim any mesne profits.

12. There was no finding in the Courts below on the question of liability for mesne profits; certainly there was none on the question of the quantum

of mesne profits; but since liability for mesne profits does not arise at all there is no point in asking for a finding on that issue from the Courts below.

13. The appeal fails and is dismissed with costs.