
(1949) 03 MAD CK 0037
In the Madras High Court

Kandi Parambath Elaya Nayan Veetil Thalakurussi Atchuthan Nair APPELLANT

Vs

Vellilapalli Gopalan Nair RESPONDENT

Date of Decision : 16-03-1949

Acts Referred:

Citation : (1949) 2 MLJ 129

Hon'ble Judges : Rajagopalan, J

Bench : Division Bench

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 of 1938). That application was allowed by the trial Court on 27th December, 1938 and the decree debt was scaled down to Rs. 427-3-0.

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. 427-3-0.

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 paragraph 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. 427-3-0 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 v. Tesoo ILR (1918) Bom. 235. 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 pre-vious 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 of Madras Act IV 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 the sixth defendant. 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 put 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 v. Yesoo ILR (1918) Bom. 235 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 v. Yesoo ILR (1918) Bom. 235 are to be followed, there could be a conditional

order, that is, an order for re-delivery of property on condition that the defendant judgment-debtor paid up the amount due under the amended

decree in O.S. No. 132 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 unlawful, there could be no question of any liability for mesne

profits.

10. Apart from the inapplicability of the principles laid down in Shivbai v. Yesoo ILR (1918) Bom. 235 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. 4.27-3-0. That 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.

(Leave is refused).