

(2017) 04 MAD CK 0099

In the Madras High Court

Case No : 584 of 2016 and CMP Nos 10874, 11098, 17534, 17535, 17536 of 2016

K.Sundari

APPELLANT

Vs

K.Suseela, & Anr.

RESPONDENT

Date of Decision : 27-04-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 21Rule 97](#) - [Order 41Rule 27](#) - [Indian Penal Code, 1860](#), [Section 427](#), [Section 448](#)

Citation : (2017) 04 MAD CK 0099

Hon'ble Judges : M.Sathyanarayanan

Bench : SINGLE BENCH

Advocate : M.Sathyanarayanan

Judgement

1. The appellant is the obstructor and the second respondent in E.A.No.264/2012 in E.P.No.461 of 1999 in O.S.No.183 of 1991 on the file of

the IX Assistant City Civil Court, Chennai and she is also the wife of the judgment debtor, namely Mr.M.Kannan and the above petition for

obstruction in respect of the property in Door No.19A, Rajamangalam Main Road, Villivakkam, Chennai-600048 came to be dismissed on

20.04.2015 and challenging the legality of the same, she filed an appeal in A.S.No.144/2015 on the file of the VI Additional Judge, City Civil

Court, Chennai and the said appeal was also dismissed, vide impugned judgment and decree dated 26.02.2016 and aggrieved by the same, has

filed this Second Appeal.

2. The present litigation in the form of this Second Appeal is having a chequered history. Facts briefly narrated and necessary for the disposal of

this Second Appeal are as follows:

2.1. One D.Mangalakshmi had filed O.S.No.263 of 1991 on the file of the IX Assistant Judge, City Civil Court, Chennai against the second

respondent herein and husband of the appellant herein for recovery of a sum of Rs.53,750/-, being the principal of Rs.50,000/- and interest of

Rs.3,750/- due in respect of three pronotes dated 27.08.1990 for a sum of Rs.26,600/-, Rs.7,300/- and Rs.16,100/- executed by him in favour

of the said person together with interest @ 18% p.a. from the date of plaint till the date of realization and for costs.

2.2. The defendant in the said Suit, who is arrayed as the second respondent in this Second Appeal- husband of the appellant, though served with

summons, was called absent and set exparte and after taking evidence and marking the documents, the said Suit came to be decreed exparte on

25.06.1991. The decree holder, namely D.Mangalakshmi levied execution by filing E.P.No.2389 of 1994, praying for sale of the property

admeasuring to an extent of 2146 sq.f.t along with superstructure constituted in Konoor Village, Village Ground Rent Patta No.16,

R.S.No.224/2B, 278/3 and in the Court auction sale, the first respondent herein was the successful bidder and she was issued with the Sale

Certificate dated 28.08.1998 in respect of the said property.

2.3. The Auction Purchaser, after getting the Sale Certificate, filed E.P.No.461 of 1999 for delivery of possession of the above said property and

it was ordered. When the Bailiff went to the suit property bearing Door No.19, the appellant herein obstructed the delivery of the property stating

that she is residing in Door No.19A and therefore, it cannot be taken delivery of possession. The Bailiff has noted the same and submitted his

report dated 23.02.2010 stating about part delivery of the possession in respect of the front portion of the premises and further indicated that in the

rear portion delivery could not be effected on account of obstructions made by the appellant herein.

2.4. The first respondent/auction purchaser filed E.A.No.264 of 2012 in E.P.No.461 of 1999 in O.S.No.263 of 1991 on the file of the IX

Assistant Judge, City Civil Court, Chennai under Order 21 Rule 97 C.P.C. for removal of all obstructions caused by the appellant and also to pass

orders for removal of all obstructions. The appellant/obstructor was put on notice

and she filed a counter stating that she is the absolute owner of the property bearing Door No.19A, Rajamangalam Main Road, Villivakkam, Chennai and the petition for obstruction has been filed belatedly and as such, it is barred by limitation and since the said property has not been sold in the Court auction sale in favour of the first respondent/auction purchaser, removal of obstruction cannot be ordered and prayed for dismissal of this petition for removal of obstruction.

2.5. Enquiry was conducted in E.A.No.264 of 2012 for removal of obstructions and the first respondent/auction purchaser examined herself as

PW1 and marked Exs.P1 to P17. and the obstructor/appellant herein examined herself as RW1. The husband of the appellant herein/obstructor,

who was the judgment debtor, was arrayed as the first respondent and the present appellant, who was arrayed as the second respondent, did not

file any document or let in any oral evidence. The Executing Court, after considering and appreciating the averments made in the petition for

obstruction and the counter affidavit filed by the obstructor and also considering the oral and documentary evidence let in on behalf of the auction

purchaser, ordered the petition, vide fair and decreetal order dated 20.04.2015.

2.6. The obstructor/appellant herein filed A.S.No.144/2015 on the file of the VI Additional Judge, City Civil Court, Chennai, challenging the order

of removal of obstruction and the husband of the appellant herein- judgment debtor has also filed C.M.P.No. 1359 of 205 for reception of

additional documents by invoking Order 41 Rule 27 CPC.

2.7. The Lower Appellate Court had formulated the following points for determination:

(i) Whether the order and decreetal order passed in E.A.264/2012 in E.P.461/1999 in O.S.263/1991 dated 20.04.2015 by the learned IX

Assistant Judge is liable to be set aside ?

(ii) Whether the appeal is to be allowed?

The Lower Appellate Court, after tracing out the history of the litigation, found that the Court auction was conducted on 10.11.1997 and the sale

was effected in favour of the auction purchaser on 19.02.1998 and the Sale Certificate was also issued in favour of the auction purchaser and

thereafter, he filed E.P.No.461 of 1999 against the judgment debtor - husband of the appellant herein for delivery of possession of the property

and it was ordered on 10.09.2001 and the auction purchaser took possession of the E.P. schedule property through Court bailiff with police aid,

except the tailoring shop occupied by one R.Vijayakumar in the main front side building portion and two portions in the rear and north side annexe

building occupied by another obstructor namely Pushpavalli Jayakumar and to remove the said obstruction, the auction purchaser filed E.P.No.461

of 1999.

2.8. The Lower Appellate Court further noted that criminal case was also filed against the judgment debtor and the obstructor before V4,

Rajamangalam Police, Kolathur, Chennai, and the said case, after investigation, was taken on file in C.C.No.10344 of 2001 before the X

Metropolitan Magistrate, Egmore, Chennai and vide, judgment dated 10.09.2001, the accused 1 to 3, namely the appellant, her husband - second

respondents as well as the one Senthil were convicted for the offences under Section 448 and 427 IPC and the fourth accused, namely

Thiru.T.Saaraiya was convicted for the offences under Sections 448, 427 r/w. 109 IPC and all of them were imposed with sentence of 6 months

simple imprisonment with a fine of Rs.1,000/- in default to undergo 3 months simple imprisonment. The Lower Appellate Court further found that

while executing the warrant for removal of obstructions passed in E.A.No.5390 of 2001 in E.P.No.461 of 1999, the appellant as well as the

second respondent once again caused obstruction by claiming that the portion occupied by them in D.No.19A, which is owned by the obstructor

and not covered in the E.P. Schedule property and in order to remove the obstruction caused by the judgment debtor through the obstructor, the

auction purchaser has filed an application in E.A.No.264 of 2012 in E.P.No.461 of 1999 and it was ordered, which led to the present litigation.

2.9. The Lower Appellate Court has also taken into consideration the oral evidence of PW1, Exs.P1 to P17 as well as the testimony of RW1 and

found that Ex.B1 did not show about the extent and the reply provided by the Corporation under Ex.P4 dated 19.03.2010 also disclose about the

non availability of records a regards Door No.19A and in fact, no records exists in the name of the appellant herein and further that no

documents/records are available in the Revenue Department of the Corporation of Chennai regarding payment of property tax in respect of Door

No.19A.

2.10. The Lower Appellate Court also found that the appellant/obstructor also filed O.S.No.7845 of 2009, marked as Exs.P5 against the first

respondent/auction purchaser and A.Arivazhagan for the relief of permanent injunction restraining them from interfering with the peaceful

possession and the said Suit was dismissed for non-prosecution on 12.04.2010, vide judgement and decree marked as Ex.P17. The auction

purchaser also filed W.P.No.16297 of 2012 against the Tamil Nadu Electricity Board, appellant and the second respondent praying for issuance

of a Writ of Mandamus to disconnect the electricity service connection granted in their favour and vide order dated 04.09.2012, it was ordered as

prayed for and thereafter, the appellant and the second respondent filed M.P.No.1 of 2013 to recall the said order and it was also allowed. The

Lower Appellate Court, further found that Ex.P12/Reply by the Assistant Revenue Officer would also clearly reveal that tax receipts produced by

the auction purchaser in respect of the property bearing Door No.19A is a forged one and the appellant/obstructor did not produce any document

to establish ownership in respect of property bearing Door No.19A. The Lower Appellate Court, on a thorough consideration of oral and

documentary evidence, found that the documents relied on by the first respondent/auction purchaser are bogus in order to defeat the rights of the

auction purchaser and she and her husbandsecond respondent had created an imaginary Door No.19A and prepared bogus documents well in

advance to see that delivery is not effected in favour of the auction purchaser and citing the said reasons, had dismissed both the appeals and the

obstructor alone had filed this Second Appeal.

3. The Second Appeal was admitted on 20.07.2016 on the following Substantial Questions of Law:

(i) Whether both the Courts below are justified in law in entertaining the petition under Order 21 Rule 97 C.P.C. filed by the respondent

herein/deGREE holder when the decree has already been executed by in full delivering the suit property to the respondents and therefore, whether

the Courts below are justified in accepting the contention of the respondents that still there is obstruction?

(ii) Whether the contention of the appellant that excess property is sought to be

taken possession by way of the present application more than the extent available in the decree has been considered by the Courts below in proper perspective manner based on the evidence let in by the parties and also the earlier execution proceedings?

4. Mr.V.Selvaraj, learned counsel assisted by Mr.Ponnappa Pillai, learned counsel appearing for the appellant/obstructor has drawn the attention of this Court to the report of the Bailiff dated 16.07.2010 and would submit that since the premises which is the subject matter of obstruction has been delivered fully, fresh petition for removal of obstruction in E.A.No.264 of 2012 is per se not maintainable in law and therefore, it ought not to have been entertained. It is the further submission of the learned counsel appearing for the appellant that as per the schedule, the property admeasuring 2146 sq.ft. with superstructure and Door No.19A in occupation of the appellant herein is beyond the portion indicated in the said schedule and by ordering removal of obstruction and delivery of possession, the Courts below had committed a grave error in ordering delivery of excess portion than that of the schedule and therefore, prays for interference.

5. Per contra, Mr.R.Shamugham assisted by Mr.S.N.Narasimhalu, learned counsel appearing for the first respondent/auction purchaser would contend that the present litigation is a classic case of abuse of process of Court and the oral evidence of the auction purchaser/PW1 coupled with Exs.P1 to P17, which have been considered in detail by the Courts below would clearly establish the fact that imaginary Door No.19A had been created by the appellant and bogus and fabricated documents have been created and after taking delivery, she and her husband had committed trespass and criminal prosecution was also lodged and it also ended in conviction and it has also been confirmed by the Appellate Court and taking into consideration fraud and deceit played by the appellant in connivance with her husband- second respondent/judgment debtor, the Courts below had rightly ordered removal of obstructions and delivery of possession and since the findings rendered are concurrent in nature, this Court may not interfere with the same and prays for dismissal of this Second Appeal with exemplary costs.

6. This Court, paid its anxious consideration and best attention to the rival submissions and also perused the entire materials placed before it in the

form of typed set of documents filed by the appellant as well as by the first respondent.

Substantial Question of Law No.1

7. The first respondent/auction purchaser purchased the schedule mentioned property in the Court auction sale on 10.11.1997 and thereafter, filed

E.P.No.461 of 1999 for delivery of possession of the property and Sale Certificate was also issued, which was also registered on 11.09.1998 on

the file of the Sub-Registrar Officer, Villivakkam, Chennai-600 049. The appellant was given delivery of possession with the help of police, except

one tailoring shop occupied by one R.Vijayakumar in the main front side building portion and two portions in the rear and north side annexe

building occupied by one Pushpavalli Jayakumar and in order to remove the obstruction, she filed E.A.No.5390 of 2011 in E.P.No.461 of 1999.

8. The primordial submission made by the learned counsel appearing for the appellant/obstructor is that the suit schedule property pertains to Door

No.19 and she is not the owner of the premises bearing Door No.19A and admittedly, the possession of the premises bearing Door No.19A has

been delivered to the first respondent/auction purchaser and that the Bailiff, in his report dated 16.07.2010 has also indicated that the possession

has been handed over and the second petition for removal of obstruction is not at all maintainable. Since the Courts below had given a finding that

fabrication of documents on the part of the appellant herein coupled with the fact of dismissal of various cases filed by it, this Court has to

necessarily go into the question regarding conduct of the appellant/obstructor.

9. The Suit Schedule mentioned property refers to R.S.Nos.224/2B and 278/3 in respect of an extent of 0.05 cents with specific boundaries and

the area given as 2146 sq.ft with superstructure. The learned counsel appearing for the first respondent/auction purchaser sought information under

the Right to Information Act from the Assistant Manager, Zone-IV, Corporation of Chennai as to the details of property tax in respect of Door

No.19 and vide reply under Ex.P4, the said official has given a report stating that from 1993 onwards, there is no record of property tax in respect

of property in Door No.19 and insofar as Door No.19A, which is the subject matter of present litigation is concerned, there are no records

available and therefore, the question of furnishing information does not arise at

all. Though it is the claim of the appellant that she has paid property tax in respect of the property bearing Door No.19A, in the light of the information given by the concerned official under Ex.P4, there is no property bearing Door No.19A.

10. The appellant herein filed O.S.No.7845 of 2009 against the first respondent/ auction purchaser and also A.Arivazhagan for permanent

injunction restraining them from interfering with the peaceful possession and enjoyment in respect of the property in Door No.19A, Rajamangalam

Main Road, Villivakkam, Chennai-600 049 and the said Suit was also dismissed for default on 12.04.2010, marked as Exs.P5 and P7 and no

efforts have been taken to set aside the said exparte decree. The appellant, apart from filing the said Suit, filed W.P.No.25379 of 2008, praying

for restoration of electricity service connection in respect of the property bearing Door No.19A and it was entertained and an interim direction was

granted to effect temporary electricity service connection and thereafter, it was listed for disposal and since there was no representation on behalf

of the appellant, it was dismissed for default on 11.08.2011, marked as Ex.P9.

11. The first respondent/auction purchaser had filed W.P.No.16297 of 2012 against the Tamil Nadu Electricity Board as well as the

appellant/obstructor and the second respondent herein- her husband, praying for a Writ of Mandamus directing the Tamil Nadu Electricity Board

to disconnect the electricity service connection given in respect of Door No.19A and by citing detailed reasons, the writ petition was ordered and

direction was given to TNEB officials to disconnect the electricity service connection and it was done and as on today, the said premises is not

having electricity service connection.

12. It is not in dispute that the appellant/obstructor had filed O.S.No.3688 of 2013 against the first respondent/auction purchaser, the

Commissioner, Corporation of Chennai and the Chairman, TNEB, Chennai-2 praying for a declaration that the schedule mentioned property

bearing Door No.19-A, Rajamangalam Main Road, Villivakkam, Chennai-49 is the absolute and independent property of the appellant and for a

declaration declaring that the appellant/plaintiff is entitled to domestic electricity service connection. The said Suit was entertained and thereafter,

the first respondent/auction purchaser filed I.A.No.9674 of 2015 praying for

rejection of plaint and it was ordered and the plaint was rejected, vide judgment and decree dated 09.12.2015.

13. It is also an admitted fact that the judgment debtor, who is the husband of the appellant/obstructor filed E.A.No.8050 of 2012 in E.P.No.461

of 1999, praying for the restitution of 5 x 50 sq.ft. of building by suitably repairing the same, alleging that the auction purchaser had illegally

executed the warrant and the Bailiff had also colluded with him and claimed that the property bearing Door No.19A is his wife's property and the

said petition was dismissed as not pressed, vide order dated 30.04.2014.

14. It is also borne out from records that in E.A.No.264 of 2012, filed for removal of obstruction, the appellant examined herself wherein she has

admitted that after the Bailiff delivered possession, she has once again came back to the said premises and that she has got approved plan in

respect of superstructure which is under pledge. The above said documents would clearly indicate that the appellant had fabricated and created

documents as to the existence of the property in Door No.19A and admittedly, as per the revenue records maintained by the Corporation of

Chennai, no such property is in existence and the endeavour made by the appellant in the form of various cases filed before the City Civil Court as

well before this Court, restraining the auction purchaser to get possession and to get electricity service connection had ended in failure, vide various

orders, which had also become final.

15. In *Adimoolam Mudaliar v. PL.Gnnamalai Achi and Others* [1997 T.L.N.J. 345], the question arose for consideration as to whether each

occasion of obstruction and cause of action for filing application to remove obstruction and the Division Bench of this Court has taken into

consideration Order 21 Rule 97 and by placing reliance upon the decision in *Bhanwar Lal v. Satyanarain and another* [1995 (1) SCC 6], held that

each occasion of obstruction or resistance furnishes a cause of action to the decree holder to make an application for removal of the obstruction

or resistance by such person.

16. A faint attempt was made by the learned counsel appearing for the appellant that since superstructure exists as per the report of the Bailiff, if at

all delivery is ordered, superstructure cannot be ordered to be delivered.

17. In Arthur Theodore James (deceased) and others v. Mrs.Hanna Rosaline and others [1999 -1-L.W.222], it was found that superstructure was

put up after institution of the Suit and by placing reliance upon the judgment in Duraisami Mudaliar v. Ramasami Chettiar and another [1979-1-

MLJ- 380] it was held that even in cases where there was superstructure before the institution of the Suit, the judgment debtor must be directed to

remove the superstructure and appropriate direction was given to the Bailiff to remove the superstructure.

18. The learned counsel appearing for the appellant contended that while taking delivery, portion of the superstructure has been damaged, but this

Court has already pointed out that the husband of the appellant and the second respondent had filed E.A.No.8050 of 2010 in the present

execution petition for restoration of the execution petition and it was dismissed and hence, the said submission is liable to be rejected.

19. In the present proceedings, though the appellant has entered the witness box, he did not file any document and though it is contended by the

learned counsel appearing for the appellant that in the light of the revenue records that superstructure exists, the submission is summarily liable to be

rejected for the reason that the documents relied upon held to be fabricated as per the findings rendered by the Courts below and in the judgment

in G.Ganesan and Others v. J.Surendran and Others [(2005) 1 M.L.J. 191], it has been held that a petition as obstructor can be filed only if there

are documents to show actual possession and if such petitions is permitted to be filed, it cannot be entertained and nothing but an abuse of process

of law.

20. In Munusamy & 4 others v. Vengadachalam and 10 others [2011- 1-L.W.647], the scope of Order 21 Rules 97 and 101 CPC came up for

consideration and it has been held that when an obstructor objects to the delivery of possession by the decree holder, claiming independent right,

the Court has to find out whether the obstructor has got any legal right to be in possession of the property and if the Court comes to the conclusion

that he has got every right to be in possession of the property, the Court can pass orders to that effect and in that proceedings, the Court cannot go

into the legality of the decree passed in favour of the decree holder at the instance of the obstructor and the obstructor has to prove that he has got

an enforceable right or interest in the property and without proving his title or interest in the property, a third party, who is squatting on the property, cannot question the validity of the decree.

21. In the present proceedings, the second respondent/judgment debtor is waging a proxy war through his wife/appellant in the form of obstructor

and in the considered opinion of the Court, the present exercise is nothing but an abuse of process of Court and in the light of the conduct

exhibited, which was also pointed out by the Courts below by analyzing the oral and documentary evidence, the appellant is not entitled to get any

indulgence from this Court.

22. In the light of the factual findings recorded by this Court as above and also in the light of the ratio laid down in the decision in Adimoolam

Mudaliar v. PL.Gnnamalai Achi and Others [1997 T.L.N.J. 345], Substantial Questions of Law No.1 is answered in negative against the

appellant/obstructor.

Substantial Question of Law No.2

23. The Courts below had recorded about the fabrication of documents and deceit and fraud played by the appellant. This Court also, on an

independent application of mind to the entire materials placed, is of the view that there is no property bearing Door No.19A and in fact, if at all the

appellant was in possession of property bearing Door No.19, the appellant as well as the second respondent once again caused obstruction by

claiming that the portion is occupied by them in D.No.19A and when it was questioned by the auction purchaser, he was attacked, which resulted

in filing of criminal cases in C.C.No.10344 of 2001 on the file of the Xth Metropolitan Magistrate, Egmore, Chennai and it also ended in acquittal

and the appeal filed by them also ended in dismissal and challenging the conviction and sentence, the appellant and other accused filed Criminal

Revision Case before this Court and it is pending. The delivery of possession effected in respect of Door No.19 was strictly in accordance with the

schedule given in the Execution Petition for delivery of possession and the first respondent/auction purchaser did not make any attempt to get the

delivery of possession of the excess one purchased from the auction and therefore, Substantial Questions of Law No.2 is also answered in

negative against the appellant/obstructor.

24. It is to be pointed out at this juncture that Sale Certificate was issued in favour of the auction purchaser on 11.09.1998 and she was able to take possession of the property nearly after 12 years on 16.02.2010 and the appellant and her husband/second respondent by abuse of process of law and also by fabrication of records and also by subletting it, managed to remain in some portion of the said property and the attempt made by them through very many rounds of litigations had also ended in failure. Such kind of acts exhibited by the appellant and her husband/second respondent are highly deprecated and condemned. Though the second respondent is represented by Mr.G.Appavu, learned counsel, no arguments were advanced on his behalf and even otherwise, his act of supporting his wife/appellant herein through a proxy litigation, is liable to be condemned.

25. In the result, this Second Appeal is dismissed and the judgment and decree dated 26.02.2016 made in A.S.No.144/2015 on the file of the VI

Additional Judge, City Civil Court, Chennai and the judgment and decree dated 20.04.2015 made in E.A.No.264 of 2012 in E.P.No.461 of 1999

in O.S.No.263 of 1991 on the file of the IX Assistant Judge, City Civil Court, Chennai are confirmed. In the light of the dismissal of this Second

Appeal, the appellant and her husband/second respondent herein, claiming to be in possession of property bearing Door No.19A, have to vacate

and deliver vacant and peaceful possession of the remaining portion of the premises on or before 05.06.2017. No costs.

26. In the light of the concurrent findings rendered by the Court below, CMP.No.11098 of 2016 lacks merit and accordingly it is dismissed.

CMP.Nos.10874, 17534 to 17536 of 2016 are closed. List the Second Appeal ""For Compliance"" on 07.06.2017.