
(1997) 04 MAD CK 0026
In the Madras High Court

L. Narayanan Chettiar, AL. Pertanan Shanmugham	APPELLANT
Vs	
R.M. Loganathan and AL. Lakshmanan	RESPONDENT

Date of Decision : 02-04-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 99, 60
Limitation Act, 1963 — Section 3

Citation : (1997) 2 LW 326 : (1998) 1 MLJ 27

Hon'ble Judges : Govardhan, J

Bench : Division Bench

Judgement

Govardhan, J.—These two appeals arise out of the com-mon order passed by the Subordinate Judge Sivaganga in E.A. Nos. 158 of 1990

and 160 of 1990 in E.P. No. 17 of 1986 in Madurai Sub Court O.S. No. 398 of 1977.

2. The averments in the amended petition in E.A. No. 158 of 1990 as follows: The petitioner is a third patty in the decree. The petitionermentioned

property belongs in the petitioner's grandfather Narayanan Chettiar uncertainly. After his death, the petitioner's father Lakshmanan Chettiar

became entitled to the same. By registered partition deed dated 24.8.1939 among the petitioner's father Lakshmanan Chettiar and his two sons

Alagusundaram Chettiar and minor petitioner represented by his father as guardian, all the properties except the petitionermentioned property were

divided by metes and bounds. The petition mentioned property was kept in common. After the death of their father, the petitioner is entitled to a

half share in the petitionmentioned property. It was en-joyed by all the members of the family during occasion and festival. The petitioner is paying

the tax. The petitioner's elder brother Alagusundaram Chettiar died leaving three

sons. Since there was no division among them, in respect of their property, the petitioner mentioned property which is the ancestral house is also not divided with a specific share. The key of the petitioner mentioned house was with the petitioner's cousin Chinnan Chettiar. One Gurusamy got an ex parte decree against the second respondent Lakshmanan, son of Alagusundaram Chettiar. He assigned the decree in favour of the first respondent.

The first respondent has moved this Court in E.P. No. 17 of 1986 for sale of the entire property as if it belonged to the second respondent. The

first respondent purchased the property in court-auction and has filed E.A. No. 134 of 1990 for delivery of the property. He has also filed

application for breaking-open the lock and for police aid in E.A. Nos. 141 and 142 of 1990 and obtained orders. When the Amin came to effect

delivery, the petitioner's caretaker Palaniappa Chettiar offered obstruction stating that the second respondent-judgment debtor has no right in the

property and it is in the possession of the petitioner. After receiving obstruction statement from Palaniappa Chettiar, the Amin informed him that he

would submit the same to the court and return the delivery warrant with an endorsement that the property could not be delivered on account of the

obstruction by third parties. But, it appears that the Amin has colluded with the decree-holder, broke open the lock in the main entrance and

opened out all the rooms inside the premises. The valuables in the rooms might have been removed stealthily. The second respondent has no

independent or exclusive right in the property. The first respondent knowing that the second respondent has no exclusive right, has made a false

claim that it belonged to the second respondent and has brought the property for sale. The court auction sale is invalid and not binding on the

petitioner. Hence, the application to receive the obstruction statement and to adjudicate that the property is not liable to be delivered in pursuance

of the court-auction sale and to order re-delivery of the property to the petitioner.

3. The respondent in his counter and additional counter contends as follows. As per the order of the court, the Amin has delivered possession of

the property to the decree-holder on 10.8.1990. The property exclusively belonged to the judgment debtor Lakshmanan only. The allegation with

regard to the partition deed dated. 24.8.1939 is denied. The house was under

the control of the judgmentdebtor and he was keeping the keys.

Knowing fully well that the respondent will take delivery of the property, the judgmentdebtor was not present at the time of taking delivery. Then

only the respondent obtained the permission of the court to break upon the lock and take delivery of the house. It is not true to say that one

Palaniappa Chettiar offered obstruction to the Amin and he gave an obstruction statement it is also false to say that the Amin colluded with the first

respondent and delivered the house to the first respondent. The movable in the property were taken note of by the Amin and delivered to these

respondents. The respondent in his turn handed over them to the court officer Advocate Elangovan. The delivery of the house may be duly

recorded. The application under Order 21, Rules 99 and 101 of the Code of Civil Procedure is barred by limitation. The delivery was effected on

10.8.1990. The application is therefore liable to be dismissed.

4. In the reply affidavit, the petitioner contends as follows: The petitioner has prayed for adjudication of his rights and getting re-delivery in E.A.

No. 158 of 1990. No new relief is asked for. Redelivery is implicit in the prayer that the property is not liable to be delivered.

5. E.A. No. 160 of 1990 is an application filed by Perianna Shanmugham son of Alagusundaram Chettiar as a third party obstructor and the

allegations in the affidavit are similar to the allegations in E.A. No. 158 of 1990. The allegations of the counter of the first respondent decree holder

are also similar to the allegations in the counter in E.A. No. 158 of 1990. The relief sought for in E.A. No. 160 of 1990 is not to record delivery of

the property.

6. The learned Sub-Judge, Sivaganga held an enquiry in both the petitioners and has upheld the case of the first respondent and dismissed the

application filed by the third party petitioners in E.A. Nos. 158 of 1990 and 160 of 1990.

7. Aggrieved over the same, the petitioners in E.A. Nos. 158 of 1990 and 160 of 1990 have come forward with these two appeals viz., C.M.A.

Nos. 1317 of 1993 and 894 of 1994.

8. One Gurusamy got an ex parte money decree against the second respondent in these appeals namely. Lakshmanan, son of one Alagusundaram

Chettiar, in the Sub Court at Madurai in O.S. No. 398 of 1977. The decrees was

assigned in favour of the first respondent. The first respondent has filed E.P. No. 17 of 1986 in the Sub Court at Sivagangai after having the decree transferred to the said Court and has brought the property bearing door No. 3-A in Ward No. 3 of Kandamanickam village for sale contending that the said property belonged to the judgment-debtor. Lakshmanan and purchased the same in the court-auction sale. Subsequently, he has filed an application for delivery of possession through court and took delivery of the property. The applicant in E.A. No. 158 of 1990 is the junior paternal uncle of the judgmentdebtorLakshmanan. The applicant in E.A. No. 160 of 1990 is the brother of the said judgment-debtor. They have filed the said applications contending that the property was the ancestral property of the grand-father of the applicant in E.A. No. 158 of 1990, one Lakshmanan Chettiar and that a partition by metes and bounds was effected between the said Lakshmanan Chettiar and his two sons viz., Alagasundaram Chettiar father of the judgment-debtor and the applicant in E.A. No. 158 of 1990 who was then a minor represented by his father and natu-ral guardian, and in that partition, all the properties except the petition mentioned property were divided between them and the petitionermentioned property was kept in common to be enjoyed by the family members during festivals and other occasions, and the assignee-decree-holder has brought the property for sale as if it belongs to the judgment-debtor abso-lutely and also took possession of the same through court, and it is invalid and therefore, the same should be declared accordingly. The said application was filed under Order 21, Rule 97 of the Code of Civil Proce-dure within ten days of taking delivery of possession of the property by the decree-holder. Subsequently, they have filed two interlocutory applications for amending the prayer in the said application with a prayer for re-delivery of the property to them and the amendment was also allowed. The learned Sub-Judge, who held on enquiry in these two E.A. Nos. 158 of 1990 and 160 of 1990 along with the interlocutory application by one other brother of Lakshmanan, has held that the judgmentdebtor has got only 1/6th share in the property. The learned Sub Judge has also held that in view of the fact that the order allowing amendment is silent with regard to the date on which the amendment is to take effect, it can have effect only from the date of the order

and it is beyond 30 days of delivery of possession of the property to the decree-holder and therefore, the applicants in E.A. Nos. 158 of 1990 and

160 of 1990 are not entitled to the relief prayed for by them and dismissed the two applications. It is against this order, passed in E.A. Nos. 158

of 1990 and 160 of 1990, these two appeals have been preferred by the applicants in the said applications.

9. The learned Counsel appearing for the appellants/applicants in both the appeals would contend that the sale itself is ab initio void since the

property brought for sale does not belong to the judgment-debtor absolutely and the relief sought for by them should have been granted by the

lower court. The learned Counsel appearing for the first respondent would on the other hand contend that the amendment ordered itself causes

prejudice to the decree-holder since they were ordered beyond the period of limitation proving for re-delivery and the order of the learned Sub

Judge is well-founded and does not call for any interference by this Court. The learned Counsel appearing for the first respondent has also argued

that the finding of the lower court that the petitioner mentioned property is excluded from partition between Lakshmanan Chettiar and his sons has

not been proved by any documentary evidence and it is the case of the first respondent that it belongs to Lakshmanan, the second respondent

absolutely and the lower court has failed to consider that there was no material to show that it belongs to all the three and has relied upon the tax

receipts to hold that the property belongs to the three and it is erroneous. It has to be noted that the first respondent has not preferred any cross

appeal with regard to the finding of the lower court that the petitioner mentioned property is the ancestral, joint family property of Lakshmanan

Chettiar and his two sons and the judgmentdebtor has got only one sixth share in it. It is also to be noted that no appeal or revision has been filed

when the application for amendment was ordered by the lower court in order to appreciate the contention of the learned Counsel appearing for the

respondent that the amendment ordered by the lower court is erroneous. The learned Counsel appearing for the first respondent has also argued

that the Order 21, Rule 97 of the CPC contemplates an application by the decree-holder and a person in possession who is not made a party to

the execution application cannot apply to court to safeguard his interest in the property and the applicants in E.A. Nos. 158 of 1990 and 160 of

1990 who claim to be in joint possession of the property and who are not parties to the execution application cannot apply to the court to

safeguard their interest in the property invoking Order 21, Rule 97 of the Code of Civil Procedure, and the applications are not even maintainable

and no relief could be granted to them when the amendment to the applications has been after the period of limitation in respect of an application

for re-delivery of possession since it is likely to cause prejudice to the decree-holder. In the decision reported in *Motamarii Ramaiah and Others*

Vs. Malliah and Others, , it has been held that under Order 21, Rule 97, C.P.C. only the decree-holder can file an application to the court

complaining resistance or obstruction and an obstructor who is not a party to the decree-under execution cannot approach the court with an

application to determine and, safeguard his inter-ests to obtain an order in his favour under Order 21, Rule 97, C.P.C. or any other provision of

law. The said decision also lays down that if a third party files such an application, impleading the decree-holder, it would be open to the decree-

holder to contend that such as application does not lie, that the third party cannot ask for an enquiry in the matter or relief and to ask for an order

in favour of himself and if he so contends, the application will have to be dismissed. The above ruling further holds as follows:

But, if instead of raising such an objection, the decree-holder files a counter and takes part in the proceedings, and if an order is passed in the

proceedings, the latter will be valid just as if the counter which he filed was an application filed by him under Order 21, Rule 97, C.P. C, and as if

the application which had been filed by third party had been a counter filed by such third party, and that a decree-holder who has so co-operated

without raising any objection probably in the hope that the proceedings would end in his favour and against the third party, cannot be allowed a en-

couraged to attack the order passed in such proceedings on the ground that the third party's objection application was not maintainable in law, if

and when he finds that the order is not to his advantage or to his taste or upto his expectation.

In the case on hand, the first respondent has filed counter to the two applications filed by the appellants herein and has co-operated in the enquiry

without raising any objection regarding maintainability of the applications under Order 21, Rule 97, C.P.C. and therefore, it is not open for the first

respondent decree-holder now to contend in the appeal that the finding of the lower court that the judgment debtor has no saleable interest in the

entire property and he has got only one sixth undivided share, since it is not upto his taste or upto his expectation. 10. While canvassing the

objection with regard to the amendment already ordered by the lower court, the learned Counsel would contend that in cases where the

application to set aside the sale is filed within the period of limitation, and subsequent amendment for re-deliver of property is filed beyond the

period of limitation, there is no justification to grant permission for amendment and relies upon the decision reported in P.B. Ramjee and Others

Vs. P.B. Lakshmanaswamy Naidu and Others, , in which the Division Bench of this Court has held that subsequent amendment for setting aside

sale filed beyond period of limitation in a suit of partition and separate possession filed within limitation, is barred by limitation and there is no

justification to grant permission for amendment. The learned Counsel appearing for the first respondent would also contend that even if the plea of

limitation is not raised in the application for amendment, by the first respondent, since the period of limitation was one that goes to the root of the

matter and is a pure legal plea not depending upon investigation further facts, it is the duty of the court u/s 3 of the Limitation Act to dis-miss the

petition barred by time and the amendment application therefore should have been dismissed by the court itself. The learned Counsel has also

drawn the attention of this Court to Section 3 of the Limitation Act in support of their above contention. Section 3 of the Limitation Act provides

for bar of limitation which is to the effect that every suit instituted, appeal preferred and application made after the prescribed period shall be

dismissed although limitation has not been set as a defence. According to the learned Counsel appearing for the first respondent, the Original

Application is said to be a defective one with its pleadings in that it has no prayer for redelivery and the amendment sought for, being barred by

time, the order passed in the amendment application is to be treated as one as newly constituted cause of action and the said application should

have been dismissed. There can be no two opinions with regard to the propositions of law canvassed by the learned Counsel with regard to the

period of limitation and the prayer permitted to be included in the petition by way of amendment. But the question is whether the said amendment

gives rise to a new cause of action which is prejudiced to the interest of the decree-holder. 11. The learned Counsel appearing for the appellant in CM.A. No. 895 of 1994 would contend that if a person who is neither a judgmentdebtor nor one claiming through him cites a wrong provision of law, claiming certain relief, the executing court should see the averments in the petition and the applicability of relevant rule and dismissing such an application on the technical ground of limitation is erroneous since procedure is the handmaid of substantial justice. The learned Counsel relies upon the decision reported in Bhanwar Lal Vs. Satyanarain and another, for the above proposition and would contend that even though the applicants are not claiming through the judgment-debtor, they have filed the application under Order 21, Rule 97 of the CPC stating the ground of attack of the same and it cannot be dismissed on the technical ground of limitation. According to the learned Counsel, when a manifest illegality is committed in court sales, even if application is not filed within the prescribed time, the court cannot remain a mute spectator to obvious and manifest illegality in such court sales. According to the learned Counsel, when the entire property in which the judgmentdebtor has no saleable interest has been brought for sale, and the decree-holder also purchased the same without obtaining the leave of the court, big fraud has been played on the court and the fraud upon the courts vitiates the entire proceeding and the entire proceedings is to be held as a void one. The finding of the learned Sub-Judge is to the effect that the judgmentdebtor has no saleable interest over the entire property. The claim of the appellant in CM.A. No. 895 of 1994 that the decree-holder has not obtained permission to bid at the counter-auction sale before purchasing the property is not disputed by the respondents. Section 60 of the CPC provides for the attachment and sale in execution of a decree only the property belonging to the judgment-debtor and in which the judgmentdebtor has a saleable interest. It also provides that where the judgment-debtor has no disposing power over a particular property, the said property is not liable for attachment and sale in execution of a decree. In the case on hand, the decree-holder has brought the petitionmentioned property in which the judgment-debtor has only an undivided 1/6th share for sale after attaching it and it is in violation of Section 60 of the Code of Civil Procedure. Therefore, the claim of the appellant in C.M.A. No. 895 of 1994 that the entire procedure

and is to be held as a void one is well founded. In those circumstances the question of limitation or amendment which is a technical one has to

recede to the background and therefore the argument of the learned Counsel appearing for the first respondent that the amendment itself should not

have been allowed is not a tenable one.

12. As already observed by me, the first respondent has not disputed the contention of the appellant that the decree-holder has not obtained

permission to bid at the auction. Order 21, Rule 90, of the CPC which provides for application to set aside a sale on the ground of irregularity or

fraud renders a sale of property in execution as an invalid one, in the absence of the court's permission to the decree-holder to bid at the court

auction sale. The decision reported in Kamala Kanta Mohapatra and Another Vs. Debarchan Seth and Another, relying upon certain earlier

decisions, is to the effect that a purchase of property by the decree-holder without permission of the court Order 21, Rule 90, of the CPC would

not be absolutely void but merely voidable and is liable to be set aside if an application for the purpose is filed under Sub-Rule (3). In essence, the

above ruling has laid down that the absence of court's permission to the decree-holder to bid for the property renders the sale invalid. When we

approach the case on hand bearing in mind that the decree-holder has brought the property in which the judgmentdebtor has no saleable interest in

its entirety and the decree-holder has purchased the property in court-auction sale without permission of the court, the contention of the learned

Counsel appearing for the respondent that the very amendment to the petition filed under Order 21, Rule 97 of the CPC is invalid is not a tenable

one.

13. The learned Counsel appearing for the appellant in CM. A, No. 1317 of 1993, would argue that it is no doubt true that the courts would as a

rule, decline to allow amendment if a fresh suit on the amended plaint would be barred by limitation on the date of the application, but that it is

factor to be taken into account in exercise of the discretion as to whether the amendment should be ordered and does not affect the power of the

court to order it, if that is required in the inter-ests of justice. The quoting of an erroneous statutory provision by the applicant viz., Order 21, Rule

97 of the CPC at the first instance cannot be a bar to order the amendment since

the court is entitled to exercise its power to order amendment in the interests of justice and it would be defeated if it is held that the applicant has originally filed an application under Order 21, Rule 9.7 of the CPC and the amendment with a prayer for redelivery quoting the correct provisions, viz., Order 21, Rule 101 of the CPC is barred by limitation since it cannot be in the interests of justice. In this connection, I wish to refer to the decision reported in Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others, , wherein it has been held as follows:

All amendments ought to be allowed which satisfy the two conditions (a) not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been ordinarily correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of cause of action which since the institution of the suit had become barred by limitation the amendment must be refused to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him on a good defence to the claim. The ultimate test therefore still remains the same can the amendment be allowed without injustice to the other side, or can it not?

When we approach the case on hand bearing the above proposition of law laid down by the Supreme Court, we have to come to the conclusion that if the amendment is refused, it would cause prejudice to the applicant and if it is allowed, no prejudice would be caused to the respondents since the basis of the case of the applicant is stated in the affidavit to the application is already filed.

14. Fraud is an act of deliberate deception, the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. By describing the property in which the applicants have got an interest or a saleable interest as the exclusive property of the judgment-debtor, the first respondent is said to have played a fraud on the Court. This argument of the learned Counsel appearing for the appellant in C.M.A. No. 895 of 1994 is convincing since by describing the property in which

the applicants have got a saleable interest to the extent of 5/6th share, the decree-holder wants to take an undue advantage to his benefit and it would result in a loss to the appellant. Therefore, the argument of the learned Counsel appearing for the appellant that the decree-holder has played a fraud on the court has to be accepted. That leads us to the other conclusion that fraud upon the court vitiates all proceedings and all proceedings are void. The entire execution proceedings have therefore to be held as void and the applications should have been allowed instead of dismissing them on the ground that the order passed for amendment does not say for which date the amendment is to take place. The court has power to allow amendment of such applications under its inherent power and it is an appropriate case, in which, application for amendment has been allowed by the court for the ends of justice and for preventing the abuse of process of court. It is more so when the amendment does not constitute an addition of a new cause of action or raise a different case, but amounts to a different or additional approach to uphold justice on the same facts. This amendment has therefore, to be allowed even after the expiry of the statutory period of limitation, that is what has been done and it is not open for the respondents now to challenge the amendment.

15. In the decision reported in *Bombay Warehouse Corporation Vs. Devraj and another*, it has been held that where the amendment is with regard to the real dispute in respect of possession of entire premises and not merely portion thereof amendment of plaint by deletion of words portion of should have been allowed and it would relate back to date of filing of suit. In the case on hand, amendment for application is with regard to the prayer for delivery of possession quoting the correct provision of law, it is in respect of a dispute regarding possession of the property. When it is held that the applicants have got 5/6th share in the property, even assuming that delivery of possession was handed over by the Amin to the decree-holder, possession of the property by the decree-holder would amount to possession by one co-owner viz., co-owner having 1/6th share, saleable interest in the property and therefore it must be treated as possession by him on behalf of the other co-owner viz., the applicant also. The learned Counsel appearing for the appellants would contend that when once the possession of the decree holder is held as

possession on behalf of the other co-owners also, there is no necessity for amending the application itself, and it is only by way of abundant

caution, the amendment has been sought for and when it is ordered, objecting to it on the ground that it is barred by limitation and dismissing the

entire application as barred by limitation cannot be said to be in the interest of justice and it is more so when the amendments dates back to the

date of petition. I am in agreement with the learned Counsel appearing for the appellant on the aspect and I am of opinion that the applications filed

by the applicants ought to have been allowed instead of dismissing them.

16. Specific case of the appellant in C.M.A. No. 131 of 1993 is that his agent has filed objection at the time of delivery. The respondent resisted

the same by contending that there was no objection. Even assuming that there was no objection, delivery could be effected only in the presence of

the appellant or his agent and if delivery is taken by the Amin in the absence of claimant it cannot be considered as a proper delivery. If there is no

proper and valid delivery, the improper delivery said to have been effected by the Amin to the decree-holder cannot be recognised and in that

view also, the application, should have been allowed. But the learned Sub Judge has dismissed the application solely on the ground that the

amendment comes into operation only on the date of the order passed for the same and it is beyond the period of 30 days for an application

seeking de-livery of possession and therefore, the application are liable to be dismissed. The said finding of the learned Sub Judge is erroneous and

thereof the appeals have got to be allowed.

17. In the result, the appeals C.M.A. Nos. 1317 of 1993 and 895 of 1994 are allowed setting aside the order passed by the Subordinate Judge,

Sivaganga and allowing the application in E.A. Nos. 158 of 1990 and 160 of 1990. No costs.