

(1992) 07 KL CK 0038
In the High Court Of Kerala
Case No : S.A. No. 221 of 1986

Lakshmikutty Amma Retnamma

APPELLANT

Vs

P.N. Krishna Pillai and Others

RESPONDENT

Date of Decision : 23-07-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 39 Rule 1, 151
Limitation Act, 1963 — Article 99

Citation : AIR 1992 Ker 373 : (1992) 3 ILR (Ker) 514

Hon'ble Judges : Chettur Sankaran Nair, J

Bench : Single Bench

Advocate : G. Krishnakumari, for the Appellant; B. Raman Pillai, Sunny Varghese, S. Vijayakumar, M.P. John, K. Bhaskaran Nair, M.N. Sukumaran Nayar and V. Divakaran Poti, for the Respondent

Final Decision : Dismissed

Judgement

Chettur Sankaran Nair, J.—This appeal by sixth defendant in the suit, is directed against the concurrent findings of the Courts below. The Courts below declared, that a Court sale, pursuant to Ext. A-7 decree in OS 147/68, was not binding on the respondent/ plaintiffs.

2. The chronology of events, leading to the suit from which the Second Appeal arises, is as follows:

The original owner of the suit property, 4th defendant, sold it to 5th defendant by Ext. A-2 dated 18-2-1958 and he, in turn sold it to "Nair Sahodhara Sangham" by Ext. A-1 dated 6-7-1960. Plaintiff N.S.S. Karayogam stepped into the shoes of the "Nair Sahodhara Sangham" by reason of Exts. A-3 and A-11. While so, one Sankaran Narayanan filed a suit, OS 359/63 against the aforesaid Sangham, and that ended in a compromise (Ext. A-5). Earlier, 4th defendant had executed Ext. B-4 chitty bond in favour of first defendant. Based on that, first defendant filed OS 147/68 against the 4th defendant. Ext. A-6 is the judgment in that Suit and Ext. A-7 the decree. Plaintiffs were not parties to the Suit.

3. In execution of Ext. A-7 decree, the suit property was sold in Court auction. Defendants 2 and 3 purchased the same, Ext. A-8 is the Delivery Kychit. Later, 3rd defendant executed Ext. A-9 release deed in favour of second defendant. Second defendant conveyed her rights to 6th defendant under Ext. B-1 dated 24-9-1975.

4. Coming to know of the Court sale, plaintiffs filed the present suit for setting aside the same and for a declaration that the sale was not binding on them. Appellant/6th defendant resisted the suit on the ground that plaintiff M.S.S. Karayogam, had not obtained any rights in the property. The Courts below concurrently found that the Court sale was not binding on the plaintiffs.

5. In addition to the contentions raised in the suit, counsel for appellant contended that the suit was barred by limitation, and that the Courts below should not have invoked Section 151 of the Code of Civil Procedure, to restore possession to plaintiffs. Elaborating his contention, counsel submitted that a suit for setting aside the sale has to be filed within one year of the confirmation of sale by reason of Article 99 of the Limitation Act, and that the suit filed beyond one year of that period is barred by limitation. Answering this contention, counsel for respondents submitted that the suit was one for a declaration, that the sale will not bind respondents, and that the question of limitation, relating to a suit falling u/s 99, was alien to the context.

6. The imprecise language in which the prayers are couched, gives rise to an argument that the prayer is to set aside the Court sale. The time for filing a suit for that purpose, is one year under Article 99. Indisputably, the suit was filed beyond that period. But, a prayer for a declaration that the sale is not binding on the plaintiffs, is incorporated in prayer (b). True, there is also a specific prayer for setting aside the sale. Clarity of thinking and precision in drafting, are not virtues of the plaint in question. But, on a reasonable undertaking of prayer (b), a prayer for the declaration aforesaid, can be gleaned.

7. More importantly, the relief that can, be claimed in a case like this, where the plaintiff is not a party to the suit leading to the sale, can only be one for a declaration that the decree and sale will not bind him, a stranger. It will not be proper for him to seek the remedy of setting aside the sale. The Judicial Committee of the Privy Council had held consistently that the remedy for a stranger to a suit, in which a sale is ordered, is a declaratory relief and not a suit to set aside the Court sale. In *Manohar Lal v. Jadunath Singh* 33 IA 128 the Judicial Committee observed that the appropriate relief in such circumstances, would be a declaration that the decree does not bind one who was not a party to the suit. The principle upon which this view rests, is that a decision cannot bind a stranger to the proceedings. It is not proper to set aside the decree either, because it may be good against others. The Privy Council expressed the same view in *Khiarajmal v. Daim* ILR 32 Cal 296. Regarding a stranger, the Judicial Committee observed :

"Against such persons the decree sale would be a nullity and might be disregarded without any proceedings to set them aside."

In *Kedar Nath Goenka v. Munshi Ram Narain* ATR 1935 PC 139 the Judicial Committee held that where a property is sold at a time when the title to the property was not in the judgment-debtor, the sale would be a nullity. A Full Bench of the Madras High Court had occasion to consider a situation similar to the one on hand in *Abdul Hameed Sait and Another Vs. The Provident Investment Co. Ltd. and Others*, . *Subba Rao (J)* (as His Lordship then was), delivering the opinion of the Bench, stated that a sale cannot affect the title of a party, who was not a party to the suit, leading to the sale and it is not necessary for him to have the sale set aside :

"The terms of the Article (corresponding to Article 99) indicate that it applies only to a case where the Court sale is required to be set aside. . . ."

Other decisions which have taken a similar view are *Paluri Venkatasiva Rao Vs. Bodapati Venkatanarasimha Satyanarayanamurthy and Others*, , *Thangachi Nachial and Another Vs. Ahmed Hussain Malumiar and Others*, , *Bhai Ishar Das Vs. Smt. Govindi and Others*, ; *Ganapathi Koundan and Others Vs. Natarajan*, etc.

8. Authority is thus legion for the proposition that Article 99 of the Limitation Act will not govern cases, where strangers seek to set aside a Court sale pursuant to decrees, to which they were not parties. What they can seek, and what they should seek, are declarations to avoid the effect of the decree or sale, so far as it concerns them. The contention based on Article 99 of the Limitation Act, must be repelled. As for the declaration, it is not in dispute that the suit was within the period.

9. It was then contended that possession was with the appellant, and that Section 151 of the CPC should not have been invoked. Physical possession can not be presumed in every instance of delivery. As rightly pointed out by the first appellate Court, there is no evidence of possession in favour of appellant. Ext. A-8 which is the main plank of appellant's case, is only a delivery kychit and not even the Amin was examined. In this state of evidence, the contention regarding possession, now to be rejected.

10. The allegation that Ext. A-2 evidences a sham transaction, was not substantiated. Nor, has the appellant succeeded in establishing that appreciation of evidence by the Courts below was unreasonable. It is pertinent to note that the title of 5th defendant, was not successfully challenged by appellant.

11. The only other contention urged is that Section 151, C.P.C. should not have been invoked, by the Court below to "restore" possession. The Court below stated that it was "competent to restore possession". For want of elucidation, this statement has lent an argument to appellant. What was obviously meant by the Court below, was that by violating the order of injunction, appellant could not gain possession and that Section 151, C.P.C. enables the Court to make an order

necessary for the ends of justice. When unlawful means are adopted by a party, it is plainly the responsibility of the Court to invoke Section 151, C.P.C. to secure the ends of justice, or to prevent abuse of process of Court. In the instant case, an order of injunction was issued under Order 39, Rule 1. In disregard of that, the appellant took possession of the property. In such circumstances, the Court was bound to intervene, and intervention was not to give an unrelated relief, but only to enforce the order under Order 39, Rule 1. As observed in *Satish Chandra Maity Vs. Sm. Saila Bala Dassi and Others*, , when a party comes into possession of property violating an order of injunction, it is the duty of the Court to restore possession, by recourse to its inherent powers u/s 151, CPC. The High Court of Rajasthan also, in *Magna and Another Vs. Rustam and Another*, held that Section 151, CPC can be invoked when one of the parties obtained possession, violating an order of injunction. The same view finds acceptance in *Hari Nandan Agrawal and Another Vs. S.N. Pandita and Others*, , in *The State of Bihar Vs. Usha Devi and Another*, and in *Kochira Krishnan Vs. Joseph Desouza*, Consensus of judicial opinion, without divergence, is that Section 151, CPC cannot only be invoked, but should also be invoked to effectuate an order validly made by a Court of competent jurisdiction. That is what the Courts below did, and no more, and that is what they are required to do. The judgment and decree do not call for interference.

The appeal is without merit, and it is accordingly dismissed, but without any order as to costs.

I regard appreciation of the help rendered by counsel on both sides and particularly by Shri N. Subramaniam who addressed the Court as *Amicus Curiae*.