

(2003) 10 MAD CK 0030

In the Madras High Court

Case No : Civil Revision Petition (NPD) No. 793 of 2003 and C.M.P. No. 8584 of 2003

M. Indirani and Others

APPELLANT

Vs

Sri Saravana Finance and Others

RESPONDENT

Date of Decision : 28-10-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Contract Act, 1872 — Section 45

Citation : (2003) 10 MAD CK 0030

Hon'ble Judges : P.K. Misra, J

Bench : Single Bench

Advocate : G.R. Swaminathan, for the Appellant; Parthasarathy, for Respondent-1 and K.A. Ravindran, For Respondents 7 and 8, for the Respondent

Judgement

P.K. Misra, J.—Heard the learned counsel for the parties.

2. The present Civil Revision is directed against the order dated 10.4.2003 passed by the Executing Court rejecting the application filed by the present petitioners u/s 47 CPC.

3. Petitioners are the daughters of one Margabandhu. Respondents 3 to 6 are the sons of the aforesaid Margabandhu. Respondent No.1 in the

present Revision had filed O.S.No.30 of 2000 against the aforesaid Margabandhu and respondents 3 to 6. The aforesaid persons are the partners

of one Saravana Theatre. During pendency of the suit, the aforesaid Margabandhu died. However, since the suit was against a partnership firm and

since other partners were on record, the present petitioners were not impleaded as parties to the suit. In due course, a decree was obtained against

the partnership firm and two items of the properties were sold. The present

respondents 7 & 8 are the auction purchasers. The present petitioners filed objection u/s 47 CPC after the sale was confirmed. It was their contention that the judgment in O.S.No.30 of 2000 dated 14.7.2002 was void as the petitioners being the legal representatives were not brought on record. To the objection filed by the petitioners, the decree-holder and the auction purchasers have contended that the present petitioners have been set-up by the respondents 3 to 6.

4. The Executing Court relying upon Order 30 Rule 4 CPC held that since the suit was filed against a firm, on the death of one of the partners, his legal representatives need not be impleaded as parties to the suit. It was indicated that there was no other defect in the confirmation of sale and accordingly the application was rejected.

5. Learned counsel appearing for the petitioners has contended that the petitioners being the daughters of the deceased Margabandhu have right in the properties left by him and since they were not impleaded as defendants nor any notice was issued to them in the execution case, they are not bound by the sale in favour of the respondents 3 to 6. It is their contention that item No.1 in the application filed by them was purchased by Margabandhu and item No.2 was purchased by him benami in the name of the respondent No.4, and therefore, in both the items the petitioners have right.

6. Learned counsels appearing for the respondent No.1 and the respondents 7 & 8 have contended that in view of the provisions contained in Order 30 Rule 4, it is not necessary to implead the present petitioners as legal representatives. They have also contended that since the petitioners were not parties to the suit, they did not have any locus standi to file objection u/s 47 CPC and their remedy, if any, is to file objection to the attachment under Order 21, Rule 54 or to take steps as contemplated under Order 21, Rule 97 or under Order 21, Rule 99 CPC.

7. Order 30 Rule 4 is to the following effect :-

4. Right of suit on death of partner.- (1) Notwithstanding anything contained in Section 45 of the Indian Contract Act, 1872(9 of 1872) where

two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such person dies, whether before the

institution or during the pendency of any suit, it shall not be necessary to join

the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule(1) shall limit or otherwise effect any right which the legal representative of the deceased may have -

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

In view of the aforesaid provision, the contention raised by the petitioners that the decree was void cannot be sustained.

8. It is of course true that they have filed their objection u/s 47 CPC which may not be strictly applicable as they were not parties to the suit.

However, they can resist delivery of possession, in which event, the procedure contemplated under Order 21 Rule 97 is to be followed. Such

person, if dispossessed, can file application under Order 21, Rule 99 CPC. When any such application is filed under Order 21, Rule 97 or Order

21, Rule 99, the Court has to decide relating to right, title and interest in the property as contemplated under Order 21 Rule 101.

9. Learned counsel for the petitioners in course of hearing of the Revision has suggested that even though the application filed u/s 47 CPC was not

strictly speaking, maintainable inasmuch as the present petitioners were not parties to the suit, the executing court should have treated the

application as one filed under Order 21, Rule 99 CPC or at any rate should have treated the application as offering resistance or obstruction to

possession of immovable property by the auction purchaser.

10. The scope of Order 21, Rules 97, 99 and 101 has been considered by the Supreme Court in the decision reported in Shreenath and Another

Vs. Rajesh and Others, . It has observed :

. . . Order 21, Rule 99 conceives of resistance or obstruction to the possession of immovable property when made in execution of a decree by

any person"". This may be either by the person bound by the decree, claiming title through judgment debtor or claiming independent right of his

own including tenant not party to the suit or even a stranger. A decree holder, in such case, may make an application to the Executing Court

complaining such resistance, for delivery of possession of the property. Sub-clause (2) after 1976 substitution empowers the Executing Courts

when such claim is made to proceed to adjudicate upon the applicant's claim in accordance with provisions contained hereinafter. This refers to

Order 21, Rule 101 (as amended by 1976 Act) under which all questions relating to right, title or interest in the property arising between the

parties under Order 21, Rule 97 or Rule 99 shall be determined by the Court and not by a separate suit. By the amendment, one has not to go for

a fresh suit but all matter pertaining to that property even if obstructed by a stranger adjudicated and finality given even in the executing

proceedings. We find that expression ""any person"" under sub-clause (1) is used deliberately for widening the scope of power so that the Executing

Court could adjudicate the claim made in any such application under Order 21, Rule 97. Thus by the use of the words "any person" it includes all

persons resisting the delivery of possession, claiming right in the property even those not bound by the decree, includes tenants or other persons

claiming right on their own including a stranger.

11. In the aforesaid Supreme Court decision, reliance was placed upon an earlier decision of the Supreme Court reported in Noorduddin Vs. Dr

K.L. Anand, . After making reference to various provisions, it was observed :

. . . Thus, the scheme of the Code clearly adumbrates that when an application has been made under Order 21, Rule 97, the Court is enjoined to

adjudicate upon the right, title and interest claimed in the property arising between the parties to a proceeding or between the decree-holder and

the person claiming independent right, title or interest in the immovable property and an order in that behalf be made. the determination shall be

conclusive between the parties as if it was a decree subject to right of appeal and not a matter to be agitated by a separate suit. In other words, no

other proceedings were allowed to be taken. It has to be remembered that preceding CPC Amendment Act, 1976, right of suit under Order 21,

Rule 103 of 1908 Code was available which has been now taken away. By necessary implication, the legislature relegated the parties to an

adjudication of right, title or interest in the immovable property under execution and finality has been accorded to it. Thus, the scheme of the Code

appears to be to put an end to the protraction of the execution and to shorten the litigation between the parties or persons claiming right, title and

interest in the immovable property in execution.

9. Adjudication before execution is an efficacious remedy to prevent fraud, oppression, abuse of the process of the court or miscarriage of justice.

The object of law is to meet out justice. Right to the right, title or interest of a party in the immovable property is a substantive right. But the right to an adjudication of the dispute in that behalf is a procedural right to which no one has a vested right. The faith of the people in the efficacy of law is the saviour and succour for the sustenance of the rule of law. Any weakening like in the judicial process would rip apart the edifice of justice and create a feeling of disillusionment in the minds of the people of the very law and courts. The rules of procedure has been devised as a channel or a means to render substantive or at best substantial justice which is the highest interest of man and almanac for the mankind. It is a foundation for orderly human relations. Equally the judicial process should never become an instrument of oppression or abuse or a means in the process of the court to subvert justice. The court has, therefore, to wisely evolve its process to aid expeditious adjudication and would preserve the possession of the property in the interim based on factual situation. Adjudication under Order 21, Rules 98, 100 and 101 and its successive rules is sine qua non to a finality of the adjudication of the right, title or interest in the immovable property under execution.

12. In 2001(1) CTC 287 (ELANTHAMMAL AND ANOTHER v. ALAGAR AND ANOTHER) after referring to the decision of the Supreme

Court reported in 1998 SC 1827 (cited supra), it was indicated by a learned single Judge of this Court that third parties to suit claiming possession

of immovable property can take recourse to the procedure contemplated under Order 21, Rule 97 and Rule 99 CPC by filing an application.

13. It is of course true that Order 21, Rule 97 contemplates filing of application by an auction purchaser, who was obstructed in obtaining

possession. Similarly, Order 21, Rule 99 contemplates filing of application when any person other than the judgment debtor is dispossessed of the

property by the auction purchaser. However, it would not be proper to confine the applicability of Order 21, Rule 97 or Order 21, Rule 99 to a

stage "after the event", that is to say, after the actual obstruction or after the actual dispossession. Any decree-holder or auction purchaser, who

reasonably apprehends obstruction, can invoke the court's power under Order 21 Rule 97 and similarly any person apprehending dispossession

can also file application under Order 21, Rule 99. As apparent from Order 21, Rule 101, all questions including the question relating to right, title

or interest in the property should be decided under Order 21, Rule 101 read with Order 21, Rule 97 or Order 21, Rule 99 as the case may be.

14. In the present case, the very fact that an application has been filed challenging the validity of the sale would be sufficient to bring the matter

within the scope of Order 21, Rule 97 or Order 21, Rule 99. Even though a formal application had not been filed, in the interest of justice, the

application already filed should have been treated as one under Order 21, Rule 99 so that the matter could be decided under Order 21, Rule 101

CPC.

15. Learned counsel appearing for the respondents 7 & 8 has contended that whatever may be position relating to item No.1 of the property, so

far as item No.2 of the application is concerned, no such question can be countenanced at the instance of the present petitioners. It has been

submitted that admittedly the sale deed in respect of that property stands in the name of the respondent No.4. The contention of the petitioners that

it was purchased by their father deceased Margabandhu in benami in the name of respondent No.4 cannot be countenanced in view of the

provisions contained in the Benami Prohibition Act.

16. The aforesaid submission of the learned counsel for the respondents 7 & 8 is justified. In view of such provision, it is not open to the present

petitioners to contend otherwise. Therefore, the matter should be now confined to item No.1 of the property in the list and not in respect of item

No.2. In respect of item No.2, the Executing Court should take steps to deliver possession to the auction purchaser as early as possible.

17. So far as item No.1 is concerned, the Executing Court should now decide the right, title and interest of the present petitioners in the property, if

any. However, it is made clear that so far as the respondents 3 to 6 are concerned, they being parties to the suit, are bound by the decree. Sale

would be valid so far as they are concerned.

18. Civil Revision is accordingly allowed in part and the matter is remanded for fresh consideration so far as item No.1 is concerned. No costs.