

(2013) 07 MAD CK 0056

In the Madras High Court

Case No : S.A. No. 710 of 2013 and M.P. No. 1 of 2013

Mangali and Malliga

APPELLANT

Vs

Sakku Bai (deceased) and Paramanandam

RESPONDENT

Date of Decision : 19-07-2013

Acts Referred:

Citation : (2013) 5 LW 160

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

G. Rajasuria, J.—This Second appeal is focussed by the defendants/judgment debtors animadverting upon the judgment and decree dated

10.1.2013 passed by the XVI Additional City Civil Judge, Chennai, in A.S. No. 436 of 2012 in confirming the judgment and decree dated

03.10.2012 passed by the X Assistant City Civil Judge, Chennai, in E.A. No. 9971 of 2010 in E.P. No. 3492 of 1988, which was one for

declaration and for delivery of possession. The parties are referred to hereunder according to their litigative status and ranking before the lower

Court.

2. Compendiously and concisely the germane facts absolutely necessary for the disposal of this second appeal would run thus:

(a) O.S. No. 1395 of 1983 was filed by the deceased Sakkubai-the propositus of Paramanandam-the respondent herein as against the three

defendants, namely, 1. R. Radha, 2. Muniammal and 3. Dharman seeking the relief of declaration and recovery of possession specifying the

following schedule of the property:

Schedule of the Property

Vacant possession measuring 371 sq.ft in the House and ground bearing door No. 9A (old door No. 9/8A) New No. 23, Vellala Street,

Aminjikarai, Madras-29, formerly called as South Madaveethi of Ekambareswarer Temple, Aminjikarai, Madras bounded on the east by

Ranganayaki ammal's house; on the South by Coovum River, on the West by Srinivasa Pillai's house and on the North by Vellala Street, bearing

Old Survey No. 70/A/3, New Survey No. 70/3, Paimash No. 365, and measuring east to west 30 feet and north to south 250 feet admeasuring

7800 sq.ft. situated within the sub registration district of Sembiam and Registration District of Madras-Chinglepet, Corporation Division No. 78

and Old Door No. 9/1.

(extracted as such)

(b) The suit was decreed ex-parte. Thereafter, E.P.3492 of 1988 was filed so as to execute the ex-parte decree.

(c) At that time, E.A. No. 9971/2010 was filed by the respondent herein/deGREE holder/plaintiff under Order 21 Rule 97 of C.P.C. as against the

appellants herein/Mangali and Mallika/judgment debtors, seeking the following relief:

to order execution of decree in E.P. No. 3942 of 1988 by removing all the obstructers including Mangali and Mallika and put the petitioner/deGREE

holder in possession of the suit property.

(d) Counter was filed. No oral evidence was adduced on either side. On the side of the respondent herein/petitioner/deGREE holder no document

was marked. On the side of the appellants herein/respondents Exs.R1 to R16 were marked.

(e) Ultimately, the Executing Court allowed the application ordering removal of obstruction.

3. Being aggrieved by and dissatisfied with the said order passed by the Executing Court, the first appeal was filed for nothing but to be dismissed

by the first appellate Court.

4. Challenging and impugning the judgments and decrees of both the Courts below, this second appeal has been focussed by the judgment debtors

on various grounds and also suggesting the following substantial questions of law:

1. Whether the lower appellate Court is right in dismissing the appeal when admittedly the appellants are residing at Old Door Nos. 1/12 and 1/13

New Door Nos. 13/21 and 13/22 Coovum River Bank, Vellala Street, Aminjikarai Chennai-600 029?

2. Whether the findings of the lower appellate Court is correct when the appellants have proved that they are occupying Coovum river land for

several decades when same has held that appellants are occupying coovum river pormoboike land?

3. Whether the lower appellate Court is right in dismissing the appeal when it has clearly observed in the judgment that there is valid dispute

regarding the identity of the properties?

4. Whether the lower appellate Court is correct in arriving at a conclusion that the suit property is a patta property in the absence of any

documentary evidence produced by the respondent?

5. When the appellants filed Exhibit R12 notice from Public Works Department Chepauk Chennai, dated 28.8.2009 to prove they are residing in

Coovum River land, whether Courts below are justified in giving an erroneous finding?

6. Whether the failure of the lower Courts to consider the documentary evidence more particularly Exhibits R11 Caveat Notice and R12 Notice

dated 28.8.2009 with reference to their occupation in respect of Old Door Nos. 1/12 and 1/13 New Door Nos. 13/21 and 13/22 Coovum River

Bank, Vellala Street, Aminjikarai Chennai-600 029 had not made judgment incorrect and unsustainable?

5. Heard both sides.

6. The learned Senior Counsel for the appellants herein/judgment debtors would pyramid his arguments which could succinctly and precisely be set

out thus:

(i) The decree holder filed an application for correcting the description of the suit property, for replacing the Survey No. 70/3 as 70/5. As such, it

exemplifies and demonstrates that the decree holder was not sure of the description of the property, however, for reasons best known to the

decree holder, that application was not pursued for getting the suit property amended.

(ii) The learned Senior counsel would further proceed to point out that it is the

case of his clients that they are, no doubt, only partly in occupation of block No. 27 and partly in occupation of block No. 32, which is a Coovum poramboke land; but no block number is found referred to in the description of the suit property.

(iii) The learned Senior counsel would air the grievance of his clients that under the pretext of executing the decree, their possession in respect of block No. 32 should not be disturbed.

7. Per contra, in a bid to make mincemeat of the averments/arguments as put forth on the side of the appellants/judgment debtors, the learned counsel for the respondent/deGREE holder would put forth and set forth his arguments, which could succinctly and precisely be set out thus:

(i) Earlier in the application filed by the judgment debtor-Muniammal, an Advocate Commissioner was appointed to measure the suit property and locate the same. Accordingly the Advocate Commissioner filed his report with sketch.

(ii) Placing reliance on the said Advocate Commissioner's report and the sketch, the learned counsel for the respondent/deGREE holder would submit that already the Advocate Commissioner gave a clear and vivid finding, locating the suit property.

Accordingly, the learned counsel would submit that the respondent/deGREE holder would be satisfied if delivery is ordered as per that

Commissioner's report and sketch.

8. I thought fit to formulate the following substantial question of law to the knowledge of both side. Whether the Courts below were justified in

entertaining the application of the Decree Holder under Order 21 Rule 97 of C.P.C. as against the Judgment Debtors in the facts and

circumstances of this case and whether there is any mis-description of the suit property cutting at the root of the executability of the decree passed

in O.S. as against the defendants?

9. I would like to fumigate my mind with the provision of Order 21 Rule 97 of C.P.C., which is extracted hereunder for ready reference:

Order 21 Rule 97 of C.P.C. Resistance or obstruction to possession of immovable property (1) Where the holder of a decree for the possession

of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining

possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule(1), the Court shall proceed to adjudicate upon the application in accordance with the provisions

herein contained.

10. A plain reading of Order 21 Rule 97 of C.P.C. would exemplify and demonstrate that the very application filed by the respondent

herein/deGREE holder under Order 21 Rule 97 against the appellants/judgment debtors was not necessary in the facts and circumstances of this case

and that too after the judgment debtors having met with their water-loo in the earlier round of litigation u/s 47 of C.P.C. in this same matter. The

Executing Court should have simply returned that application observing that such an application was not to be filed as against the judgment debtors

in a matter of this nature. If at all between the judgment debtor and the decree holder there is any dispute, the appropriate Section would be Sec.

47 of C.P.C. The judgment debtors are bound by the decree and they cannot be treated as obstructers under Order 21, Rule 97 of C.P.C. and

that too, ignoring Section 47 of C.P.C. proceedings already went as against the judgment debtors.

11. According to the learned counsel for the respondent/deGREE holder, already u/s 47 of C.P.C., the dispute between the decree holder and the

judgment debtors was dealt with by the Court and finally disposed of. In such a case, there is no knowing of the fact as to why the decree holder

had put himself under the trouble of filing such application under Order 21 Rule 97 of C.P.C. as against the judgment debtors.

12. The executing Court should execute the decree as against the judgment debtor as per law, ignoring the obstruction.

13. Be that as it may. Now then it is clear from the records that the decree holder is running from pillar to post to get the decree executed, which

he obtained. Per pro the submission of the learned Senior Counsel for the appellants/judgment debtors, there is some discrepancy in the

description of suit property.

14. My mind is reminiscent and redolent of the following maxims:

(i) "In certum est quod certum reddi potest" That is certain which can be made certain.

(ii) "Veritas demonstrationis tollit errorem nominis" The truth of the description removes the error of the name.

15. Keeping the aforesaid maxims, I perused the available records and found that the judgment debtors in this case indulged in pettifogging

objections which were negated by the Courts below on sound reasons.

16. The judgment debtors are particular in seeing that their alleged possession in respect of the poramboke land in block No. 32 should not be

disturbed and the respondent/decreed holder also cannot get the judgment debtors evicted from block No. 32, which is a poramboke land.

17. Not to put too fine a point on it, the earlier Advocate Commissioner's report referred to by the respondent/decreed holder would not refer to

any such occupation by the judgment debtors in block No. 32.

18. Be that as it may, it is common or garden principle that whenever a decree towards an immovable property is executed, the Amin would be

provided with the assistance of Government Surveyor, and they would go to the spot and the Surveyor would locate the property, which the Amin

should deliver. Here with reference to the survey map as well as the already prepared report and sketch of the Commissioner, the process of

delivery has to be effected.

19. In such a case, there is absolutely no possibility of dispossessing the judgment debtors if they are in occupation of a different property other

than the property over which the decree operates. Accordingly I am of the considered view that cutting across technicalities, I could dispose of this

second appeal by giving the following direction:

The Executing Court shall do well to see that necessary direction is issued, so that the Amin could take the assistance of a Government Surveyor

for effecting delivery and at the time of delivering the decreed property/suit property, the Surveyor is expected to locate the suit property with

reference to survey map/record and the Commissioner's earlier report and sketch and demarcate the same from the poramboke land and only that

much portion of the structures which are in block No. 27 should be handed over by the Amin to the decreed holder and not the rest, and if no

portion of the structure is in the poramboke land, then the entire structures of the judgment debtors should be removed and vacant possession

should be handed over to the decreed holder.

20. Accordingly the substantial question of law is answered to the effect that the Courts below were not justified in entertaining the application of the Decree Holder under Order 21 Rule 97 of C.P.C. as against the Judgment Debtors in the facts and circumstances of this case and there is mis-description of the suit property also. Accordingly, the second appeal is disposed of. However, there is no order as to costs. Consequently, connected miscellaneous petition is closed.