

(1972) 09 MAD CK 0001
In the Madras High Court

Manggai Achi through her husband and Power of Attorney Agent M.P.R. Chockalingam Chettiar APPELLANT

Vs

S. Asokan represented by Advocate S. Rajan and Another RESPONDENT

Date of Decision : 26-09-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (1973) 86 LW 449 : (1973) 1 MLJ 128

Hon'ble Judges : S. Maharajan, J

Bench : Division Bench

Judgement

S. Maharajan, J.—This is an appeal by the first defendant against the order of the Subordinate Judge of Ramanathapuram, granting, at the

instance of the plaintiff, an ex parte injunction restraining the appellant from taking delivery of possession of certain properties which she had

purchased in Court auction in execution of a mortgage decree obtained against the plaintiff's father. Before discussing the questions involved in the

appeal, it is necessary to set forth briefly the background to the dispute between the parties. Sundaram Chettiar, the undivided father of Asokan,

the plaintiff, who got the ex parte injunction in the Court below, purchased a cinema theatre at Rajapalayam. At the time of the purchase he

borrowed from one Chockalingam, the husband of the appellant, Mangai Achi, a sum of Rs. 50,000 for making up the sale price. He also

mortgaged the theatre for Rs. 50,000 on 19th May, 1958, in favour of Chockalingam Chettiar. Subsequently, on 21st July, 1959, he granted

another mortgage in favour of Chockalingam Chettiar's brother for Rs. 15,000 in respect of the same cinema theatre. This mortgage was

subsequently assigned in favour of Chockalingam Chettiar. On 21st November,

1960, Sundaram Chettiar granted a third mortgage in favour of Chockalingam Chettiar for Rs. 85,000. Mangai Achi, the appellant, after obtaining an assignment of the three mortgages in her favour, instituted a suit, O.S. No. 72 of 1961, on the file of the Court of the Subordinate Judge of Ramanathapuram, on foot of the three mortgages aforementioned.

In the plaint in her suit Mangai Achi alleged that the hypotheca belonged exclusively to Sundaram Chettiar and formed part of his separate properties and that, even assuming that it had been purchased out of the joint family assets of Sundaram Chettiar, the mortgages would be binding upon Sundaram Chettiar's sons. In the plaint she expressly prayed for a decree on the alternative basis that the property belonged to the joint family of which Sundaram Chettiar was the manager. Sundaram Chettiar in his answer admitted the execution of the mortgages and the amounts due thereunder and prayed that he might be permitted to repay the amounts in instalments spread over a period of six years. In paragraph 6 of his written statement he averred that the cinema theatre business started by him was for his own benefit and that the joint family had no concern whatsoever with the business assets (presumably including the hypotheca) or the liabilities of Sundaram Chettiar. He further contended that the cinema business was a new kind of speculative business in which fortunes were made or lost and that it was unfair to foist the mortgage liability upon the other members of his family. Ultimately a preliminary decree was passed on 6th October, 1962, for Rs. 1,84,451-13. In execution of the mortgage decree, which was transferred to the Subordinate Judge's Court, Sivaganga, the appellant tried to bring the hypotheca to sale. But it is alleged that owing to the obstructive tactics of Sundaram Chettiar, the judgment-debtor, the hypotheca could be sold in auction only on 12th August, 1969, at which the appellant herself purchased it for Rs. 2,25,000. The sale was confirmed on 24th December, 1969. Sundaram Chettiar instituted proceedings for setting aside the sale on the ground that it was vitiated by material irregularities. His petition was dismissed, and against the order of dismissal he preferred C.M.A. No. 357 of 1971 to this Court and this Court dismissed the appeal on 18th November, 1971. Then the decree-holder applied for delivery of possession in E. A. No. 141 of 1971. This was opposed by Sundaram Chettiar as well as by the

Advocate-Receiver who had been appointed during the pendency of the proceedings in the mortgage suit. Those objections were over ruled by the trial Court and delivery was ordered. There upon Sundaram Chettiar filed C.M.A. No. 223 of 1972 on the file of this Court against the order directing delivery. This appeal came up before Krishnaswamy Reddy, J., who directed the appeal itself to be posted, for hearing on 3rd July, 1972, and passed an interim order directing the Receiver to continue until further orders. It was at this juncture that Asokan, the fourth son of Sundaram Chettiar, instituted O.S. No. 61 of 1972 on 28th June, 1972 on the file of the Court of the Subordinate Judge of Ramanathapuram for partition of the cinema thratre alone. Admittedly the joint family of Sundaram Chettiar owned another cinema theatre and other properties than the cinema theatre at Rajapalayam. (Vide paragraphs 10 and 11 of the plaint in O.S. No. 61 of 1972). Significantly enough, Asokan's suit for partition was confined only to the cinema theatre at Rajapalayam possession of which was on the verge of being delivered to the appellant. Asokan himself was the fourth son of his father. It is remarkable that none of his elder brothers nor himself thought of intervening during the execution of the mortgage decree setting forth the case which has been put forward in the partition suit, namely, that the cinema theatre formed part of the joint family assets and that the mortgages granted by Sundaram Chettiar had been granted for ""making merry"" and were consequently vitiated by illegality and immorality. Prima facie, it is clear, from the context in which the partition suit of Asokan was filed, that it was Sundaram Chettiar, who, after exhausting his genius for obstruction, instigated his son to file a suit for partition by damning him with immorality. It is, indeed, a pity that despite the lapse of over a decade since the grant of the decree, Sundaram Chettiar should have kept the appellant at bay and deprived her of the fruits of her decree. Upon the merits I have little hesitation in holding that the ex parte injunction granted by the lower Court was unwarranted by the facts on record. It has been procured without disclosure of the relevant facts to the Court, and the balance of convenience was certainly against the grant of the injunction, because all that the plaintiff in the partition suit prayed for was for partition and separate possession of 1/6 share in the cinema theatre and even if he ultimately succeeded in making out that the mortgages were not binding on him, he could certainly be allotted a share

in the other properties of the joint family equal in value to his 1/6 share in the theatre at Rajapalayam. I may also point out that in as much as the appellant herein had obtained a mortgage decree lawfully passed by a competent Court and in execution thereof had purchased the hypetheca in Court auction the respondent was not entitled to invoke either Order 39, Rule 1 or Order 39, Rule 2 of the Civil Procedure Code, for an injunction restraining the decree-holder auction-purchaser from doing what it was lawful for her to do, namely, to obtain delivery of possession of the property which she had lawfully purchased in Court auction. There was no allegation in the affidavit of the plaintiff (Asokan) that the property in dispute was in danger of being wasted, damaged or alienated or wrongfully sold in execution of a decree or that the second defendant in the partition action threatened or intended to remove or dispose of his property with a view to defraud his creditors. Consequently, Order 39, Rule 1, Civil Procedure Code, would not justify the grant of any injunction in favour of Asokan, the plaintiff in the partition suit.

2. The next question is whether Order 39, Rule 2, CPC could not be invoked by him. That rule says that in any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit...apply to the Court for a temporary injunction....

3. In Subramanian and Others Vs. Seetarama Aiyar, , a Division Bench of this Court has held that a person similarly situated as the appellant herein, cannot be held to have committed any illegal injury by executing the decree lawfully obtained. Consequently, the Court below erred in granting the ex parte-in junction appealed against.

4. Lastly it was contended on behalf of the respondent that the appeal as against the ex parte injunction is itself unsustainable. It is pointed out that under Order 39, Rule 4, Civil Procedure Code, an order for an injunction may be discharged or varied or set aside by the Court on application made thereto by any party dissatisfied with such order. There is nothing in this rule which interdicts an appeal being preferred against an order of ex parte injunction under Order 43, Rule (1)(r), Civil Procedure Code, which says that against an order under Rules 1, 2, 4 or 10 of Order 39 an

appeal shall lie. The order appealed against was an order passed under Rule 1 of Order 39, Civil Procedure Code, and is therefore appealable.

Where two remedies are granted by the law, it is open to the litigant to choose either. In fact, the legal position has been elaborately discussed by a

Full Bench of the Allahabad High Court in *Zila Parishad, Budaun and Others Vs. Brahma Rishi Sharma*, . The learned Judges observe:

The question of the appealability of an ex parte order was the subject-matter of decision by this Court as well as by the other Courts and the

consensus of opinion is in favour of the appealability of such an order. The cases which have held such orders to be appealable are *Amolak Ram v.*

Sahib Singh ILR 7 All. 550, *Lachmi Narain v. Rama Charan Das* ILR 35 All. 425, *Ganesh Prasad Sahu Vs. Dukh Haran Sahu*, , District Board of

Farrukhabad and Others Vs. Ikhlaque Husain , *L.D. Meston School Society Vs. Kashi Nath Misra*, , *Shyam Behari Singh Vs. B. Biseswar Dayal*

Singh and Others, , *Bhalab Das v. Mohammad Ishaw* AIR 1933 Lah. 282, *Devasahayam v. Arumukham* AIR 1953 Trav. Coch. 240 and *Ramulu*

v. Ganga Ram AIR 1953 Hyd. 138. We are in agreement with the view expressed in the above cases.

I follow this Full Bench ruling and hold that the appeal is maintainable.

5. The next question raised is that ordinarily the appeal must be confined to the evidence already on record in the lower Court and that it is not

open to the appellant to rely upon evidence which was not before the lower Court, unless fresh evidence under Order 41, Rule 27, Civil

Procedure Code, was permitted by the appellate Court. But in this case the affidavits filed by the appellant set forth all the relevant facts and the

respondent has filed counter-affidavits in which he does not dispute the truth of the facts upon which I have already come to a decision on the

merits. No question of any fresh evidence being permitted therefore arises.

6. In the result the appeal is allowed with costs, and the ex parte injunction granted by the Court below is set aside.