

(1976) 03 MAD CK 0007

In the Madras High Court

Case No : L.P. Appeal No. 8 and 13 of 1975

N. Muthukrishna Reddiar

APPELLANT

Vs

Amaravathi alias Avudayammal

RESPONDENT

Date of Decision : 24-03-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 18, Order 21 Rule 72, Order 21 Rule 90, Order 21 Rule 92

Citation : (1976) 03 MAD CK 0007

Hon'ble Judges : Kailasam, O.C.J.; Balasubrahmanian, J

Bench : Division Bench

Advocate : G. Ramaswamy and G.R. Lakshmanan, for the Appellant; K. Venkataswamy and K.R. Govindarajan, for the Respondent

Judgement

Kailasam, O.C.J.

1. L.P.A. No. 8 of 1975 is filed against the Judgment of N. S. Ramaswami, J. in C.M.A. No. 61 of 1974, which was filed against the order in

E.P. No. 95 of 1971 in O.S. No. 47 of 1957, on the file of the Subordinate Judge's Court, Tirunelveli. The facts that are necessary for the

disposal of the appeal may be briefly stated. The respondent herein; Amaravathi alias Avudayammal obtained a decree against the appellant's

father Pappu Reddiar in O.S. No. 76 of 1948. The appellant's father obtained a decree against the respondent amounting in all to a sum of Rs.

4,09,291.80. We are concerned with a decree for Rs. 35,198.26 for costs in the suit, for which execution was taken by the appellant's father in

E.P. No. 95 of 1971. The decree in favour of Pappu Reddiar was on 19th January 1968. The respondent filed a petition for execution of her

decree in O.S. No. 76 of 1948 and prayed for a set off. This petition was

dismissed on the ground that the parties in the two suits were different and a set off could not be ordered under Or. 21, Rule 18, C.P.C. Against that order, the respondent filed C.M.A. No. 367 of 1971, which was disposed of on 13th January 1972. That Civil Miscellaneous Appeal was allowed and the execution petition filed by the respondent was directed to be taken on file and disposed of according to law. On 28th February 1972, the execution petition, which was revived by the order in C.M.A. No. 367 of 1971 was dismissed on the ground that it was time barred. On the same date, E. P. No. 95 of 1971 filed by the appellant's father in O.S. No. 47 of 1957 was ordered and the sale was posted to 21st April 1972. The respondent in the meantime preferred an appeal against the order dismissing her execution petition as time barred and prayed for a set off. That was pending. The appeal was numbered as C.M.A. No. 157 of 1972. In C.M.P. No. 4458 of 1972 in C.M.A. No. 157, of 1972, stay of sale was ordered. Again, on 15th June 1972, an order was passed in C.M.P. No. 4458 of 1972 and in C.M.P. No. 5776/72 in C.M.A. No. 157 of 1972 to the effect that the sale in E.P. No. 95 of 1971 in O.S. No. 47 of 1957 would go on. The respondent herein was directed to deposit a sum of Rs. 8,000/- within six weeks from that date. It was ordered that on such payment the confirmation of the sale would stand stayed. Admittedly, the sum of Rs. 8,000/- as directed was deposited and the result was that the confirmation of the sale in E.P. No. 95 of 1971 was stayed.

2. In the meantime, the decree-holder was attempting to execute E.P. No. 95 of 1971. It was posted to 1st September 1972. As there was no bid, the sale was adjourned to 17th November 1972. He filed E.A. No. 536 of 1972 for permission to bid and set off. This application came up for hearing on 8th November 1972. As the respondent was absent and set ex-parte, the decree-holder was allowed to bid and set off in E.A. No. 536 of 1972 in E.P. No. 95 of 1971. Two days later, on 10th November 1972, the respondent filed a petition to set aside the ex parte order in E.A. No. 536 of 1972 and that was allowed. The result was that the order granting permission to bid and set off was set aside. But, on 17th November 1972, the court gave permission to the decree-holder to bid and set off, and the sale in--E.P. No. 95 of 1971 took place and the decree-holder became the auction purchaser. The respondent judgment debtor

filed C.M.A. No. 601 of 1973 against the order in E.A. No. 536

of 1972 in E.P. No. 95 of 1971 granting permission to bid and set off. No stay was obtained. Ultimately, on 26th October 1973, C.M.A. No.

157 of 1972 which was filed by the respondent against the order dismissing her execution petition for set off under Or.21 rule 18 was allowed.

The result is that execution will have to proceed after taking into account both the decrees and permitting a set off to the respondent. Execution

could only be confined to the excess amount that might be found due by the respondent.

3. Without following this procedure, that is proceeding to dispose of the application of the respondent under Or. 21. Rule 18. C.P.C. and giving a

set off, the matter was advanced and taken up on 30th November 1973, although the E.Ps. were originally posted to 20th December 1973,

without notice to the respondent. The lower court took all the E.Ps. in C.S. No. 47 of 1957, and further execution was ordered in all the E.Ps. The

order runs as follows:

Taken up to-day as A.A.O. was disposed of on 26th October 1973. No petition to set aside the sale is filed. The sale is confirmed. P.S. for Rs.

16,439.70 is recorded. E.P. closed.

This order, dated 30th November 1973, is, on the face of it, clearly illegal and improper. The execution petitions were posted for 20th December

1975 and they should not have been taken up without notice to the respondent when the E.Ps. were advanced to 30th November 1973. While the

court referred to the disposal of A.A.O. No. 157 of 1972, it did not consider the result of such disposal. The result of allowing C.M.A. No. 157

of 1972 is that the respondent is entitled to have a set off, and, without determining the amount, the sale in favour of the appellant cannot be

proceeded with. But the court immediately proceeded to confirm the sale. The result of the respondent succeeding in C.M.A. No. 157 of 1972

would be a bar to any execution proceedings in the decree obtained by the appellant. Taking any proceedings in furtherance of the sale in favour of

the decree-holder, who was given leave to bid and set off is clearly unjustified and against law and without jurisdiction. It may further be noted that

the respondent had filed an appeal against the order giving leave to bid and set off to the decree-holder. Though it was numbered as C.M.A. No.

601 of 1973, as there is no appeal provided for in the Code against an order granting leave to the decree-holder to bid and set off, C.M.A. No.

601 of 1973 was converted into C.R.P. No. 19 of 1975. That Civil Revision Petition is allowed on the ground that the order granting leave to the

decree-holder to bid and set off in favour of the appellant was vitiated by material irregularity in the exercise of jurisdiction.

4. Against the order of the learned Judge granting permission to convert the Civil Miscellaneous Appeal into a Civil Revision Petition, L.P.A. No.

13 of 1975 has been filed by the appellant. A preliminary objection is taken as to its maintainability on the ground that no Letters Patent Appeal

lies against an order converting a Civil Miscellaneous Appeal into a Civil Revision Petition. The learned Counsel for the appellant conceded that no

appeal lies against that order. L.P.A. No. 13 of 1975 is therefore dismissed. There will be no order as to costs.

5. The matter was taken up further against the order in the Civil Revision Petition. A SLP was filed in the Supreme Court and, after hearing the

arguments, the Supreme Court dismissed the petition on the ground that it was not pressed. So the matter has to rest there.

6. Reverting back to L.P.A. No. 8 of 1975, the Civil Revision Petition having been allowed and the order of the lower court permitting the decree-

holder to bid and set off having been reversed, the sale in favour of the appellant becomes nullified, apart from the illegality of the lower Court

proceeding with the E.Ps. on 30th November 1973, on an advanced date, and confirming the sale. It is very significant to note that, after an order

was passed by the lower Court on the advanced date of hearing, namely 30th November 1973, further proceedings were taken at great speed.

The sale certificate, dated 30th November 1973 was issued on 1st December 1973 and on 3rd December 1973, E.P. No. 668 of 1973 in O.S.

No. 47 of 1957 filed by the decree-holder to take delivery of the property was ordered on the same date and on 4th December 1973 symbolical

delivery of a half share of Lot I house property was taken and regarding Lot II, actual delivery was recorded to have been taken. On 5th February

1974 the respondent filed C.M.A. No. 61 of 1974 against the order of confirmation of the sale. As already pointed out, L.P.A. No. 8 of 1975, is

against the order of the learned Single Judge allowing C.M.A. No. 51 of 1974,

7. The main contention put forward by Mr. G. Ramaswami, the learned counsel for the appellant is that when once a sale is confirmed, unless

proceedings under Or. 21, rules 89 and 90 are taken, the confirmation of the sale cannot be disturbed. He referred to Or. 21, Rule 92 which

provides:

(1) Where no application is made under Rule 89, Rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an

order confirming the sale, whereupon the sale shall become absolute.

His submission is that after the sale, if, no proceedings are taken under any of the rules, 89, 90 or 91, it is a statutory requirement that the sale will

have to be confirmed. In support of this contention, the learned counsel referred to various decisions. In *Kavu Patteri v. Mana Naika* ILR 1953

Mad. 1143 at 1150 there is the following passage :

The principle to be deduced from these authorities is that breaches of the provision of the CPC relating to execution against immovable properties

commencing from their attachment down to their sale should all be dealt with under Or. 21, R. 90, and not otherwise and that the order of

confirmation under Or. 21, R. 92 should give the final quietus to all objections which could be raised under Or. 21, R.90.

It may be observed that the Judgment-debtor or some other person interested did not question the decree-holder obtaining permission under Or.

21, Rule 72. The above decision can have no application, for, on the facts we have found that the execution proceedings taken in the appellant's

execution petition is without jurisdiction and in contravention of the stay order granted by this Court in the appeal preferred by the respondent

herein. The learned counsel also referred to the decisions in *Hukumchand v. Bansilal* AIR 1968 S.C. 86 and in *Arimardan Singh v. Deonandan*

Prasad AIR 1963 Patna 103 in this connection. We do not think that these decisions are applicable to the facts of this.

8. The learned counsel relied on the decision in *Muttalooru Boojanna v. Boya Krishtappa* ILR 1947 Mad 721=60 L.W. 20 and in *Basanta*

Kumar Biswas Vs. Mihirlal Biswas, in support of his contention that the court cannot invoke the inherent power to cancel a sale. We do not see

that any of these decisions is applicable to the facts of this case.

9. Finally, the learned counsel submitted that an appeal against the order of

confirmation of sale cannot be maintained. He relied on the decision in Satyanandam v. Nammayya AIR 1938 Mad. 307=47 L.W. 51 where it has been held that there is no provision in the CPC for an application by the auction purchaser for confirmation of the sale and that an order rejecting an auction purchaser's application for confirmation of the sale is not appealable, nor can it be revised. The learned single Judge, relying on the decision in Trivandrum Permanent Fund v. Md. Mohideen 1968 II M.L.J. 377 held that as the order affected the rights of parties to execution, S.47 would apply when the order was made without notice. In this case, there could be no difficulty in our coming to the conclusion that S.47 would apply, for, the order challenged provided that the sale was confirmed and part satisfaction for Rs. 16,439.70 was recorded. It is not denied that an appeal is available against an order recording part satisfaction. In this view, C.M.A. No. 61 of 1974 is clearly maintainable, and the order setting aside the confirmation of sale is quite correct. In conclusion, we would like to point out that, in this case, the order of the lower court granting the decree-holder leave to bid and set off and subsequently on 30th November 1973, confirming the sale, is clearly unsustainable. The order granting leave to the decree-holder to bid and set off had been set aside by this Court and any sale which was held in pursuance of such permission to bid and set off would have to be set aside automatically. Further, pending C.M.A. No. 157 of 1972, no sale could be confirmed, because there was an order of stay. As C.M.A. No. 157 of 1972 had been allowed subsequent to that date, the sale could not be confirmed without giving a set off to the respondent herein under Or. 21, Rule 18, C.P.C . We have no hesitation in dismissing L.P.A. No. 8 of 1975 with costs.