

(1951) 11 KL CK 0004

In the High Court Of Kerala

Case No : Second Appeals No's. 175 and 179 of 1950

Perumal Abraham

APPELLANT

Vs

Geevarghese George

RESPONDENT

Date of Decision : 19-11-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 88, Order 21 Rule 91, Order 21 Rule 94, Order 21 Rule 97, Order 21 Rule 98

Citation : (1951) 11 KL CK 0004

Hon'ble Judges : Vithayathil, J;Koshi, J

Bench : Division Bench

Advocate : K.P. Abraham and K.N. Narayanan Nair, for the Appellant; N. Narayana Pillai and M. Abraham, for the Respondent

Judgement

Koshi, J.—These two second appeals arise from one and the same appellate decision of the District Judge of Mavelikara in A.S. No. 344 of 1122 setting aside an order of the District Munsiff of Pathanamthitta refusing further execution of the decree in O.S. 485 of 1108 of the Addoor Munsiff's Court which was under execution before the Pathanamthitta Court.

2. The decree bears the date 20-11-1108 and it is one passed on foot of a chitty hypothecation bond the deceased father of Defendants 1 to 4 executed in favour of the Plaintiff. On 20-2-1121 the decree-holder brought to sale the hypotheca as also five items attached in execution and himself, purchased item 1 of the proclamation schedule (one of the attached items) for the decree-debt. The decree was recorded as satisfied and the sale was in due course confirmed on 20-3-1121. Pursuant to the sale certificate granted to the decree-holder the Court also gave him possession. The delivery was on 26-5-1121 but within a few days thereafter on 13-6-1121 four persons who were utter strangers to the decree and the execution proceedings filed an application purporting to be u/s 115 and Order 21, Rules 94, 97 and 98, CPC (Travancore) and Article 211, Travancore Civil Courts Guide, requesting the Court to set aside the delivery

receipt after declaring the delivery purported to have been made thereunder sham and unreal.

The petition also prayed that the execution sale may be vacated and that in the event of the Court finding that the decree-holder-purchaser had obtained possession redelivery may be effected in favour of the Petitioners. Their case was that the judgment-debtors had no right or title to or possession of the items sold to the decree-holder and that it belonged to them absolutely and were also in their possession. The decree-holder and the judgment-debtors were made counter-Petitioners to that application. The execution Court held an enquiry into that petition and upheld in its entirety the case of the Petitioners. The operative part of the Court 's order dated 20-10-1121 reads thus:

In the result this application is allowed. The report of delivery is quashed and the sale of the property is quashed. The decree-holder is entitled to further execute the decree. Ordered accordingly.

The decree-holder or the judgment-debtors did not seek to impugn this order by any appeal or revision or by a separate suit.

3. Not long after the above order, on 2-12-1121 the decree-holder filed E.P. 593 seeking further execution of the decree. Defendants 1 and 3 raised objections to the execution stating that the decree had become incapable of execution as it was once satisfied and duly recorded as such. According to them the execution Court's order was null and void as it was passed without jurisdiction. A further objection raised was that execution was barred by limitation. The execution Court upheld these objections and dismissed E.P. 593. On appeal by the decree-holder the learned District Judge of Mavelikara reversed the Munsiff's decision and Defendants 1 and 3 seek to impugn the appellate order in S.A. 175 and 179 respectively.

4. On their behalf it was strenuously argued by their learned Counsel that the execution Court went beyond its powers in vacating the sale and permitting further execution by the decree-holder on an application filed by third parties beyond thirty days of the sale and after it was confirmed. The argument was that third parties had no "locus standi" to move for setting aside the sale and all that they were concerned with was to get redelivery of the property if it was actually delivered over to the decree-holder-purchaser or to get a declaration that there was in fact no delivery at all. It was also urged that the Court went wrong in vacating the sale on the ground that the judgment-debtors had no saleable interest in the property on an application made beyond thirty days of the sale. We cannot quarrel with any of these propositions but they are not sufficient in law to render the order impugned null and void or one made without jurisdiction. The points urged do certainly show that there was irregular assumption of jurisdiction by the execution Court. There was however no want of jurisdiction in the Court over the subject-matter or over the particular question submitted for its decision.

The order was made in a proceeding to which the judgment-debtors were also parties and with due notice to them. They submitted to it and thought of repudiating it when it was too late. The only legitimate criticism that can be levelled against the conduct of the execution Court is that in the exercise of the jurisdiction it possessed it acted in a mode different from that prescribed by Code of Civil Procedure. That amounts only to an irregular exercise of the jurisdiction and does not relate to any question of the existence of the jurisdiction. Non-compliance with the rules of procedure does not destroy the jurisdiction of the Court. No doubt the order was wrong but a Court has jurisdiction to decide wrong as well as right.

5. The two Calcutta decisions - "Sukh Lal v. Tara Chand" Ta 33 Cal 68 (FB) (A) and - Mahiganj Loan Office Ltd. Vs. Behari Lal Chaki, which Mr. M.N. Narayanan Nair Counsel for the Appellant in S.A. 179 brought to our notice only confirm the above view and do not run counter to it. Recently a Full Bench of this Court had occasion to consider the distinction between orders passed without jurisdiction and those made as a result of irregular assumption of jurisdiction. Vide order on connected C.R. Petition "Mariamma Mathew v. Ittoop Poulo" AIR 1952 TC 195 (FB) (C) on the file of the Travancore High Court. The view held was that orders falling under the later class would only be irregular and not void and that the irregularity was one which would, be cured by failure to object in good time. The present case comes under that category and by their conduct in allowing the execution Court's order dated 20-10-1121 to become final they must be deemed to have waived their right to object to it.

6. Most of the cases cited at the bar are those which hold that an execution sale of a property in which the judgment-debtor has no saleable interest is not void and that the law does not permit the decree-holder-purchaser to treat the sale as a void sale or ignore it and further proceed with the execution without getting the sale duly vacated. Those cases also say he can get the sale set aside on the ground mentioned only under Order 21, Rule 91 (Travancore Rule 88) Code of Civil Procedure. What we have said above does not go against that view. The question is what consequences follow if a Court chooses to set aside the sale on the ground that the judgment-debtor had no saleable interest on an application filed by a stranger claiming the property long after thirty days of the sale in a proceeding to which the decree-holder and the judgment-debtor are parties and they both allow the order to become final. To solve that question the cases cited are not helpful and we do not therefore think it necessary to discuss them. In - "Padmanabha Pillai v. Lakshmanan Pillai" 31 TLJ 1 (D) the sale was declared cancelled in a collateral proceeding, that is, in a suit brought by an unsuccessful claimant to the attached property. The sale was conducted pending the claim petition. With respect we venture to observe that we cannot accept the decision as laying down correct law.

7. Once the order the execution Court passed in this case on 20-10-1121 is held to be binding on the parties, it automatically follows that the present execution is

not barred by limitation. It only sought to revive the earlier one struck off when the sale was confirmed.

8. In the result the second appeals fail and we dismiss them with costs.