

(1953) 12 MAD CK 0022

In the Madras High Court

Case No : Second Appeal No. 840 of 1949

Pethaperumal Ambalam

APPELLANT

Vs

Chidambaram Chettiar through property guardian, P.E. Eapen

RESPONDENT

Date of Decision : 18-12-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35, Order 21 Rule 94, Order 21 Rule 95, Order 21 Rule 96
Evidence Act, 1872 — Section 115
Limitation Act, 1908 — Article 142, 143, 144

Citation : AIR 1954 Mad 760 : (1954) ILR (Mad) 1206 : (1954) 67 LW 339 : (1954) 1 MLJ 585

Hon'ble Judges : Rajamannar, C.J; Rajagopala Aiyangar, J

Bench : Division Bench

Advocate : N.C. Srinivasan, for the Appellant; C.A. Mahomed Ibrahim and T.S. Santhanam, for the Respondent

Final Decision : Dismissed

Judgement

Rajagopala Aiyangar, J.—This second appeal has been referred to a Bench at the instance of Ramaswami J. for the reason that the case raised a point as to the legal effect of the death of a judgment-debtor after the issue of a sale certificate, but before the auction-purchaser obtains delivery of possession by proclamation and affixture under Order 21 Rule 96, C.P.C. which is not covered by authority.

2. One Uthandarayan Ambalam was originally the owner of the properties in suit and the plaintiff's paternal grandfather, Chidambaram Chettiar had a money claim against him. Before a suit could be filed for the realisation of the dues. Uthandarayan died in September 1924, leaving a widow, Meenakshi and his mother Alagu who are stated to have entered into possession of these properties. Therefore Chidambaram Chettiar filed O.S. No. 457 Of 1925 on the file of the District Munsif Court, Devakottai, for the recovery of the moneys due to him impleading Meenakshi and Alagu as defendants, obtained a decree, attached and brought to sale among others the properties now in suit, and

purchased them himself. The sale was held on 13-8-1928 and was confirmed on 14-8-1928.

3. In due course, the purchaser applied in E. A. No. 348 of 1929 for the delivery of possession of the properties purchased and as these were admittedly in possession of tenants delivery of possession was effected by proclamation and affixture on 8-7-1929. Meenakshi the widow of Uthandarayan is stated to have remarried sometime before 1928 and Alagu the mother, who became the heir by reason thereof, died on 22-11-1928. No legal representatives of Uthandarayan or Alagu were impleaded in O. S. No. 457 of 1925 after Alagu's death.

4. As would be seen the plaintiff is the representative of the purchaser to whom delivery of the suit property was effected in July 1929 and he brings this suit for declaration of his title to the suit properties, for possession thereof and for mesne profits. According to his plaint, his grand father, Chidambaram Chettiar got into possession of the suit properties on 8-7-1929, and he and after him, plaintiff's father was in enjoyment thereof until September 1934, when the plaintiff's father died leaving the plaintiff an infant of tender years, when one Vinayakam Ambalam who was an agnatic reversioner of Uthandarayan trespassed upon the suit properties and has been in possession ever since. The present suit was filed on 3-7-1941 by the plaintiff then a minor 12 years old by his property guardian.

5. The first two defendants are the legal representatives of Vinayakam Ambalam, being his sons and the other defendants are stated to be in possession of the properties being tenants. A written statement was filed on behalf of the first defendant which the second defendant adopted. The other defendants remained ex parte. Originally the suit was decreed ex parte against all the defendants but subsequently the ex parte decree was set aside as against the second defendant, that as against the other being confirmed.

6. The defence of the second defendant who is the appellant before us is that the proceedings for delivery of possession in pursuance of the order in E. A. No. 348 of 1929 were fraudulent and that these proceedings were void for the reason that on the death of Alagu on 22-11-1923, no legal heirs of Uthandarayan had been brought on record and that the delivery of possession effected on 8-7-1929 without the legal representatives being impleaded is void; that consequently the defendants acquired a title by adverse possession under Article 144.

7. Before we deal with the point mentioned above, it is necessary to mention certain findings on the basis of which these questions have to be considered. The plaintiff's case that there was a trespass in 1934 and that it was only then that possession of the plaintiff's family was lost, has been found against by both the courts. The defendants had further raised a plea that the delivery of possession by proclamation under Order 21, Rule 96 was fraudulent and not true in the sense that the requisites prescribed by the said provision were not complied with, but though this was found in appellant's favour by the trial court, has been

found against by the lower appellate court. It is on the basis of these two findings which we accept that this second appeal has to be decided.

8. The argument of Mr. Viraraghavan, learned counsel for the appellant was that as the proceedings for the delivery of possession by a decree-holder have been held to be proceedings in execution within Section 47, Civil P. C., there was a statutory obligation on the part of a decree-holder to implead the legal representatives of the deceased judgment-debtor even at that stage u/s 50, Civil P. C. and that in the absence of the legal representatives being brought on record the delivery of possession under Order 21, Rule 96, is a nullity. For this he relies on the Pull Bench decision in -- Kanchamalai Pathar Vs. Ry. Shahaji Rajah Sahib (deceased) and Others, . Another line of reasoning was that a symbolical delivery under Order 21, Rule 96 was binding only against the parties to the suit and not against strangers and that in the case of the latter, their adverse possession was not interrupted by such delivery and for this position decisions of the type illustrated by -- "Juggobhundhu Mukherji v. Ram Chunder Bysack" 5 Cal 584 (B), were referred to, and on this basis a contention was raised that the defendants must be taken to have acquired a title by adverse possession.

9. These contentions, in our opinion, proceeded upon a misconception of the nature of the proceedings under Rule 95 and Rule 96 of Order 21, Civil P. C. We shall first deal with the effect of the death of the judgment-debtor & the failure to bring the legal representative on record at that stage. On the Issue of a sale certificate to the purchaser under Order 21, Rule 94, the latter's title becomes perfected and complete and his right to possession unimpeachable as against the parties to the suit as well as those claiming under them. There is no obligation on his part to apply to the court for delivery, and it is open to him to obtain possession out of court. If he took possession outside court either by taking "Khas" possession of the property, or getting an attornment or recognition from the tenants in possession, it is clear that neither the judgment-debtor nor his representatives, if he were dead, can raise an objection to such possession. In such a case it would be apparent that the death of the judgment-debtor after the sale certificates and before possession had been taken by the purchaser would have no legal effect notwithstanding that the legal representatives have not been impleaded before possession is taken.

10. The next question is whether it makes any difference in legal effect if possession is taken through court. The code contemplates no notice to the judgment-debtor at that stage or any objection being raised by him to the delivery of possession under Rule 95, or Rule 96, and as the full title to the property has passed from the judgment-debtor to the auction purchaser, he has no interest in the property to protect. This furnishes the point of distinction between the case dealt with in -- Kanchamalai Pathar Vs. Ry. Shahaji Rajah Sahib (deceased) and Others, ". Vide at p. 214, where emphasis is laid on the continuance of the title in the property in the judgment-debtor. It therefore follows that there is here no question of the proceedings under Order 21, Rule 95

or 96 being rendered "void" at this stage by the death of the judgment-debtor without the legal representatives being impleaded.

11. Mr. Viraraghavan had to admit that if in the present case delivery was effected under Order 21, Rule 95 and "Khas" possession had been obtained by the plaintiff, his suit could not be resisted by the appellant. Does it make any difference that the delivery is effected under Order 21, Rule 96. In our opinion it does not. The characterisation of possession taken under Order 21, Rule 96 as "paper possession" "is hardly justified and runs counter to the principle on which the provision is based. Symbolical possession obtained under Order 21, Rule 96 is quite a different thing from paper possession, which might correctly describe only the possession obtained by a party who being entitled to actual possession, the judgment-debtor himself being in possession, obtains delivery of possession on paper without actual possession; or those cases where without complying with the requisites of the statute a false return is made as if they were complied with. Possession obtained by proclamation and affixture under Order 21, Rule 96 is equivalent to real possession in those cases where the Code expressly or impliedly provides that it shall have that effect. On the finding of the lower appellate court that the statutory requisites under Order 21, Rule 96 have been followed the possession obtained by the plaintiff's predecessor in title was real and was not invalidated by the non-impleading of the legal representatives of Alagu.

12. The other line of reasoning submitted by learned counsel for the appellant that a symbolic delivery of possession interrupted only the possession of the parties to the record and not strangers, also proceeds on a misapprehension as to the rule. The decisions in -- "5 Cal 584 (B)", accepted by the Privy Council in -- "Thakur Sri Radhakrishna v. Ram Bahadur", AIR 1917 PC 197 (C), lays down the rule that symbolic delivery of possession is binding against the parties to the record. But a legal representative of a party to the record is as much bound by every estoppel binding on his predecessor and if as we have held there was no legal obligation to implead the legal representatives at that stage, it is clear that these decisions are really adverse to the contentions raised by the appellant.

13. As the suit was brought within 12 years from 8-7-1929 when delivery by proclamation and affixture was effected, it is clearly in time. The second appeal therefore fails and is dismissed with costs.