

(1989) 12 MAD CK 0056
In the Madras High Court

R. Dakshinamoorthy

APPELLANT

Vs

Padmavathy Ammal

RESPONDENT

Date of Decision : 12-12-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97

Citation : (1990) 1 MLJ 179

Hon'ble Judges : Abdul Hadi, J

Bench : Division Bench

Judgement

Abdul Hadi, J.—This Civil Miscellaneous Appeal by (sic) obstructor in execution, is against the order (sic) dismissal dated 11.4.1989 in E.A. No. 135 of 1987 in E.P. No. 22 of 1987 in O.S. No. 123 of 1985 on the file of Subordinate Court Pattukottai.

2. The respondent herein is the plaintiff-decree holder. When the decree for possession of the suit house, dated 17.3.1987 was sought to be executed on 7.9.1987, the petitioner obstructed and gave obstruction memo to the bailiff, but since the latter refused to receive the same, the petitioner filed the abovesaid E.A. u/s 151 of the CPC on or about 14.9.1987 for reception of the said obstruction memo, on the ground that he is the absolute owner in possession of the suit property under a will and that the judgment-debtor had no right over the same. The decree holder-respondent resisted the said E.A. stating that the appellant had no right over the said property. She filed her counter and the execution court below held a detailed inquiry in the matter regarding title and possession of the appellant petitioner. The appellant also examined himself as P.W.1 and one other witness P.W.2 and also marked four documents on his side. The respondent also examined her husband as D.W.1 and marked as many as eleven documents. The court below treated the said proceeding as one under Order 21, Rule 97, C.P.C. for removal of obstruction and held that the obstructors had no title or possession to the said property and dismissed the said petition. The aggrieved obstructor has filed this Civil Miscellaneous Appeal. No doubt he

has earlier filed C.R.P. in this Court against the said dismissal, but as it was not maintainable he withdrew it and filed this Civil Miscellaneous Appeal.

3. In this C.M.A. his main contention is that the Court below should not have treated the said E.A. proceeding as one for removal of obstruction under Order 21, Rule 97, C.P.C. According to the learned Counsel for the appellant, the court below should have only seen whether there was prima facie case in the claim made by the appellant, and, if so, the court should have directed the bailiff to receive the obstruction memo, leaving the respondent to file an application for removal of obstruction under Order 21, Rule 97, C.P.C. and then only the court will have jurisdiction to go into the question conclusively whether the obstruction is justified. Secondly, the learned Counsel for the appellant submitted that even assuming the procedure adopted by the court below was right, the decision of the court below, on facts also, was wrong.

4. The appellant who is himself an advocate practising at Thanjavur gave evidence as P.W.1, to the following effect.

He got the said property as legatee under Ex.A.1 registered Will dated 27.9.1967 of his father. Mahalingam Pillai from whom the respondent-decree holder is alleged to have purchased the property in 1979 is his maternal uncle to whom his sister 1st defendant was also given in marriage. In the dispute between him and the said sister regarding the said Will, the District Court, Thanjavur has upheld the genuineness of the Will in its order (Ex.A.2) in I.A. (sic) 173 of 1970 in O.S. No. 13 of 1959, de-sp(sic) fact that Mahalingam Pillai deposed as a(sic)ess against the appellant herein in the said proceeding. The said decision has become final and after the said decision, Mahalingam Pillai himself has under Ex.A.3, acknowledged the title of the appellant herein under the said will (marking of the said document Ex.A.3 was objected to by the respondent on the ground that the signature therein was not that of Mahalingam Pillai.) The said Mahalingam Pillai was the agent of the appellant's father and his deposition was marked as Ex.A.4.

5. In cross examination P.W.1 however deposed that his father purchased the said property benami in the name of the said Mahalingam Pillai under Ex.B.3 dated 1.2.1944. He also admitted that he was not living in the said suit house and that Mahalingam Pillai became the owner of the said house and sold the same to the plaintiff-decree holder. He also admitted that he was not having the tax receipts and electricity bills relating to the said property. It is also borne out from the evidence that the tax assessment and electricity connection for the said house were in the name of Mahalingam Pillai and after the sale to the plaintiff they were changed to plaintiff's name and that the said property was earlier enjoyed by Mahalingam Pillai.

6. D.W.1 husband of the plaintiff deposed to the following effect:

Mahalingam Pillai sold the said property to the plaintiff. But though he executed a sale deed thereto, he died subsequently on 26.11.1977 without registering the

sale deed. Then through compulsory registration the sale deed was registered. Then, in order to get possession of the said property the above said O.S. No. 123 of 1985 was filed and decree for possession was got by the respondent against the heirs of Mahalingam Pillai.

7. In the light of the abovesaid evidence, the court below held that the suit house (sic) originally belonged to Mahalingam Pillai and the latter sold to the plaintiff and that though there was a registered will in favour of the appellant herein, there was no proof that the appellant's father (the testator) had title to the said property given under the Will and that the appellant was in possession and enjoyment of the suit property. So far as the abovesaid objected document Ex.A.3 the court below disbelieved it and held that there was no necessity for Mahalingam Pillai to give such a document after having deposed earlier in the abovesaid O.S. No. 13 of 1959 that the said Will was not genuine.

8. In the light of the abovesaid evidence, I also concur with the decision of the court below. Despite the fact that there was a registered Will and even assuming that its genuineness was accepted in the abovesaid I.A. No. 173 of 1970 in O.S. No. 13 of 1959 on the file of the District Judge, West Thanjavur, it is not proved that the testator under the said Will had title to the said property given under the Will. Even in the abovesaid order in I.A. No. 173 of 1970 it is only stated that some of the properties claimed by Mahalingam Pillai as his properties are included in the abovesaid Will and the Court added further in that context, that merely because of the fact that the said Will includes some property he claimed as his own it cannot go to prove that the said Will was a genuine document. In the circumstances no title can be held to have been conveyed to the alleged legatee the appellant herein, under the abovesaid Will. Even assuming that the Will is genuine, unless it is proved that the testator therein had title to the property said to have been given under the Will, no title to the said property would pass on to the appellant herein. The appellant says that the said property was purchased by his father benami in the name of Mahalingam Pillai, the vendor of the plaintiff decree holder. But there is no proof regarding the said benami character of the purchase. As stated above in paragraph 5, P.W.1 also admitted that Mahalingam Pillai became the owner of the said house. So, it is clear that the appellant's father had no title to the said property and hence, the appellant did not get any title under the said Will. It is also clear from the evidence of P.W.1 himself that he was not in possession and enjoyment of the said property at any time. So, his obstruction is not lawful.

9. On the other hand, the main argument of the learned Counsel for the appellant is that the lower Court should not have treated the said E.A. proceeding as one for removal of obstruction and that the Court has no jurisdiction to do so. The learned Counsel for the appellant relied on an unreported decision dated 20.4.1956 by Basheer Ahmed J. in C.R.P. No. 258 of 1956 on the file of this Court. But that was not a case where such an E.A. proceedings by obstructor was treated as a proceeding for removal of obstruction

under Order 21, Rule 97, C.P.C. The question there was, whether a similar E.A. as the present one for directing the bailiff to receive an obstruction memo, would lie at all u/s 151, C.P.C. The learned Judge there posed a question, should the obstructor wait until he is dispossessed by the bailiff and then only could be approach the Court for restoration of his possession. The Court rightly answered the said question by stating that he need not wait so, but can file such an application before his actual dispossession. So, that decision has no application to the point in issue in the present case.

10. The points in issue here are (1) whether the execution court can treat the abovesaid E.A. proceedings as a proceeding for removal of the obstruction, under Order 21, Rule 97, C.P.C. and dispose of the same accordingly, after holding an inquiry into the alleged title and possession of the obstructor and (2) whether after letting in all necessary oral and documentary evidence regarding his alleged title and possession to the property in question and after having had full opportunity to prove his alleged title and possession, is it open to the obstructor to contend for the first time, after two years, in this appeal that the execution court had no jurisdiction to treat the abovesaid E.A. proceeding as one under Order 21, Rule 97, C.P.C without taking such a stand before the execution Court itself, even before the evidence was taken on the question at issue. On these two points I have no doubt that the appellant's contention has no merit. Such a contention is raised only with a view to protract the proceeding.

11. The execution court below has rightly relied on the decision in Tahera Sayeed Vs. M. Shanmugam and Others, for treating the present E.A.-proceeding as one under Order 21, Rule 97, C.P.C The following passage in the said decision is quite significant:

The procedure has been devised as handmaid to advance justice and not to retard the same. The primary object for which the court exists is to do justice between the parties. The approach of the court would be pragmatic but not pedantic or rigmarole. Considered from this perspective, I have no hesitation to hold that when the third party, not bound by the decree approaches the court-to protect his independent right, title or interest, before he is actually dispossessed from immovable property and files an application under Order 21, Rule 97, it must be treated to be an intimation to the court as caveat to the decree holder or purchaser or a person claiming through him....

and the court is to treat it as a complaint or a counter in opposition as an application for the purpose of Order 21, Rule 97, and to adjudicate it under Rule 98 or Rule 101 which shall be final and conclusive between the parties and it shall be treated to be a decree for the purpose of Rule 103 and it is subject to appeal and further subject to the result in the prior pending suit under Rule 104. This approach is consistent with *ubi jus ebi remedium* shortens the litigation, prevents needless protraction and expenditure and affords expeditious quietus to execution apart from assuaging fair justice.

Further, the decision reported *Badul Rashid Dar v. Mohd. Ismail and Ors.* AIR 1959 J.& K. 48 goes one step further and holds thus:

Where execution of the decree for possession of property is objected to by a person other than the judgment-debtor who claims to be in possession in his own right but whose claim is unacceptable on the face of it, and cannot be said to be made in good faith the court will be obliged to make an inquiry into the claim of the objector as provided under Order 21, Rules 97 to 101, C.P.C. It has only to see whether *prima facie* there is any just cause for resistance and objection and need not investigate the question of title thoroughly.

In the present case, no doubt, a thorough investigation has been made and the court below has held that the obstructor had no title or possession to the property in question.

12 Another decision of the Andhra Pradesh High Court, namely, *Motamari Ramesh and Others Vs. Malliah and Others*, answers both the abovesaid points raised by me in the present case. It holds that when the obstructor files an application under Order 21, Rule 97, C.P.C., the decree holder can object to it saying that such a third party cannot file an application under Order 21, Rule 97, C.P.C. and that only the decree holder can file an application under the said provision. The said decision further goes on to hold as follows:

But, if instead of raising such an objection, (decree holder) files a counter and takes part in the proceedings and if an order is passed in the proceedings, the latter would be valid just so if the counter which he filed was an application filed by him under Order 21, Rule 97, C.P.C. and as if the application which had been filed by third party had been a counter filed by such third party. A decree holder who has so co-operated, without raising any objection probably in the hope that the proceedings would end in his favour and against the third party, cannot be allowed or encouraged to attack the order passed in such proceedings, if and when he finds that the order is not to his advantage or to his taste or upto his expectation.

This principle enunciated in the abovesaid Andhra Pradesh High Court's decision applies squarely to the present case to the obstructor-appellant herein. He cannot now complain for the first time that the procedure adopted by the Court below is wrong, even assuming it is wrong. Normally it is the decree holder who can initiate action under Order 21, Rule 97, C.P.C. for removal of obstruction. But, when the obstructor himself comes before the Court seeking direction for reception of his obstruction memo as in the present case and the execution court gives opportunity to the decree holder to file her counter and holds a full-fledged inquiry in investigating the alleged title and possession of the obstructor to the suit property, treating the said proceeding as one under Order 21, Rule 97, C.P.C. and the obstructor acquiesces in the said procedure being followed, without raising any objection to the executing court adopting the said procedure and gives all necessary evidence oral and documentary in support of his case, he

cannot later on complain that the abovesaid procedure adopted was wrong. By his conduct, he should also be deemed to have waived any such objection which he could have raised earlier as against the different procedure adopted.

13. The abovesaid decision in Motamarii Ramaiah and Others Vs. Malliah and Others, is also approved in the above referred to decision reported in Tahera Sayeed Vs. M. Shanmugam and Others, , which also states that the ratio in Motamarii Ramaiah and Others Vs. Malliah and Others, is in consonance with the procedure envisaged in Abdul Aziz v. Chokkan AIR 1935 Mad. 803 (F.B.) It is also observed in Tahera Sayeed Vs. M. Shanmugam and Others, that similar is the view in Mahabir Pershad Vs. Delhi Traders Private Ltd. and Others, and Ramchandra v. Manmal Singhi AIR 1983 Sik 1. No doubt, the decision in Smt. Usha Jain and Others Vs. Manmohan Bajaj and Others, over-ruling the decision in Bhagwat Narayan Dwivedi Vs. Kasturi, expresses a different view stating that the executing court has no jurisdiction to start an enquiry under Order 21, Rule 97 C.P.C. at the instance of a third party other than the decree holder. But, in view of so many other decisions cited above, particularly, Tahera Sayeed Vs. M. Shanmugam and Others, , and Motamarii Ramaiah and Others Vs. Malliah and Others, whose ratio was held to be in consonance with the procedure envisaged in the abovesaid decision of the Full Bench of this Court in Abdul Aziz v. Chokkan AIR 1935 Mad. 803 prefer to follow the principles enunciated in Tahera Sayeed Vs. M. Shanmugam and Others, . In the circumstances, I see no reason to interfere with the order of the court below and hence the C.M.A. is dismissed with costs.