

(1963) 02 MAD CK 0010
In the Madras High Court
Case No : A.A.O. No. 265 of 1961

Ramaganesan Pillai and Others

APPELLANT

Vs

Rajah Ayyar and Others

RESPONDENT

Date of Decision : 22-02-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35, Order 21 Rule 35(2), Order 21 Rule 95, Order 23 Rule 4, 47

Citation : AIR 1964 Mad 53 : (1963) ILR (Mad) 911 : (1963) 76 LW 414

Hon'ble Judges : S. Ramachandra Iyer, C.J.;Sadasivam, J;Anantanarayanan, J

Bench : Full Bench

Advocate : U. Somasundaram, P. Kothandaraman and W.A. Wahab, for the Appellant; T.V. Balakrishnan, L. Vanchinathan, V.N. Srinivasa Rao and C.S. Rajappa, for the Respondent

Final Decision : Dismissed

Judgement

S. Ramachandra Iyer, C.J.—This civil miscellaneous appeal poses for determination a question as to the competency of the executing court

to direct fresh delivery of Immovable property there having been earlier a symbolical one. The reference to the Full Bench was occasioned by a

doubt felt as to the correctness of the decision in Manager of Sri Meenakshi Devasthanam, Madura v. Abdul Kasim Sahib, ILR 30 Mad 421. But

in the view we are disposed to take of the appellants' right to dispute the authority of the court to grant the relief sought a consideration of that

decision in detail has become unnecessary.

2. The facts giving rise to the appeal are these. The appellants are the sons of the third respondent. The Kumbakonam Bank Ltd., obtained a

decree for a large sum of money against them. The trial court in addition granted relief as against the share of the third respondent (one-fourth) in a

house belonging to the family, and which had been given as security to the loan. Under the decree the appellants were liable to the extent of their

interest in the joint family properties. The decree-holder enforced the decree in execution by proceeding against the charged property and also

independently attaching the remaining three-fourth share therein of the sons and bringing them for sale.

In the events that followed, the decreeholder became the purchaser of the one-fourth share in enforcement of the charge; the first respondent

purchased the other three-fourth share at the sale held in pursuance of the attachment. The sales were duly confirmed. We may also state in

passing that subsequently this court, in an appeal filed by the bank, declared that the charge created by the trial court would ensure not merely to

comprehend the interest of the third respondent in the property but also that of his sons.

3. Both the purchasers, the Kumbakonam Bank Ltd., and the first respondent, applied for and obtained on 29-7-1957, what was characterised as

symbolical delivery of possession of the one-fourth and three-fourth share respectively. The first respondent thereafter purchased from the

Kumbakonam Bank Ltd, its one-fourth share. Alleging that by virtue of his purchase he became entitled to the entire property, the first respondent

applied to the executing court in E. A. No. 367 of 1959 for actual delivery of the property under Or. 21 rule 95 C. P. C. The judgment-debtors

had also filed applications to set aside the court sales. Those applications failed. It is needless now to refer to the vicissitudes of the petition filed by

the first respondent for actual delivery of the entire house, except to state that ultimately it was disposed of by a compromise between the parties,

which was duly recorded after being sanctioned by the Court as being one in the interests of the minor appellants.

Under the compromise the judgment-debtors were enabled to retain the property themselves if they were to pay a sum of Rs. 27000 to the first

respondent in five instalments spread over nearly five years with an express stipulation that time formed the essence of the contract. There was also

a provision that in case of default in the payment of any one instalment, the purchaser would be entitled to take possession of the entire property in

execution under Or. 21 Rule 95 C. P. C. "without notice to the defendants and without the plea of limitation being available to them". The validity

of the last part of the compromise, which; on the face of it is severable from the rest, does not, however, call to be decided upon now.

4. There was default by the appellants in the performance of the conditions imposed by the compromise as even the first instalment was not paid.

The first respondent, immediately after the default occurred, applied to the lower court in E. A. No. 228 of 1961 for delivery of possession of the

entire house on the basis of the consent order referred to above. The lower Court, overruling the objections of the appellants, directed delivery of

possession. The appeal, which is filed against that order, impugnes the propriety of the direction given , by the lower court, as amounting in

substance to an order for a second delivery to the auction purchaser, the property having already been delivered on 29-7-1957. There is also a

further objection to the order, and that is this. The first respondent's private purchase from the Kumbakonam Bank Ltd., of its one-fourth share

would not entitle him to be treated as a court auction purchaser of the entire property and what he would be entitled to get from the court will be

joint or symbolical possession of the three-fourth share and one-fourth share separately.

5. There are certain matters which are beyond dispute. The lower court, as the executing court, had complete jurisdiction over the subject matter,

namely, the house of the judgment debtors, which was sold in court auction under the two execution petitions. That house formed the subject matter

of the suit as well as the decree. The Kumbakonam Bank Ltd. purchased an undivided one-fourth share of the third respondent, who along with

his three sons constituted a joint Hindu family. The first respondent's purchase was likewise of only an undivided share in the joint family property,

albeit the extent was a larger one. Each one of the purchasers obtained only a right to sue for a partition. It may be that as the rights of all the

members of the family were sold and the first respondent had become the purchaser, he could maintain a suit for possession of the specific

property. But on the basis of the court auction purchase itself neither of the two purchasers can obtain from the executing court delivery of

possession, either actual or symbolical.

Order 21 Rule 35 C. P. C. which relates to execution by the holder of a decree for possession, provides for delivery of joint possession where the

decree is for a share of the property. In the case of a purchaser of an undivided share in execution of a decree for payment of money, joint

possession can perhaps be given under Order 21 Rule 95 C. P. C. which is sufficiently wide to include such a case (read with, rule 35 (2)). But

these provisions cannot apply to the present case where the purchasers obtained only a right, as it were, in equity to have the property purchased

by them allotted in partition to their vendor's share. The first respondent cannot by reason of his private purchase of the one-fourth share from the

other court auction purchaser be treated as if he had purchased the entire property in execution so as to enable him to apply under Order 21 rule

95 C.P.C.

In *Yelumalai Chetti v. Srinivasa Chetti*, ILR 29 Mad 294, it was held that it would not be open to the executing court to pass an order for delivery

of possession at the instance of a purchaser of a share of joint family property. The principle was further clarified by *Rajamannar C. J.* while

delivering the judgment of the Bench in *V.C. Thani Chettiar and Another Vs. Dakshinamurthy Mudaliar and Others*, , where it was pointed out that

there could in law be neither symbolical nor actual delivery of possession, in the case of a court auction purchaser of an undivided share of a

member of a joint Hindu family, the remedy of the purchaser being only to sue for partition. That decision is remarkable in its similarity to the case

before us in one respect, namely, that there also the entire family property had been sold to two different purchasers in auction, each of them

having purchased a moiety. It was held that symbolical delivery of possession which was given to the purchasers could not give them the benefit of

a fresh cause of action.

From the principle laid down in those cases it would follow that symbolical delivery of possession effected on 29-7-1957 in the instant case would

have no legal effect. When, therefore, the first respondent, after his private purchase of the one-fourth share from the Kumbakonam Bank Ltd,

applied for delivery of possession, the question, whether the first respondent having acquired the entire rights in the property sold could sustain an

application under Order 21 Rule 95 C. P. C. would have come to the forefront. Probably that question would have had to be answered in the

negative having regard to the nature of the purchase at the court auction.

6. But that question was never allowed to be finally decided, as the parties came to an arrangement for adjusting their rights, under which the entire purchase was to be rendered nugatory if the judgment debtors were to pay a sum of money to the purchaser; in default the decree was to be executed as if it were one for actual possession, or one in execution of which the first respondent had purchased the entire property. It is a well settled position in law that although one member of a joint Hindis family cannot sell a specific item or a share in any specific item and create, rights therein in the purchaser, such alienation can be made with the concurrence of all the members of the family. There was therefore nothing illegal in the judgment debtors agreeing to treat the two purchasers in court auction as amounting to a sale of a specific item of family property, namely, the house now under execution process. Further the agreement was one between the parties to the decree in relation to the subject matter of the decree. It however altered the procedure as it attempted to confer an authority in court to deliver possession which it could have had only under a different set of circumstances namely, where the entire house had been sold in court auction. There was however nothing per se illegal in the compromise.

7. But Mr. U. Somasundaram, appearing for the appellants, contends that by reason of the earlier symbolical delivery of possession given by court to the two purchasers, there could be no further jurisdiction in the court to direct a fresh delivery and that the consent of parties cannot confer a jurisdiction unknown to law. It is further argued that the present application for delivery would be barred by Article 180 of the Limitation Act. The last contention can be disposed of shortly. The present execution application is only to implement the consent order passed in E. A. No. 367 of 1959 and there can be no bar by limitation as the date of the order and the application will show.

8. The CPC contains various provisions as to when actual, joint or symbolical possession can be given. There can also be cases, as in the case of a purchaser of an undivided share of a member of a joint family in which none of these categories of possession can be appropriate or be given. But in a case where possession has been lawfully given in any one of the three kinds specified above, it would not be competent for the decree-holder

or purchaser to apply again for delivery (actual or constructive) unless there was no legal, complete or effective delivery on the earlier occasion.

Where joint or constructive possession is given, the further remedy of such a person would be to sue for partition, likewise in the case of a

purchaser of an undivided share in a joint family property where no possession of any kind can be given, Order 21 Rule 95 C. P. C. confers a

power in the court to deliver, possession of the property sold in court auction to the purchaser.

Once that is done, there will be no occasion for a second delivery, for if there is a subsequent dispossession the remedy will be by suit. In case of

symbolic or joint possession, the further remedy of the purchaser will also lie in a separate and appropriate suit. But the circumstances of this case

are peculiar. The symbolical deliveries were not authorised by the Code. The purchaser had only to file a suit. But instead he filed an application¹

for delivery as if he were the court auction purchaser of the entire house. There was a consent order for delivery. Could such a consent confer

jurisdiction in the court, to order delivery? Even if there be no such jurisdiction, would it be open to a party at whose instance and for whose

benefit such consensual authority was given to repudiate it?

9. In the leading case of *Ledgard v. Bull*, ILR 9 All 191 (PC), Lord Watson enunciated the following two principles:

When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper

judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him.

But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join

issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the

initial procedure which, if objected to at the time, would have led to the dismissal of the suit.

An illustration of the first of the two principles is found in the decision of the House of Lords in *Burgess v. Morton*, 1896 AC 136, where by

consent of parties a special case was raised for decision before the Court on questions of fact only while under the law a special case can be stated

only on questions of law. It was held that the proceedings were extra cursum curiae and the judgment of the Court would be in the nature of an

arbitrator's award, it being incompetent for any consenting party thereafter to challenge it by way of an appeal. Lord Halsbury, L. C. observed,

My Lords, it has been held in this House that where with the acquiescence of both parties a Judge departs from the ordinary course of procedure

and, as in this case, decides upon a question of fact, it is incompetent for the parties afterwards to assume that they have then an alternative mode,

of proceeding and to treat the matter as if it had been heard in due course.

In *Makudam Mohamed v. Mohamed Sheik Abdul Kadir*, 71 MLJ 281 : AIR 1936 Mad 856, Pandurang Row, J., applied the same rule to a case

where, at the request and consent of the parties, the Court adopted a novel procedure for terminating a suit. The learned Judge held that the party

who had himself invited the Court to adopt a special procedure not contemplated by the CPC would be estopped from blaming the Court for

adopting the very procedure suggested by him, and the judgment in such a case would be in the nature of an arbitration award.

10. In the instant case, if we were to hold that the executing Court had no jurisdiction to effect actual delivery of possession of the house, the rule

recognised in the cases referred to above, would entitle the first respondent to claim that the departure in the procedure being on the basis of a

consent between the parties, it would not be open to the appellants to challenge the same.

11. We are not, however, disposed to decide the case on the principle aforesaid, as in our opinion, the case would come within the second of the

two principles enunciated in ILR 9 All 191 (PC).

12. In *Sadasiva Pillai v. Ramalinga Pillai*, 2 Ind App 219 (PC), a decree was silent as to future mesne profits but acting upon an agreement

between the parties contained in a security bond:1 given to the Court an order for payment thereof was made. The Privy Council accepted as

settled law that where a decree was silent as to mesne profits, the executing Court could not award the same but at the same time observed,

But even if it (decree) did not, they think, upon the ordinary principles of estoppel, the respondent cannot now be heard to say that the mesne

profits in question are not payable under the decree.....The Court here had

a general jurisdiction over the subject-matter, though the exercise of that jurisdiction by the particular proceeding may have been irregular. The case therefore seems to fall within the principle laid down and enforced by this Committee in the recent case of *Pisani v. Attorney General of Gibraltar*, (1874) LR 5 PC 516, in which the parties were held to an agreement that the questions between them should be heard and determined by proceedings, quite contrary to the ordinary *cursus curiae*.

13. Whether a bargain between the parties, during the course of execution, though it exceeded in a way the terms of the decree, could be enforced in execution came up for consideration in *P.M. Subramania Pillai Vs. Corera and Others*, where a debtor in consideration of the decree-holder giving him time agreed? subsequent to the final decree in the case to pay enhanced rate of interest. That agreement was recorded by the Court.

Subsequently, when the decree-holder sought to recover the enhanced rate of interest in execution, the debtor objected to the competency of the

executing Court to grant relief beyond the terms of the decree. But the claim for recovery of enhanced interest in execution was upheld on the

ground of estoppel. A similar rule was applied by the Privy Council in AIR 1939 80 (Privy Council) where during the pendency of proceedings for

sale in execution of a mortgage decree, the judgment-debtor, in consideration of the decree-holder giving him time, agreed to pay interest at a

higher rate..than what warranted by the terms of the decrees. That agreement was enforced in the execution proceedings themselves, Sir George

Rankin observing at pp. 662-3 (of Mad LJ) : (at pp. 85-86 of AIR):

On this difficult and important question their Lordships are not in agreement with the view taken by the Chief Court. They do not consider that it

takes sufficient account of the facts that the Code contains no general restriction of the parties' liberty to contract with reference to their rights and:

obligations under the decree and that, if they do contract upon terms which have reference to and affect the execution discharge or satisfaction of

the decree, the provisions of Section 47 involve that questions relating to such terms may fall to be determined by the executing Court.

Amendment", or alteration of the decree whether u/s 152 or by review is a different matter under the Code. No doubt, an adjustment if note

recorded under Order 21 Rule 2 cannot be recognised by any Court executing the

decree. The compromise of 1927 however, was recorded; it was an adjustment even if it was something more, and it contained the terms upon which the adjustment was agreed to. It was not an attempt to bring under the decree a liability extraneous to the mortgage or the mortgage suit Such a bargain has its effect upon the parties' rights under the decree, and the executing Court u/s 47 has jurisdiction to ascertain its legal effect and to order accordingly If it appears to the Court, acting u/s 47, that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with u/s 47. In such a case, to say that the creditor may perhaps have a separate suit is to misread the Code, which by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing Court.

14. It is undoubted that parties have the right to enter into agreements in the course of execution proceedings. In the illuminating judgment (if we may say so with respect) of Mahmood, J., in *Muhammad Suliman v. Jhukki Lal*, ILR II All 228, the proceedings in execution of a decree were for that purpose regarded as amounting to separate litigation, it being competent to the parties to enter into a compromise much in the same manner as in a regular suit. The executing Court will be bound to give effect to such a compromise subject to the limitation indicated in the relevant provisions of the Code. The learned judge observed, I hold further, that when such a compromise has been duly arrived at and sanctioned by the Court executing the decree, neither the decree-holder nor the judgment-debtor can resile from the position which they thus deliberately took up in the matter of the compromise. I go even further, and hold that, even if such a compromise is irregularly sanctioned by the Court executing the decree - the irregularity not amounting to want of jurisdiction - the compromise must take effect unless the order sanctioning the compromise is set aside by the procedure required by the law for

such a purpose. But so long as the order sanctioning the compromise stands, the parties are bound by it in all proceedings relating to the execution

of the decree, and where they have acted upon the compromise they are estopped thereafter from questioning its validity.

15. From the foregoing decisions it will be "apparent that a Court executing the decree will be competent to enforce an agreement entered into

between the decree-holder and the judgment-debtor in the course of execution proceedings if the agreement is a lawful one, not extraneous to the

decree but on the other hand governs the liability under the decree and relates to the manner of the enforcement. But the decision in ILR 30 Mad

421, went even further. The suit in that case was laid for recovery of arrears of rent by a lessor against his lessee in respect of two shops. But

under the compromise which culminated in the decree it was stipulated that if a certain specified sum was paid by the defendant to the plaintiff

within the time stipulated, the former was to continue in possession as a lessee for a further term of 11 years at a specified rent. But if default was

made in the payment of one year's rent, possession of the property should be delivered to the plaintiff.

The compromise thus created fresh rights - a new lease and rights for breach of conditions therein. A default occurred. In execution it was held that

although the decree gave reliefs which were beyond the scope of the suit, yet the compromise could not be said to be unlawful as the Court could

grant those reliefs if properly approached, and that therefore execution could be levied for recovery of possession of the two shops which did not

form the subject-matter of the suit but in respect of which fresh rights were created under the compromise decree. We are doubtful whether that

view can be supported; but it is unnecessary to express any final opinion on the correctness of the decision, as it is not necessary to do so for the

purpose of the case before us.

Here is an agreement in the course of execution proceedings with reference to the subject matter of the decree and the purchase, thereunder; it is in

relation to the manner of delivery of possession. It may be that the manner agreed upon adopted a procedure not prescribed by the Code, for this

case but available in different circumstances. But that cannot make it illegal or outside the jurisdiction of the Court. The Court will therefore be

entitled to enforce the agreement in execution and the judgment-debtors will be estopped from disputing the authority of the Court to depart from the procedure to which they agreed.

16. In the result this appeal fails and is dismissed with costs.