
(1946) 07 MAD CK 0019
In the Madras High Court

R.T. Ramayya Servai

APPELLANT

Vs

R. Sama Ayyar and Others

RESPONDENT

Date of Decision : 09-07-1946

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 21

Citation : AIR 1947 Mad 92 : (1947) ILR (Mad) 397 : (1946) 59 LW 508 :
(1946) 2 MLJ 210

Hon'ble Judges : Somayya, J

Bench : Division Bench

Judgement

Somayya, J.—The first defendant is the appellant. The appeal is against the decree of the District Court of East Tanjore passed in O.S. No.

21 of 1943. The plaintiff (first respondent) filed the suit to recover possession of the suit properties from the first defendant who is alleged to be in

possession as agent or lessee of the plaintiff. The property originally belonged to one Anantharama Aiyar who mortgaged it to the second

defendant's father in the year 1919. Anantharama Aiyar sold it to one Venkatasubramania Aiyar in the year 1920 directing him to pay off the

mortgage. That was not done and Venkatasubramania Aiyar died. The mortgagee filed O.S. No. 52 of 1930 and got a decree for about Rs.

15,000 against the sons of Venkatasubramania Aiyar. That decree is being executed and it is pending as an application for scaling down the decree

debt has been filed under the Madras Agriculturists' Relief Act. Venkatasubramania Aiyar's sons sold the property on the 20th of January, 1942,

for Rs. 19,000 and the sale deed stands in the name of the plaintiff. A sum of Rs. 1,000 was paid and Rs. 18,000 was reserved with the vendee

for being paid over to the mortgagee decree-holder after the amount due to him.

is ascertained in the scaling down proceedings. The plaintiff says that he purchased the property under Ex. P-1 and that the first defendant is unlawfully setting up adverse title. The first defendant who is the contesting defendant denied the plaintiff's right and alleged that the sale in favour of the plaintiff was benami for himself. The main issue in the suit is whether the purchase in the name of the plaintiff was benami for the first defendant's benefit.

2. It would appear that the first defendant is in possession of some of the properties and that the other properties are in the possession of other persons who are cultivating them. During the course of the suit a receiver was appointed and the Subordinate Judge allowed defendants 1 and 4 to 6 to cultivate the lands during the pendency of the suit and directed them to pay certain sums to the receiver. The amounts directed to be paid by defendants 1 and 4 to 6 were not paid in full; and after repeated orders the Subordinate Judge ultimately passed an order saying that if the amount was not paid by a particular date the defence will be struck off. Even by the time given the amount was not paid and the defence was therefore struck off by an order dated 14th April, 1944. Thereafter evidence was recorded on behalf of the plaintiff and a decree was passed. The first defendant appeals and the main objection is that the lower Court had no power to pass an order directing the defence to be struck off for non-payment of the amount in question and that even if the Court had such a power the circumstances of this case did not justify the order which the lower Court has passed.

3. It is clear that the case does not fall within the specific provisions of the CPC giving power to Courts to strike off a defence in certain contingencies. Order XI, Rule 21 of the Code provides:

Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out...

No other provision has been brought to my notice relating to the power of the Court to strike out a defence. It is very doubtful whether Section 151 of the Code on which reliance is placed by the learned advocate for the respondents would apply in a case where there is a specific provision

enacted by the Legislature. It is not as if the Legislature has omitted to provide for the case of striking out a defence. The Legislature has provided

that under circumstances set out in Rule 21 of Order XI, the Court may strike out a defence. A decision of Sundaram Chetti, J., reported in Dasari

Venkatacharyulu Vs. Manchala Yesobu and Another, has been brought to our notice. In an application for appointing a receiver, one of the

defendants offered to give security and he was directed to furnish security by a particular date. He furnished a security bond and the Court ordered

the testing of the sufficiency of the security by issuing a warrant to an Amin to investigate the matter. The necessary batta for the issue of process

was not paid by the defendant but he cut and carried away the crops on the suit land. The Court subsequently passed a further order that a certain

sum of money should be deposited in Court within a particular date. The defendant defaulted and his defence was struck off. The learned Judge

held that Section 151 of the CPC gave jurisdiction to the Court to pass the order which it did. The learned Judge held that as one of the parties

after avoiding the appointment of a receiver, on offering to give security entered upon the land and cut and carried away the crops without paying

the batta for the testing of the sufficiency of the security offered by him, the conduct of the party amounted to a contempt of Court. There is no

difficulty in agreeing with the learned Judge's order so far, but it is very doubtful whether even in such a case the Court can order the defence to be

struck off. Two decisions are referred to by the learned Judge and the first of them is Gauri Shankar v. Mt. Manki Kunwar I.L.R.(1923) All. 624.

That decision had reference to an order to answer certain interrogatories and it is covered by Order XI, Rule 21 of the Code to which reference

has already been made. The other case referred to is the one reported in East Indian Railway Co. v. Jit Mal Kallu Mal ILR (1925)All. 538. That

refers to a case of a defendant obtaining an adjournment on condition that if he did not pay the day cost ordered within a particular time his

defence might be struck off. In a case where a party obtains an indulgence on condition of his defence being struck off if he did not pay a particular

sum within a given date it might be said that he cannot go back upon his own agreement and that he must be held bound to the agreement. If he

had not agreed to such an order the suit would have been proceeded with on that very day and the result would be that the suit would be

proceeded without his being in a position to defend the suit. We are of opinion that these two decisions do not afford any help.

4. Further, we are of the opinion that the lower Court was not justified in passing the order which it did on the 14th of April, 1944. The defendant

was in possession and a receiver was appointed. Ordinarily, the receiver must be left to take his own steps to recover possession from the persons

in possession. If the defendant did not pay the amount in spite of repeated orders it may be that he rendered himself liable to be proceeded against

for contempt of Court. The proper procedure would have been to direct the receiver to take possession forthwith and to take other proceedings

for recovery of the amount due from the defendant. But that does not justify the drastic order of striking out the defence if the amount ordered to

be paid was not paid within the time given.

5. The result is that the appeal succeeds, the decree of the lower Court is set aside and the suit remanded for disposal according to law. As the

plaintiff respondent states through his advocate that he did not invite the order under appeal we order that the costs of this appeal should abide and

be provided for in the revised decree of the trial Court. The court-fee paid on the memorandum of appeal will be refunded.

6. The lower Court while passing a decree in favour of the plaintiff directed him to pay into Court a sum of Rs. 18,000 which was left with him

under Ex. P-1. We fail to see how this order came to be passed or what power the Court had to make this order. It is not supported before us.

Even where a vendor is not paid the price and the vendee files a suit for possession this Court has held that the vendee is entitled to an

unconditional decree for possession leaving the vendor to take independent proceedings to recover the unpaid purchase money. We allow the

plaintiff to take back the amount which he has paid into Court.