

(1988) 10 KL CK 0002

In the High Court Of Kerala

Case No : C.R.P. No"s. 884, 3022 and 3027 of 1983

Secretary, Ayancheri Service Co-operative Bank

APPELLANT

Vs

Moideen and Others

RESPONDENT

Date of Decision : 26-10-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35, Order 21 Rule 93, Order 21 Rule 94, Order 21 Rule 95, 47

Citation : (1988) 2 KLJ 856

Hon'ble Judges : K.P. Radhakrishna Menon, J

Bench : Single Bench

Advocate : V.P. Mohankumar, for the Appellant; P.V. Narayanan Nambiar and C. Vathsalan, for the Respondent

Final Decision : Allowed

Judgement

K.P. Radhakrishna Menon, J.—The points arising for consideration in these revision petitions are identical and therefore; these three petitions are jointly heard and disposed of by this common order. In execution of the award obtained by the petitioner-bank, the properties in dispute was sold in public auction. The petitioner-bank purchased them with the permission of the sale officer. The sale officer issued the sale certificate. Failure on the part of the judgment debtors to surrender possession of the properties resulted in the petitioner-bank filing execution applications from which these revisions arise, before the Munsiff of Payyoli, under Order XXI Rules 35 and 95 C.P.C.

2. The execution court after considering the various aspects of the case has dismissed these applications by the common order under challenge.

3. That the Co-operative Societies Act and the Rules do not contain provisions authorizing the sale officer to put the decree-bolder-purchaser in possession of the property, in the event of the proceedings to take possession is obstructed by the judgment debtor himself, is beyond challenge. The question therefore is under such circumstances can a decree-holder initiate proceedings under Order

XXI Rule 35 or 95 C.P.C. to take delivery of possession of the property from the judgment debtor?

4. According to the learned counsel for the judgment debtors the only remedy that can be availed of by the decree holder under such circumstances is to file a suit for recovery of possession and not to have resort to the provisions contained in Order XXI C.P.C. Dilating on this aspect the learned counsel argues that the moment the sale takes place and the sale, proceeds are adjusted towards the decree, the decree stands satisfied and therefore thereafter there is nothing that could be done through the execution court.

5. Yet another point raised by the learned counsel in this context is that inasmuch as the sale certificate is not one issued under Order XXI Rule 94 C.P.C. the execution court cannot entertain an application under Order XXI Rule 93. Another impediment highlighted by the learned counsel is that whatever be the position regarding these matters since the sale certificate has not been registered in compliance with the provisions contained in Rule 83(5) of the Co-operative Societies Rules, the attempt to take delivery pursuant to such sale certificate cannot be taken cognisance of.

6. It is by now well established that until the property is taken delivery of the decree-holder-purchaser, he retains his character of a party to the suit and therefore if any dispute regarding the nature of the right purchased by the judgment-debtor at the time of delivery of possession arises or if the judgment-debtor offers any resistance to delivery of possession, they must be treated as matters relating to the execution and satisfaction of the decree and hence coming within meaning of Section 47 C.P.C. (See *Harnandrai Badridas Vs. Debidutt Bhagwati Prasad and Others*,).

7. If that be so, the petitioner continues to retain the character of a decree-holder and therefore the petition to deliver the property under Order XXI Rule 95 is maintainable. A question however would arise and it is this; can the petitioner, who has already chosen one of the two remedies to execute the decree, be allowed to leave that remedy half-way and switch over to the other mode only for the purpose of getting delivery of the property. That there is no provision in the Co-operative Societies Rules conferring power on the sale officer to "deliver possession of the property to the decree-holder-purchaser, in the event of the delivery being obstructed by the judgment-debtor, is beyond dispute. Under such circumstances, I am of the view that the principle of estoppel by election is not applicable. The holder of the award therefore must be held to have the right to approach the civil court under Order XXI Rule 95 for delivery of the property in the occupation of the judgment debtor.

8. The question then is, can the judgment debtor resist delivery of the property on the ground that the certificate of sale is not registered under the Registration Act. My answer is no, because so far as the judgment debtor is concerned, the decree stands satisfied by the sale of the property. May be that a party other than

the judgment debtor can raise such a" technical plea. Unlike a person who is a bonafide purchaser without notice, judgment debtor has no manner of right to retain the property under such circumstances. If this technical plea is given the stamp of approval by a court of law, justice will be the causality. That shall not happen. Therefore I am of the view that the application under Order XXI Rule 95 for delivery of the property is maintainable.

9. The arguments highlighted in Para 6 above are liable to be rejected in the light of the discussions in the preceding paragraph. The order under challenge for the reasons stated above is set aside and the execution petitions are remanded to the court below: The court below is directed to pass appropriate orders directing delivery of the property, as expeditiously as possible, in any event, within three months from the date of receipt of a copy of this order. The C.R.Ps are allowed. No costs.