
(2011) 02 MAD CK 0074

In the Madras High Court

Case No : C.M.S.A. No. 11 of 2010 and M.P. No's. 1 and 2 of 2010

Thangeswari, Arumba Ammal and Ponnusamy

APPELLANT

Vs

Thirumalvalavan and Others

RESPONDENT

Date of Decision : 18-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 52
Limitation Act, 1963 — Article 129

Citation : (2011) 02 MAD CK 0074

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : P. Valliappan, for the Appellant; S. Kamadevan, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Ramanathan, J.—The Appellants herein are the obstructors, who filed the suit in O.S. No. 506 of 1992.

2. The facts which are necessary for the disposal of this Second Appeal are as follows:

i) The Respondents 1 to 5 herein filed the suit in O.S. No. 520 of 1981, against the Respondents 6 to 9, for specific performance of an agreement

of sale, executed by one Kathirvel Padayachi, whose legal representatives are the Respondents 6 to 9 in this Second Appeal. The suit was

decreed on 10.02.1982. Thereafter, an application in I.A. No. 6602 of 1993, was filed by the Respondents 6 to 9 to set aside the decree and that

was ultimately dismissed on 22.01.2001.

ii) Thereafter, a suit in O.S. No. 506 of 1992, was filed by the Appellants and another seeking the relief of declaration that they are the owners of

the suit property and for injunction, restraining the Defendants thereunder. The

Respondents 1 to 7, herein were the Defendants in O.S. No. 506

of 1992 and in that suit, the Appellants filed I.A. No. 428 of 1992, seeking for the relief of injunction and that was granted on 12.03.1992, by

which the Respondents were restrained from taking possession of the suit properties. That injunction order was extended periodically till

08.02.1993, the date on which the suit was dismissed and the injunction application was also dismissed.

ii) Thereafter, the Appellants filed application in I.A. No. 107 of 1993, to set aside the dismissal order passed in O.S. No. 506 of 1992 and that

was allowed and thereafter, it was dismissed and after filing various applications to restore the same, the suit was dismissed finally on 12.07.2002.

Meanwhile, the Respondents 1 to 5, filed execution petition in E.P. No. 50 of 1992, to execute the sale deed, in pursuant to the decree passed in

O.S. No. 520 of 1981 and the sale was also executed by the Executing Court on 02.03.1992. Thereafter, E.P. No. 47 of 2003, was filed for

delivery of the property and at that time, the Appellants caused obstructions stating that during the pendency of the suit in O.S. No. 520 of 1981,

they purchased the suit property under two sale deeds dated 26.03.1987 and 13.12.1990 and they are in enjoyment of the same.

iii) Therefore, the Respondents 1 to 5, filed E.A. No. 58 of 2004, to remove the obstructions caused by the Appellants and that was ordered.

Against the said order, the Appellants filed an appeal in C.M.A. No. 1 of 2005, on the file of the Subordinate Court, Ariyalur, and that was also

dismissed and as against the same, the present Civil Miscellaneous Second Appeal is filed.

3. The following substantial questions of law were framed at the time of admission of this Civil Miscellaneous Appeal:

A) When it is axiomatic in law that an order allowing application under Order 21 Rule 97 of CPC would tantamount to a decree as per Rule 103

and is appealable, whether the Lower Appellate Court is correct in law in holding that the appeal filed by the Appellants is not maintainable?

B) Whether it is open to the Lower Appellate Court to consider the appeal filed by the Appellants on merits, after holding that the appeal itself is

not maintainable, when it is a well settled that once the matter is held to be not maintainable, the Court cannot adjudicate on the merits of the case?

C) When the decree dated 10.2.1982 has to be executed within a period of 12 years as per Article 136 of the Limitation Act, 1963, whether the

Execution Petition filed in the year 2003, is sustainable in law?

D) When there was no order preventing the Respondents 1 to 5/deed holders from proceeding with the execution, whether the Courts below are

correct in law in holding that the execution petition filed by the Respondents 1 to 5, after the period of limitation is sustainable?

E) When the sale deed was executed on 2.3.1992 and as per Article 137, the petition for possession has to be filed within three years there from,

whether the execution petition filed after eleven years therefrom is sustainable in law?

F) When the petition to remove the obstruction has to be filed within a period of 30 days from the date of obstruction, as per Article 129 of the

Limitation Act, 1963, whether the petition to remove the obstruction filed on 22.3.2004 in respect of the obstruction made on 18.2.2004 is

maintainable in law?

G) Whether the Courts below are correct in law in misconstruing the scope of the earlier suit filed by the Appellants which did not prevent the

Respondents 1 to 5 from proceeding with the execution and in holding that the present execution proceedings is not a continuation of the earlier

proceedings?

4. It was contented by Mr. P. Valliappan, the learned Counsel appearing for the Appellants that the sale deed was executed by the Court on

02.03.1992 and within three years from the date of execution, the Execution Petition ought to have been filed and here, the E.P. No. 47 of 2003

for delivery of the property was filed 12 years after the date of passing of the decree and therefore, the Execution Petition is barred by time.

5. The learned Counsel further submitted that as per Article 129 of the Limitation Act, 1963 (hereinafter referred to as the "said Act") for removal

of the obstruction, the application ought to have been filed within 30 days from the date of obstruction caused by the Appellants and in this case,

admittedly, the obstruction was made on 18.02.2004 and E.A. No. 58 of 2004, to remove the obstruction was filed only on 22.03.2004, which is

beyond the period of 30 days and therefore, E.A. No. 58 of 2004, is also barred by time.

6. In support of his contention, the learned Counsel also relied upon the judgments reported in (2001) 4 C.T.C. 495 in the case of [Antonyswami

v. Arulanandam Pillai (Dead)by L.Rs. and Anr.], A.I.R (2001) S.C. 279 in the case of (Ratansingh v. Vijaysingh; (2001) I C.T.C. 683 in the

case of and A. Krishnaraj Vs. T. Vasantha Gopal and others, .

7. The learned Counsel also submitted that the Lower Appellate Court, having held that the First Appeal is not maintainable, ought not to have

dismissed the appeal on merits and the findings of the Lower Appellate Court, that the First Appeal, is not maintainable is also erroneous and

against the order passed in application filed under Order 21, Rule 97 of Code of Civil Procedure, appeal alone lies. In support of that contention,

the learned Counsel relied upon the judgments reported in S. Rajeswari Vs. S.N. Kulasekaran and Others, , Sudhir V. Joshi Vs. E. Kanniappan

and Another, ; Janaki Ammal Vs. Ganapathi Konar and Others, and AIR (2004) Mad 387 in the case of (Nallasivam v. Dakshinamurthy and

Anr.).

8. Mr. S. Kamadevan, the learned Counsel appearing for the Respondents submitted that E.P. No. 47 of 2003, for delivery of the property was

not barred by limitation, as admittedly, the Appellants filed O.S. No. 506 of 1992, for declaration against the Respondents 1 to 5 herein, who

were the decree holders in O.S. No. 520 of 1981 and obtained the order of injunction in I.A. No. 428 of 1992, restraining the Respondents from

taking delivery of the property and though the suit was dismissed on 08.02.1993, it was subsequently, restored on various dates and dismissed on

various dates and finally, it was dismissed only on 12.07.2002. Therefore, after the interim stay was vacated by reason of the dismissal of the suit

in O.S. No. 506 of 1992, on 12.07.2002, the petition in E.P. No. 47 of 2003, was filed and therefore, it is within the period of limitation.

9. The learned Counsel further submitted that even though, it was claimed by the Appellants that obstruction was made on 18.02.2004, application

can be filed to remove the obstruction on the basis of the subsequent obstruction caused by the obstructors and it is the case of the Appellants that

they continued to obstruct the decree holders/Respondents 1 to 5 and therefore, the new cause of action has arisen for removal of the obstruction.

Therefore, the application filed in E.A. No. 58 of 2004, was well within time and it

is also not barred by Article 129 of the said Act.

10. The learned Counsel also submitted that the Appellants have no locus standi to obstruct the delivery of the suit property in pursuant to the

order and decree passed in O.S. No. 520 of 1981. Admittedly, the Appellants have purchased the property during the pendency of the suit from

the Defendants in O.S. No. 520 of 1981. Therefore, their purchase is hit by doctrine of lis pendens and as per the provisions of Order 21, Rule

102, of Code of Civil Procedure, they can not challenge the Execution Petition filed by the decree holders and relied upon the judgments reported

in Usha Sinha Vs. Dina Ram and Others, , and (2002) V. C.T.C. 483 (Banumathi @ Karunaammal v. A.P. Athanari and three Ors.) in support

of his contention.

11. The learned Counsel submitted that though the suit in O.S. No. 506 of 1992, was dismissed on 08.02.1993, the same was restored on various

dates by filing of petitions by the Appellants and therefore, when the suit was restored, the interim orders passed in interlocutory applications were

also restored. Hence, there was injunction against the Respondents 1 to 5, from taking delivery of the property till 12.07.2002, the date on which

O.S. No. 506 of 1992, was finally disposed of. Therefore, there is no limitation and relied upon the judgment reported in AIR (1935) Mad 365 in

the case of (Veeraswamy v. Ramanna) in support of his contention.

12. The learned Counsel lastly submitted though the appeal is maintainable against the decree passed in a petition filed under Order 21, Rule 97 of

the Code of Civil Procedure, the Lower Appellate Court dismissed the appeal on merits and also found that the appeal is not maintainable and

therefore, it cannot be stated that the Lower Appellate Court without considering the merits of the case, dismissed the appeal on technical ground.

13. Heard the learned Counsel on either side.

14. It is admitted that O.S. No. 520 of 1981, was decreed on 10.02.1982 and the Respondents 6 to 9 were the Defendants in that suit. That suit

was filed for specific performance of an agreement of sale and the decree holders viz., Respondents 1 to 5 herein filed E.P. No. 50 of 1991, to

execute the sale deed and the same was executed by the Court on 02.03.1992.

15. Further, it is also admitted that the Appellants filed O.S. No. 506 of 1992, for declaration of title to the suit properties on the basis of the

purchase of the properties from the Defendants in O.S. No. 520 of 1981, viz., the Respondents 6 to 9 herein and also obtained injunction,

restraining the decree holders in O.S. No. 520 of 1981, from taking delivery of the property, pursuant to the decree passed in O.S. No. 520 of

1981 and the suit was dismissed on 08.02.1993 and subsequently, it was restored and dismissed on various occasions and finally it was dismissed

on 12.07.2002.

16. It is settled law that whenever interim orders were passed in a suit and when the suit was dismissed, the interim order passed will also merge

with the order of dismissal and when the suit was restored, the interim order already passed will get revived. This principle has been laid down in

the judgment reported in (1935) Madras 365 (supra) and the same principles has been reiterated by the First Bench of this Court in the judgment

reported in (2011) 1 M.L.J. 861 in the case of (B. Gurubackiam v. State of Tamil Nadu). In the above decision of First Bench of this Court relied

upon the judgment of the Hon"ble Supreme Court reported in Vareed Jacob Vs. Sosamma Geevarghese and Others, wherein, the Hon"ble

Supreme Court has held that the order of stay pending the disposal of a suit or proceedings are ancillary orders and in cases where such suit or

proceedings, dismissed for default, is restored by the order of the Court then all ancillary orders stand revived, and held that on restoration of suit,

interim order shall stand revived.

17. In this case also it is seen from the suit register in O.S. No. 506 of 1992, the suit, which was dismissed for default on 08.02.1993, was

restored on various occasions after dismissal and finally, it was dismissed on 12.07.2002. It is further seen from the proceedings in I.A. No. 428 of

1992, in O.S. No. 506 of 1992, injunction order was passed, restraining the decree holders in O.S. No. 520 of 1981, who were the Defendants

in O.S. No. 506 of 1992, from taking delivery of the property and it was extended till the suit was dismissed on 08.02.1993. Therefore, when the

suit was restored, at the instance of the Appellants, the ancillary orders of injunction was also revived and it came to an end only on the disposal of

the suit on 12.07.2002. The Execution Petition in E.P. No. 47 of 2003, for delivery of the property was filed by the Respondents 1 to 5, within

three years from the date of the dismissal of the suit in O.S. No. 506 of 1992 on

12.07.2002, and therefore, E.P. No. 47 of 2003, is not barred

by limitation, as it was filed within three years, from the date of dismissal of the injunction order granted in I.A. No. 428 of 1992, in O.S. No. 506

of 1992. As the decree holders/Respondents 1 to 5, were prevented from taking delivery of the property by reason of the injunction order passed

in I.A. No. 428 of 1992 in O.S. No. 506 of 1992, they were not able to file the Execution Petition and as a matter of fact, they filed E.P. No. 79

of 1992 and that execution petition was closed by the Court on the basis of the injunction order passed in I.A. No. 428 of 1992. Therefore, after

the disposal of the suit in O.S. No. 506 of 1992, finally on 12.07.2002, E.P. No. 47 of 2003, was filed and it is only a continuation of the earlier

Execution Petition and hence, E.P. No. 47 of 2003, was filed within three years from the date of dismissal of I.A. No. 428 of 1992 and it is well

within time and not barred by limitation.

18. The judgments relied upon by the learned Counsel appearing for the Appellants also reiterated the same position that when there is no stay of

the operation of the decree or execution of the decree, the decree has to be executed within 12 years and in this case, as stated supra, there was

injunction order passed in I.A. No. 428 of 1992, restraining the Defendants/ Respondents 1 to 5 from taking delivery of the property and hence,

the execution petition filed within three years from the date of disposal of that injunction application is well within time. Therefore, the substantial

questions of law C, D and E are answered against the Appellants.

19. No doubt, the Lower Appellate Court has held that the appeal is not maintainable. Nevertheless, the Lower Appellate Court dealt with the

merits of the matter and held that the petition in E.P. No. 47 of 2003, is not barred by limitation and also held that the appeal is not maintainable.

20. As rightly submitted by the learned Counsel appearing for the Appellants that against the order passed in application filed under Order 21,

Rule 97 of the Code of Civil Procedure, appeal alone lies and therefore, the findings of the Lower Appellate Court that the appeal is not

maintainable is erroneous. However, the Appellants cannot take advantage of that findings, inasmuch as the Lower Appellate Court has dealt with

the matter and dismissed the appeal on merits. Therefore, the substantial question of law A is answered in favour of the Appellants, holding that the

appeal filed is maintainable and the substantial questions of law A and B are answered against the Appellants.

21. It is submitted by the learned Counsel appearing for the Appellants that obstruction was made on 18.02.2004, and the application in E.A. No.

58 of 2004, to remove the obstruction caused by the Appellants was filed only on 22.03.2004, and as per the provisions of Article 129 of the said

Act, that application ought to have been filed within 30 days from the date of the obstruction caused by the Appellants and admittedly, it was filed

beyond the period of 30 days. Therefore, it is barred by limitation.

22. The submission made by the learned Counsel cannot be accepted in the light of the decision of the Supreme Court reported in Bhanwar Lal

Vs. Satyanarain and another, . In that judgment, the Hon''ble Supreme Court has held that the decree holder gets a right under Rule 97 of the

Code of Civil Procedure, to make an application against the third parties to have his obstruction removed and each occasion of obstruction or

resistance furnishes a cause of action to the decree holder to make an application for removal of the obstruction or resistance by such person. The

same principle was followed in the decision reported in AIR 1998 Mad 17 in the case of (Adimoolam Mudaliar v. PL. Unnamalai Achi and Ors.).

23. Therefore, even though the first obstruction was caused on 18.02.2004, as the Appellants continued in obstructing delivery of property by the

decree holders, each day obstruction gives rise to new cause of action and therefore, the petition is not barred under Article 129 of the said Act.

Further, the Appellants cannot obstruct to the delivery of property, inasmuch as they are purchaser pendente lite and Order 21, Rules 98 to 102,

makes it clear that nothing in Rules 98 to 102 shall apply to the resistance or obstruction in execution of the decree for possession immovable

property by a person, to whom the judgment-debtor has transferred the possession, after the institution of the suit in which the decree was passed.

Order 21, Rule 98 deals with the question to be decided and Order 21, Rules 98 to 100, deal with the determination of question relating to

obstruction and delivery and as per Order 21, Rule 102, the transferee pendente lite cannot question the same. This principle was laid down in the

judgment reported in Usha Sinha Vs. Dina Ram and Others, wherein the Hon''ble Supreme Court had held as follows:

Bare reading of the Rule 102 of Order 21 of CPC makes it clear that it is based on justice, equity and good conscience. A transferee from a

judgment-debtor is presumed to be aware of the proceedings before a Court of law. He should be careful before he purchases the property which

is the subject matter of litigation. It recognizes the doctrine of *lis pendens* recognized by Section 52 TPA. Rule 102 of Order 21 CPC thus takes

into account the ground reality and refuses to extend helping hand to purchasers of property in respect of which litigation is pending. If unfair,

inequitable or undeserved protection is afforded to a transferee *pendente lite*, a decree-holder will never be able to realize the fruits of his decree.

Every time the decree-holder seeks a direction from a Court to execute the decree, the judgment-debtor or his transferee will transfer the property

and the new transferee will offer resistance or causes obstruction. To avoid such a situation, the Rule has been enacted.

24. The Hon'ble Supreme Court also in the judgment reported in (2002) 5 C.T.C. 483 (*supra*) held that the transferee *pendente lite* cannot

question the execution. Therefore, I hold that the Execution Petition filed by the decree holders Respondents 1 to 5 is not barred by limitation and

the Appellants have no *locus standi* to obstruct the delivery of possession, as they are transferee *pendente lite*. Hence, the substantial questions of

law F and G are also answered against the Appellants.

25. In the result, the judgment and decree of the Courts below are confirmed and this Civil Miscellaneous Second Appeal is dismissed. No costs.

Consequently, connected Miscellaneous Petition is also dismissed.