

(1962) 01 MAD CK 0011

In the Madras High Court

Case No : Second Appeal No. 1179 of 1959

Tirugnana Sambanda Mudaliar

APPELLANT

Vs

Meenakshi Ammal and Others

RESPONDENT

Date of Decision : 05-01-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97, 151, 47
Evidence Act, 1872 — Section 115

Citation : AIR 1963 Mad 144 : (1962) 75 LW 444

Hon'ble Judges : Ramakrishnan, J

Bench : Single Bench

Advocate : R. Sundaravaradan, for the Appellant; P.C. Parthasarthy and P. Parthasarthy, for the Respondent

Final Decision : Allowed

Judgement

Ramakrishnan, J.—The first defendant in O. S. No. 70 of 1957 on the file of the District Munsif's Court, Chingiepur, is the appellant herein.

The prior facts necessary for a consideration of this appeal are briefly the following.

2. The plaintiff, Meenakshi Ammal, obtained a decree for maintenance against defendants 2 to 4 and their brothers, and father, in O. S. No. 8 of

1945 on the file of the Sub-Court, Chingleput. The maintenance decree imposed a charge on the one-third undivided share in two Items comprised

in the schedule to the plaint in the present suit and also another item, 372/2, 4 acres and 30 cents in extent. The plaintiff brought the plaint schedule

properties to sale for arrears of maintenance accrued due in 1951. In the court auction sale, the first defendant who is the father-in-law of the

second defendant, purchased the suit properties and the sale was confirmed on 12-8-53. It is common ground that in the sale proclamation, there

was no specific reference that the properties were subject to charge for arrears of future maintenance. For the arrears of maintenance which fell

due In September 1953 and March-September 1954 the plaintiff again filed another E. P. in 1953, brought the suit properties to sale, purchased

them in court auction and the sale was confirmed in June 1955. It is common ground that in this execution petition the plaintiff did not make the first

defendant a party. When she went to take delivery she was obstructed by the first defendant. She filed a petition for removal of the obstruction but

it was dismissed. This was on 12-6-1958. The plaintiff filed the present suit on 4-10-1956. In the plaint as originally framed the prayer was for

declaration of the plaintiffs title to the suit properties and for recovery or possession of the entirety of the suit properties. The plaintiff also alleged

the 1st defendant was a nominal purchaser for the other defendants. She subsequently amended the plaint and the prayer after the amendment was

for setting aside the summary order of the Subordinate Judge in the execution proceedings above mentioned.

3. The first defendant pleaded that he did not know about the charge for maintenance at the time when he purchased the property. Since the

plaintiff did not mention about the existence of this charge in the sale proclamation it must be assumed that she had waived the charge. The sale in

favour of the plaintiff will not be valid and binding because the first defendant was not impleaded as a party in the subsequent execution petition. In

any event, the dispute related to a matter pertaining to execution and the plaintiff's remedy was to file an appeal against the order of the learned

Subordinate Judge and an independent suit was not maintainable.

4 . Defendants 2 to 5 filed a separate written statement and after adopting some of the contentions of the first defendant they pleaded that after the

sale in favour of the first defendant, they had no longer any interest in the properties.

5. The learned District Munsif held that the suit was barred u/s 47, C. P. C. and that the remedy of the plaintiff was to file an appeal from the order

of the Sub-ordinate Judge. He also observed that in essence the plaintiff asked for a declaration and possession, whereas the relief should have

been only to set aside the summary order. He also observed that the plaintiff's relief, in any event, would be only to ask for partition of one-third

share In the property which alone was the subject of the charge for maintenance. The learned District Munsif was also inclined to hold that the plaintiff was not estopped from claiming any right to the property by her conduct and representation at the time of the first execution sale. The trial

court found that the main defect in the plaintiffs ease was her failure to implead the first defendant in the second execution petition and, therefore,

she could not claim any relief as against the first defendant, by virtue of her purchase in court auction of the suit properties, in the execution

proceedings in E. P. No. 93 of 1953. The plaintiff's suit was, therefore, dismissed. The plaintiff appealed to the learned District Judge, Chingleput,

The learned Judge took up two points for consideration: (1) whether the first defendant had purchased the suit properties free of the plaintiff's

claim for maintenance as a charge, and (2) to what relief?

6. The appellate court found that the purchase by the first defendant was subject to future maintenance claimed due to the plaintiff and that such

maintenance claim was a recurring charge on the property. Thereafter the District Judge partly allowed the appeal, and after setting aside the

decree of the trial court, granted a declaration in favour of the plaintiff that she was entitled to enforce her claim against the first defendant, in

respect of the suit properties which he had purchased, and which were the subject-matter of the charge in favour of the plaintiff, and that it will be

open to the first defendant to pay the recurring future maintenance to the plaintiff and satisfy her claim. From the above decision, this second appeal

is filed by the first defendant.

7 . The learned counsel appearing for the first defendant (appellant herein) contended that the plaintiff is a decree-holder, and the first defendant is

a representative of the judgment-debtor, and consequently, if the plaintiff is aggrieved against the order passed against her in the execution

proceedings, her relief is by way of appeal, and a separate suit is barred u/s 47 C. P. C. Next, it was contended by the appellant, that since the

plaintiff did not mention the existence of a charge for future maintenance in the proclamation of sale, it must be inferred that she had waived that

charge, and that therefore, the first defendant purchased the property free from liability for future maintenance. Thirdly, it was urged that the relief

granted by the lower appellate court by way of declaration, and the liability of the

property for future maintenance, fell outside the scope of the relief which the plaintiff had sought in the plaint, and that therefore, the court should not have modified the trial court's decree and granted relief as stated above. In fact, the plaintiff should have prayed for the setting aside of the summary order, and consequential relief of partition and possession of one-third share in the property; the suit as framed for a mere declaration without consequential relief was bad and should have been dismissed.

8. Taking up the last point, the order in E. A. no. 264 of 1955 in O. S. No. 8 of 1945 shows that the plaintiff applied under Order 21 Rule 97 and

Section 151, C. P. C. to the executing court, to remove the obstruction by the present first defendant whom she designated as a third party, and to

order delivery of possession. The application was dismissed. Though in the application, the first defendant was described as a third party, the first

defendant has purchased the entire interest of the judgment, debtors in the maintenance suit, in the property charged for maintenance. The first

defendant as the third party auction purchaser of the property brought to sale in execution of a charge decree, is a representative of the judgment-

debtor (vide A. Mallari Rao Vs. Sivagnana Vandayar, The plaintiff is the decree-holder and continues to be so even after she has purchased the

properties in court sale. Such decree-holder auction purchaser continues to be decree-holder and proceedings at her instance for delivery of

possession must be deemed to relate to the execution, or discharge or satisfaction of the decree within the meaning of Section 47 C, P. C.

(Krishna Iyer v. Subramania Iyer, AIR 1939 Mad 369. Therefore, the trial court's view that the plaintiff's suit is barred u/s 47 C. P. C. is correct.

A perusal of the judgment of the lower appellate court shows that while summarising the contentions of the plaintiff-appellant in paragraphs 7 and

8, no reference at all has been made to the finding of the trial court against the plaintiff in regard to the bar of the suit u/s 47 C. P. C. The plaintiff as

me appellant had to satisfy the lower appellate court that the decision of the trial court holding Section 47 to be a bar, was erroneous, and that the

court had jurisdiction to grant relief in the suit itself to the plaintiff. Without giving any finding that the trial court's decision was wrong in this

respect, the lower appellate court should not have proceeded to give any relief to

the plaintiff. Similarly, the frame of the plaintiff's suit is defective.

If the relief is viewed as one for declaration and possession, the plaintiff has ignored the fact that her title is restricted to one third share, in which

case, she should have sued for partition and possession. If the relief is viewed as one for a declaration setting aside the summary order, she should

have sued for the consequential relief of partition and possession. The appellate court has paid no attention to these points. For all the above

reasons the decree of the lower appellate court appears to be erroneous, and requires to be set aside.

9. The above finding is sufficient to dispose of this second appeal filed by the first defendant. However, at the time of the argument before me, two

other points were argued and I propose to touch upon them briefly. The first point relates to the omission to mention the existence of the charge for

future maintenance in the sale proclamation on the first execution petition, wherein the first defendant bought the property. The plea of waiver of the

right to future maintenance as well as the plea of estoppel against claiming such future right, were raised as against the plaintiff. Two decisions were

cited in this connection by the appellant. The first is AIR 1948 142 (Nagpur) where there is an observation:

Where a right to a charge and a right of residence given by the maintenance decree to the decree-holder are not mentioned in the sale

proclamation, the decree-holder is prima facie estopped from enforcing the rights against the auction purchaser.

These observations were however made in a particular context, where the auction purchaser failed to deposit the prescribed 25 per cent of the

balance of the purchase money, and had to face subsequent proceedings for enforcing the liability to pay the difference in price realised at a

subsequent auction through his default, wherein also he was the auction purchaser. The auction purchaser attacked the first sale on the ground that

the sale proclamation did not mention the charge for maintenance. It was in such a context that the above observations had been made and must,

therefore, be interpreted only in that context. *Sivakami Ammal Vs. C. Ganpathia Pillai and Another*, dealt with a case where a Municipality in

bringing the property to sale for arrears of property tax failed to notify the existence of another similar decree for arrears for a subsequent period.

The Municipality by its failure to mention the latter decree was estopped from asserting any claim to bring the property to sale in enforcement of the charge under the decree for subsequent years. Therefore the right of the auction purchaser under the first decree was declared as against the right of the auction-purchaser in execution of the decree for the subsequent years. The facts of the above decision can be distinguished on the ground that the auction-purchaser therein under the first decree had no means of knowing the existence of the subsequent decree in the absence of any reference to it in the sale proclamation. He could very well have been under the impression that the only charge on the property was what was mentioned in the proclamation. There is also another unreported decision of Ramachandra Iyer J. (as he then was) in A. A. O. No. 82 of 1959, which was also referred to by the learned counsel for the appellant. There the maintenance-holder who had a charge on certain property brought it to sale for arrears of maintenance, purchased the property in court auction, and took delivery. Then she sold a portion of it to the appellant, after stipulating in the sale deed that the property was free of all encumbrances. In view of this assurance, it was held that by implication the maintenance decree-holder should have released her future rights to proceed against the property sold to the appellant. The facts are clearly distinguishable from those in the present case. On the other hand, the learned counsel for the respondents cited a Bench decision of this court in *Thangavelu v. Thirumaiswami*, 1955 2 MLJ 618 : AIR 1956 Mad 67, and at p. 621 (of Mad LJ); (at p. 69 of AIR) of the report, it is mentioned:

. . . no auction-purchaser could be heard to say that he purchased the properties in court auction without the knowledge of even the very decree itself under which the properties were brought to sale ... for he must be deemed to have had notice of the charge created by the decree in the execution of which he was purchasing." " "

Again at p. 624 (of Mad LJ): (at p. 71 of AIR) there is this observation:

A maintenance decree creating a charge on the properties is not one single decree but is comprised of as many decrees for payment and realisation of the properties charged as and when there were defaults and that the purchase by the decree-holder in any previous execution of one of the items of the properties charged could not attract the operation of Section

60 when a fresh execution was taken for realisation of the further maintenance-accrued due by the default of the judgment-debtor.

Therefore, if a decision is required to be given on these further contentions in this appeal, I would uphold the trial court's finding; but, as already observed, in view of term frame of the suit and also the bar u/s 47 C. P. C.. it is not necessary to give a conclusive decision on these points in these proceedings. It will be more appropriate to go into them, when the plaintiff seeks to proceed against the properties in the hands of the first defendant for arrears of maintenance as and when they accrue in future.

10. In the result the appeal is allowed, the decree of the lower appellate court is set aside and the decree of the trial court is restored. In the circumstances there will be no order as to costs.

11. In view of the above, the memo of cross objections filed by the plaintiff respondent is dismissed, out without costs. No leave.