
(2009) 04 MAD CK 0170

In the Madras High Court

Case No : S.A. No. 569 of 2008 and M.P. No. 1 of 2008

Vaenda and Others

APPELLANT

Vs

D.G. Narasimhan, Vijayarangan @ Vijayan and Murugan

RESPONDENT

Date of Decision : 24-04-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Limitation Act, 1963 — Section 28

Citation : (2009) 04 MAD CK 0170

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : M. Sriram, for the Appellant; T.R. Rajaraman, for the Respondent

Final Decision : Dismissed

Judgement

G. Rajasuria, J.—This second appeal is focussed by the original defendants 5 to 10, animadverting upon the judgement and decree dated

18.09.2007 passed in A.S. No. 62 of 2006 by the Sub Court, Ranipet, confirming the judgement and decree of the trial Court, namely, District

Munsif Court, Sholinghur, in O.S. No. 144 of 2004. For convenience sake, the parties are referred to hereunder according to their litigative status

before the trial Court.

2. A summation and summarisation of relevant facts which are absolutely necessary and germane for the disposal of this Second Appeal would run

thus:

The plaintiff/respondent filed the suit O.S. No. 144 of 2004 as against the defendants for recovery of possession. The defendants entered

appearance and D6, D7 and D9 filed the written statement resisting the suit.

3. The trial Court framed the relevant issues. During trial, the plaintiff examined himself as P.W.1 and Ex.A1 was marked. On the side of the

defendants, D.Ws.1 and 2 were examined and Exs.B1 to B4 were marked.

4. Ultimately, the trial Court decreed the suit, as against which the appeal was filed, for nothing but to be dismissed by the First Appellate Court,

confirming the judgment and decree of the trial Court. Being disconcerted and aggrieved by the judgment and decrees of both the Courts below,

this Second Appeal is sought to be filed on various grounds and also by suggesting the following alleged substantial questions of law:

1. Whether the Lower Appellate Court is justified in confirming the judgment and decree of the trial Court?

2. Whether the courts below are justified in not considering the well settled legal propositions of law?

3. Whether the Courts below are justified in decreeing the suit in the absence of availing the specific provisions by the plaintiff as contemplated u/s

135 of Limitation Act, 1963 and Order 21 Rule 95 r/w Section 47 of CPC?

4. Whether the Courts below are justified in granting the relief based on Article 65(c) of Limitation Act, 1963 when there is no specific pleading as

to the possession of third party on the date of proclamation of sale by the plaintiff?

5. Whether the Courts below are justified in not framing necessary issues regarding the character of possession and the applicability of the Article

65 of the Limitation Act and the finding given without giving opportunity to the appellant?

6. Whether the Courts below are justified in giving finding contrary to the admission made in the plaint regarding possession by the appellant as

Legal Representatives of the judgment debtors?

7. Any other substantial question of law that may arise for consideration in the above Second Appeal?

(extracted as such)

5. Heard both sides.

6. A plain poring over and perusal of the typed set of papers including the copies of the judgments of both the Courts below and also consideration

of the arguments on either side would demonstrate and display that the plaintiff filed the suit for recovery of possession on the strength of the suit

property having been purchased by him in the Court auction sale dated 27.11.1991 which was confirmed on 03.06.1996; E.P. was not filed within

a period of one year after delivery of possession; consequently, the plaintiff resorted to filing the present suit for obtaining delivery of possession;

the trial Court decreed the suit based on the confirmation of the Court auction sale in favour of the plaintiff and also pointed out that 12 years"

limitation was not applicable, as against which the First Appeal was filed and ultimately, the First Appellate Court dismissed the suit.

7. Disputing and remonstrating the findings of both the Courts below, this Second Appeal has been filed setting out various grounds including the

main ground that the suit itself was not maintainable in view of the embargo as found embodied u/s 134 of the Limitation Act as well as Section 47

of C.P.C.

8. The learned Counsel for the appellants in the Second Appeal would advance his argument to the effect that no separate suit is maintainable in

view of the fact that there is a special provision in the Limitation Act for obtaining delivery, i.e. Article 134 within a year; over and above that

Section 47(c) of CPC would contemplate that all disputes relating to such matters should be dealt with by the concerned Court and not by a

separate suit.

9. Presumably, the learned Counsel for the appellants herein based on the following maxims

1. Expressum facit cessare tacitum : Express mention precludes implication.

2. Expressio unius est exclusio alterius : Express mention of one implies exclusion of others.

3. Generalia specialibus non derogant : General things do not derogate from specific things.

developed his argument.

These are all sister provisions which would highlight and spotlight the fact that when there is a special provision for obtaining certain remedies, the

party is not allowed to make use of general remedy. In fact, the gist and kernel, the pith and marrow of the argument of the learned Counsel for

plaintiff is only based on those principles. Further, in support of his contention, he would also cite the decision of the Hon"ble Apex Court reported

in Ganpat Singh (Dead) by Lrs. Vs. Kailash Shankar and Others, . An excerpt

from it would run thus:

9. Section 47 itself has nothing to do with the question of limitation. Article 136 prescribes a period of limitation of 12 years for the execution of a decree from the date on which the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods when default in making any payment or delivery in respect of which execution is sought, takes place. After a decree is put into execution within the period of limitation under Article 136, questions relating to execution, discharge or satisfaction of the decree may arise and such questions including the question as to the delivery of possession shall be determined by the executing court. When a property is sold in execution of a decree, an application for setting aside the sale may be made under Rule 89, 90 or 91 of Order 21 of the CPC by the persons and on grounds as mentioned therein. Such an application has also to be made within the prescribed period of limitation of sixty days from the date of sale under Article 127 of the Limitation Act, 1963. Article 134 prescribes a limitation of one year for an application for delivery of possession by a purchaser of immovable property at a sale in execution of a decree. The limitation of one year will be computed from the date the sale becomes absolute. Such an application for delivery of possession can be filed only after the decree is put into execution within the period of limitation as prescribed by Article 136 of the Limitation Act. The periods of limitation prescribed by Articles 136 and 134 are for two different purposes, the former being for the execution of a decree for possession in respect of which decree is passed and the latter for an application for delivery or possession of immovable property which is purchased in the course of execution of a decree. The two articles have nothing in common for their operation and it is not readily understandable how the two articles stand in conflict with each other. An application for delivery of possession of immovable property purchased in execution cannot, by any stretch of imagination, be construed as an application for execution of a decree for possession of property so as to invoke the provision of Article 136 of the Limitation Act. Merely because the auction-purchaser will be deemed to be a party in the suit in which the decree has been passed, as provided in

clause (a) of Explanation II to Section 47 of the Code, and by virtue of clause (b) of Explanation II all questions relating to delivery of possession

of the property shall be deemed to be questions relating to execution, discharge or satisfaction of the decree within the meaning of Section 47, an

application for delivery of possession under Order 21 Rule 95 of the CPC cannot be equated with an application for the execution of a decree for

possession so as to apply 12 years" period of limitation as prescribed by Article 136 of the Limitation Act.

11. It appears that the learned Judge of the High Court has misunderstood the scope of the provision of Section 47 of the CPC and that of the

provisions of Articles 134 and 136 of the Limitation Act, 1963. It may be that before the amendment of Section 47 of the Code, an auction-

purchaser could file a suit for recovery of possession of the property within 12 years from the date of sale, but in view of the amendment of Section

47 of the Code such a suit cannot be filed. But that is no ground for holding that Article 136 of the Limitation Act would apply to an application for

delivery of possession. Under the old Limitation Act of 1908, an application for delivery of possession could be made within three years from the

date on which sale became absolute as prescribed by Article 180 of that Act, but under Article 134 of the Limitation Act, 1963 such application

can be made within one year from the date on which sale became absolute. Thus the period of limitation for delivery of possession of property

purchased at the court sale has been reduced to a considerable extent, but that also cannot be taken into consideration for the purpose of

interpretation of the provisions of the Limitation Act. It is for the legislature to prescribe the period and the court is only to see whether any

particular application has been filed within that period. In the instant case, as stated already, the scope of Articles 134 and 136 and their subject-

matters being completely different, the question of implied repeal of Article 134, as held by the learned Judge of the High Court, does not at all

arise. We would, accordingly, hold that Article 134 will apply to an application under Order 21 Rule 95 of the CPC by the auction-purchaser for

delivery of possession of the property sold in execution of a decree.

10. I would like to point out that the ratio decidendi of the said decision is on the fact that E.P. cannot be filed after one year"s period. However,

the other decisions cited on the side of the respondents/plaintiffs herein would run thus:

1. Pattam Khader Khan Vs. Pattam Sardar Khan and Another, . An excerpt from it would run thus:

11. Order 21 Rule 95 providing for the procedure for delivery of property in occupation of the judgment-debtor etc., requires an application being

made by the purchaser for delivery of possession of property in respect of which a certificate has been granted under Rule 94 of Order 21. There

is nothing in Rule 95 to make it incumbent for the purchaser to file the certificate along with the application. On the sale becoming absolute, it is

obligatory on the court though, to issue the certificate. That may, for any reason, get delayed. Whether there be failure to issue the certificate or

delay of action on behalf of the court or the inaction of the purchaser in completing the legal requirements and formalities, are factors which have no

bearing on the limitation prescribed for the application under Article 134. The purchaser cannot seek to extend the limitation on the ground that the

certificate has not been issued. It is true though that order for delivery of possession cannot be passed unless sale certificate stands issued. It is

manifest therefore that the issue of a sale certificate is not sine qua non of the application, since both these matters are with the same court. The

starting point of limitation for the application being the date when the sale becomes absolute i.e. the date on which title passed, the evidence of title,

in the form of sale certificate, due from the court, could always be supplied later to the court to satisfy the requirements of Order 21 Rule 95. See

in this regard Babulal Nathoolal v. Annapurnabai, which is a pointer. It therefore becomes clear that the title of the court auction-purchaser

becomes complete on the confirmation of the sale under Order 21 Rule 92, and by virtue of the thrust of Section 65 CPC, the property vests in the

purchaser from the date of sale; the certificate of sale, by itself, not creating any title but merely evidence thereof. The sale certificate rather is a

formal acknowledgement of a fact already accomplished, stating as to what stood sold. Such act of the court is pristinely a ministerial one and not

judicial. It is in the nature of a formalisation of the obvious.

12. Such being the state of law on the subject, we fail to see how the High Court could have come to the conclusion that even though the sale

becomes absolute on confirmation under Order 21 Rule 92 CPC effectively passing title, the same can only be complete when evidenced by a sale

certificate issued under Order 21 Rule 94, and that unless the sale certificate is issued, limitation cannot start for the purpose of an application

under Order 21 Rule 95 CPC, vis-à-vis Article 134 of the Limitation Act, 1963. The High Court, in our view erred in holding that it is only

from the date when a sale certificate is issued, that the limitation starts running. Such view of the High Court would not only cause violence to the

clear provisions of Article 134 of the Limitation Act but have the effect of unsettling the law already settled.

2. Balakrishnan Vs. Malaiyandi Konar, An excerpt from it would run thus:

13. The limitation for the purpose of Article 134 starts from the date of confirmation of sale. (See Ganpat Singh v. Kailash Shankar) In Pattam

Khader Khan v. Pattam Sardar Khan this Court held that it is not from the date when sale certificate is issued that the limitation starts running. The

sale becomes absolute on confirmation under Order 21 Rule 92 of the Code effectively passing title. It cannot be said to attain finality only when

sale certificate is issued under Order 21 Rule 94. There can be variety of factors conceivable for which delay can be caused in issuing a sale

certificate. The period of one-year limitation now prescribed under Article 134 of the Limitation Act in substitution of a three-year period

prescribed under Article 180 of the Limitation Act, 1908 is reflective of the legislative policy of finalising proceedings in execution as quickly as

possible by providing a quick forum to the auction-purchaser to ask for the delivery of possession of the property purchased within that period

from the date of the sale becoming absolute rather than from the date of issuance of the sale certificate. On his failure to avail such a quick remedy

the law relegates him to the remedy of a regular suit for possession based on title, subject again to limitation.

11. A plain reading of the Apex Court's judgments, would leave no doubt in the mind of the Court that the Hon'ble Apex Court set at rest the

controversy that a party who failed to avail the quicker remedy of filing an E.P. and taking delivery within one year from the date of confirmation of

sale, could file a suit for delivery within a period of 12 years as contemplated under the Limitation Act. On this very same type of controversy this

Court held unambiguously and unequivocally, incontrovertibly and indubitably that filing E.P. and taking delivery is quicker and that in no way

would preclude the party from seeking delivery of possession resorting to the common law remedy of obtaining delivery within a period of 12

years. The recent two judgments of the Hon''ble Apex Court cited supra settled the law on that point.

12. Over and above that, the learned Counsel for the respondents also cited a decision of this Court reported in *The Nazareth Cooperative*

Building Society Limited Vs. Kanakaraj (died), Mrs. Alexandra Florence, K. Manoharan, M. Kirubakaran and Mrs. Rajathi, . An excerpt from it

would run thus:

18. The decision referred to above would not only disclose that the period of one year prescribed under Article 134 of the Limitation Act is only

for filing a petition in Execution Court but also for filing a suit based on title within a period of 12 years. The above said decision further would

disclose that possession of the property can be taken by the auction purchaser not only through Execution Court or by an amicable arrangement

with the judgment debtor but also by other way. But in this case, the respondents herein are seriously fighting with the appellant Society from taking

delivery of possession inspite of the purchase made by the appellant Society and that, therefore, there is no chance of taking possession by

amicable settlement. But the appellant Society has negotiated with the tenant and had made him to attorn the tenancy in favour of the appellant

Society after disposal of the appeal in C.M.A. (CS) No. 9 of 1980 referred to above and got possession on 31.1.1983 after institution of suit in

O.S. No. 688 of 1979 and also appeal in A.S. No. 148 of 1981 referred to above.

22. In *Shyam Nath and Others Vs. Durga Prasad etc.*, , it has been held that the rights of auction-purchaser were extinguished by Section 28 of

Limitation Act. Rights, if any, would accrue in favour of judgment-debtor and not in favour of objector if the auction purchaser had not filed an

application for delivery of possession of the property purchased in Court auction in execution of money decree within the period prescribed under

the relevant Article after the date of confirmation of sale and suit also was not instituted within 12 years from the date when sale became absolute.

23. In *Uma Shanker (dead) and others Vs. Sarabjeet (dead)* by L.Rs. and

others, , the Honourable Apex Court was pleased to hold as follows:

On assessment of evidence, the trial Court was right in coming to the conclusion that on account of the dispossession of Damri Lal after the

compromise decree, a fresh cause of action arose in his favour. There was no occasion for Damri Lal to have the compromise decree executed

since he has given possession under the compromise decree. It was his dispossession thereafter which gave rise to the next round of litigation. Such

litigation is not barred u/s 47 of the Civil Procedure Code. Section 47 bars a separate suit only in respect of questions relating to the execution,

discharge or satisfaction of the decree. If there is a subsequent dispossession after the decree for possession is complied with, a suit to obtain

possession is not barred simply because there was an earlier decree obtained by the plaintiff for possession which decree had been complied with.

In fact, there will be no question of executing the earlier decree when it has already been complied with.

25. The principles laid down by the High Courts and the Honourable Apex Court would disclose that the fact of not initiating proceedings u/s 47 of

the CPC as contemplated under Article 134 of the Limitation Act, which is for quicker remedy, cannot bar the auction purchaser to approach the

competent Court under common law to take delivery of possession within a period of 12 years from the date of the sale being made absolute.

Therefore, the contention raised by the learned Counsel appearing for the respondent that the suit is barred u/s 47 of the CPC cannot be sustained

in view of the case laws cited above.

In this judgment, even the scope of Section 47 of CPC has been considered and it was held that a separate suit is maintainable for obtaining

delivery of possession on the strength of the Court auction sale. Wherefore, to put simply both the Courts below au fait with law and au courant

with facts, recognising the right of the plaintiff to obtain ex debito justitiae delivery of possession, granted the relief, warranting no interference by

this Court. Hence I could see no substantial question of law involved in this matter and accordingly, the second appeal is dismissed. No costs.

Consequently, connected miscellaneous petition is closed.