

(1917) 11 MAD CK 0039
In the Madras High Court

Yamajala Sanjevudu

APPELLANT

Vs

Nakka Venkadu and Others

RESPONDENT

Date of Decision : 30-11-1917

Acts Referred:

Civil Procedure Code, 1882 — Section 335

Citation : AIR 1918 Mad 165 : 45 Ind. Cas. 24

Hon'ble Judges : Seshagiri Aiyar, J; Napier, J

Bench : Division Bench

Judgement

1. This is a suit by an auction-purchaser to recover possession. He applied in execution for possession, but was obstructed by defendants. The District Munsif passed the following order upon the application: "the counter-petitioner has no witnesses. It is not necessary to take evidence in this case. It is ordered that the property be delivered over to the petitioner at once. In case the counter-petitioners raise any further obstruction, they will be committed to jail". No attempt was made to obtain possession and we accept the finding of the Courts below that possession remained all along with the defendants. As more than 3 years had elapsed from the date of the order above referred to, the plaintiff brought this suit for possession basing his title on the sale certificate. The District Munsif held that the order for possession precluded the defendants from disputing plaintiff's title. On appeal, the Subordinate Judge held that the order for possession was not passed on investigation add that the defendants were not, therefore, estopped from showing that plaintiff acquired no title to the property. On the merits he found that the judgment-debtor, as whose property the suit site sold, had no title to it at the time of the auction sale and dismissed the suit.

2. We agree with his conclusion. u/s 335 of the old Code of Civil Procedure, the law provided for the investigation of the claim of an objector who did not derive title under the judgment-debtor. The present Code has abolished this provision. It was anomalous that the rights of a person who was no party to the suit should be concluded by summary proceedings in execution: and the Legislature has

removed this anomaly in the present Code. But as the present case is governed by the old Code, we have to see whether the order passed against the defendants has the effect of preventing them from showing that their title is superior to that of the plaintiff. Section 335 by its last clause provides that "the party against whom such order is passed may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit, if any, the order shall be final" This can only mean that the particular order, if given effect to, should not be allowed to be, reopened after a year; that is to say, if there was any application for delivery of possession within the time allowed by law, the defendant could not be heard to say that he would not deliver possession as he had a better title than the plaintiff. But where the order remained unexecuted, and the defendant continued to be in possession, he is not estopped from pleading, in defence to a suit for possession, that the plaintiff has no title to recover. He is not disputing the order passed in execution which Section 335 said was conclusive on him. He is contesting the plaintiff's right by proving that he has got a superior title. The decision in *Fidaye Shikdar v. Ozeecoddeen* 7 W.R. 87 is on all fours with the present case and we think that it was rightly decided. Mr. Justice Sadasiva Aiyar expresses concurrence with the view taken in that case in *Ayyaakkutti Mankondan v. Periasami Koundan* 31 Ind. Cas. 615: 2 L.W. 1184. it is not necessary to consider the arguments addressed to us that the learned Judge is wrong in his view that where possession of a share is given by the order of the Court, that is not actual possession we agree with him when he says that where the obstructor has not been dispossessed, the order does not conclude him in a subsequent suit from proving that the plaintiff has no title to sue.

3. As regards *Achuta v. Mammavu* 3 Ind. Dec. 1002 there was a finding that the objector had no title; consequently it was incumbent on him to sue to establish his title In *Muhamod v. Ayyappan* 9 M.L.J. 131 possession was given to the auction-purchaser which was not contested within a year. A subsequent suit by the objector based on title was disallowed apparently on the ground that the order as to possession which was carried into effect had to be vacated if the suit is to be decreed.

4. We think these authorities do not affect the present question. In our opinion the defendants whose possession was not disturbed by the order are entitled to sustain their right to continue in possession by proving that plaintiff's title is defective.

5. The decree of the lower Appellate Court is right and we dismiss the second appeal with costs.