

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

THURSDAY, THE 8TH DAY OF JANUARY 2015/18TH POUSHA, 1936

RFA.No. 252 of 2013

AGAINST THE JUDGMENT IN AS 154/2011 OF SUB COURT, IRINJALAKUDA

APPELLANT:

JAYAN KUTTICHAKKU,
S/O.KOCHUPAULY,
KUTTICHAKKU HOUSE,
KIZHAKKE CHALAKKUDY VILLAGE,
MUKUNDAPURAM TALUK

BY ADV. SRI.T.N.MANOJ

RESPONDENTS:

1. SIMON, S/O.MATHEW,
KARAKKUNNEL HOUSE,
KALLAURKKAD DESOM & VILLAGE,
MOOVATTUPUZHA TALUK,
REPRESENTED BY HIS POWER OF ATTORNEY HOLDER MATHEW
2. NAVODAYA KURIES (P) LTD.,
THRISSUR P.O, THRISSUR TALUK
3. KOCHUPAULY, S/O.AUGUSTY, KUTTICHAKKU HOUSE,
KIZHAKKE CHALAKKUDY VILLAGE, MUKUNDAPURAM TALUK
- 4.GEORGE, S/O. AUGUSTY, -DO -DO-
- 5.LILLY, D/O. AUGUSTY, DO-DO-
- 6.SUNNY, S/O.AUGUSTY, -DO-DO-
- 7.MARY JOSE, D/O.AUGUSTY
- 8.ROSSY JOY, C/O.MAZHUVANCHERYVEETIL JOY,
STATE BANK OF INDIA, THOTTAKKATTUKARA, ALUVA
- 9.LUCY KURUVILA, D/O.AUGUSTY,
KUTTICHAKKU HOUSE, KIZHAKKE CHALAKKUDY VILLAGE,
MUKUNDAPURAM TALUK

R4,R5,R7,R8 & 9 BY ADV. SRI.VIJAI MATHEWS

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON
11.12.2014, ALONG WITH OP(C)No. 3081/2011, THE COURT ON 8.1.2015 DELIVERED
THE FOLLOWING:

RFA.No. 252 of 2013

APPENDIX

APPELLANT's EXTS: NIL

RESPONDENTS EXTS:

ANN.R4(a):- COPY OF THE DEED NO.1303/1997 DTD 11.3.1997

ANN.R4(b):- COPY OF COUNTER AFFIDAVIT FILED BY THE MANAGING DIRECTOR OF
NAVODAYA KURIES (P) LTD. DTD 6.9.2010

ANN.R4(c):- COPY OF DEED NO.1312/1997 DTD 12.3.1997

ANN.R4(d):- COPY OF PROOF AFFIDAVIT DTD 7.6.2010

/TRUE COPY/

P.S.TO JUDGE

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K.ABRAHAM MATHEW J.

R.F.A No.252 of 2013 & OP(C) No.3081 of 2011

Dated this the 8th day of January, 2015

JUDGMENT

This appeal and Original Petition arise from the execution proceedings in O.S.No.1156 of 1991 on the file of Munsiff, Irinjalakuda. One Augusthy had in his ownership 20.265 cents. The adjoining 14.500 cents belonged to his wife, Kochamma. Augusthy was a judgment debtor in O.S.No.521 of 1991 in which a decree for realisation of certain amount was passed in favour of the plaintiff Kshemodayam Kuries. In execution of the decree his 20.265 cents was sold in 1999. The decree holder Kshemodayam Kuries was the purchaser. The sale was confirmed on 9.11.1999 and the property was delivered subsequently. Later, a grandson of Augusthy and Kochamma (herein after called the appellant-obstrucler) bought the property from Kshemodayam Kuries.

2. In O.S.No.1156 of 1991 on the file of Munsiff, Irinjalakuda Navodaya Kuries and Loans (P) Ltd. obtained a money decree against Augusthy, his wife, Kochamma, and their son Kochu Pauly , the last of whom is the petitioner in OP(c) No.3081 of 2011 and third respondent in the appeal. In execution of the decree, in E.P.No.1406 of 1994, Kochamma's 14.500 cents was sold. The purchaser was the decree holder Navodaya Kuries and Loans (P) Ltd., which is the second respondent in the appeal and which is herein after referred to as the decree holder. The sale was

confirmed on 22.2.1996. Ext A1 sale certificate was issued on 12.4.1996. The decree holder filed E.A.No.132 of 1997 for delivery of the property. During the pendency of that application the decree holder sold the property to the judgment debtor Kochamma by Ext A2 sale deed dated 11.3.1997. The very next day by Ext A3 sale deed Kochamma sold the property to the first respondent in the appeal.

3. The first respondent filed E.A.No.589 of 1997 to get himself impleaded in E.A.No.132 of 1997 filed by the decree holder for delivery of the property. Judgment debtor Kochamma died. Some of her legal representatives including judgment debtor No.3 Kochu Pauly, who is the petitioner in the present O.P and third respondent in the appeal, filed E.A.No.201 of 1999 to set aside the ex parte order passed in the Execution Petition. It was dismissed. C.R.P.No.394 of 2003 filed by them challenging the order was dismissed by this court. The first respondent filed E.A.No.981 of 2003 for breaking open the lock of the gate of the property sought to be delivered and for getting the property identified on the basis of the boundaries mentioned in the application and for effecting delivery. It was alleged that the third respondent Kochu Pauly destroyed the boundaries separating the property sought to be delivered from the adjoining property. The executing court treated it as an application filed under Order 21 Rule 95 Code of Civil

Procedure. The appellant-obstrucuter filed a 'counter affidavit' though he was not a party to the application. He filed Original Petition 34961 of 2004 before this court challenging the proceedings in the suit. The O.P. was dismissed. The first respondent filed E.A.No.1538 of 2004 to appoint a commissioner to identify the property sought to be delivered and for its delivery. In that application the appellant-obstrucuter is shown as the 10th respondent. In the affidavit filed in support of that application it is stated that claiming right over a certain 'portion in a corner' of the property, he obstructed delivery of the property. But no application was filed under Order 21 Rule 97 Code of Civil Procedure either by the appellant-obstrucuter or the first respondent. Realising that there are some mistakes in the description of the property the first respondent filed E.A.No.835 of 2010 for amendment of the description of the property given in the attachment schedule, the proclamation schedule and the sale certificate. It was dismissed as not pressed.

4. The learned Sub Judge enquired into E.A.No.981 of 2003 filed by the first respondent and which was treated as an application under Order 21 Rule 95 Code of Civil Procedure. PW1 was examined and Exts A1 to A8 were marked for the first respondent in this appeal and RW1 was examined and Exts B1 to B3 were marked for the opposite side. Ext C1 Commission Report and C1(a) to C1(c) plans also were marked in the enquiry. The appellant-obstrucuter

filed E.A.No.728 of 2011 to reopen the evidence, and the third respondent Kochu Pauly filed E.A.No.851 of 2011 to close the delivery application, E.A.No.132 of 1997. By the impugned common order the learned Sub Judge overruled the objection raised by the appellant-obstructor to the delivery of the property and allowed E.A.No.981 of 2003, and dismissed the other applications. She directed to effect delivery with police assistance.

5. RFA No.252 of 2013 is the appeal filed by the appellant-obstructor and O.P(c) No.3081 of 2011 is the petition filed by Kochu Pauly, third respondent in the appeal, challenging the order by which his application to close the delivery application was dismissed.

6. Heard Sri.T.N.Manoj and Sri.Sreekumar Chelur learned counsel appearing for the appellant and the petitioner in the O.P respectively and also learned senior counsel Sri.Ranjit Tampan appearing for the first respondent in both proceedings.

7. As mentioned earlier, the executing court treated E.A.No.981 of 2003 filed for identification of the property for the purpose of delivery as an application filed under Order 21 Rule 95 of the Code of Civil Procedure. Though the appellant was not a party to it, the executing court entertained the counter affidavit filed by him objecting to the delivery. Moreover, in E.A.No.1538 of 2004 filed by the first respondent for delivery of the property after its identification with the assistance of a commissioner, the appellant-

obstrucuter was made a respondent. The executing court passed a common order. It is this common order that is challenged in this appeal.

8. Augusthy and Kochamma were husband and wife. Augusthy had 20.265 cents and Kochamma 14.500 cents in their ownership. The two properties were adjoining properties. Augusthy's 20.265 cents was sold in execution of the decree in O.S.No.521 of 1991. From the decree holder-purchaser the appellant-obstrucuter purchased the property and thus he obtained title to it. Kochamma's 14.500 cents was sold in execution of the decree in O.S.No.1156 of 1991 from which this appeal arises. During the pendency of the delivery application the judgment debtor Kochamma repurchased the property and she sold it to the first respondent. The commissioner has identified the property having an extent of 34.765 cents (20.265+14.500). Ext C1 is his report and Ext C1(a), (b) and (c) are the plans attached to it. Admittedly, there are some mistakes in the description of the property purchased by the first respondent, which is the reason why he filed an application to amend the description in the attachment schedule and the proclamation schedule and the sale certificate. In view of the decision I propose to make, I do not consider it necessary to determine the question regarding the identity of the property.

9. The appellant-obstrucuter's allegation is that the attempt of

the first respondent is to take delivery of his (appellant's) property. He challenges the validity of the delivery order passed by the executing court. According to him, the order is a nullity since the executing court had no jurisdiction to order delivery after the decree was fully satisfied.

10. Sri.T.N.Manoj and Sri. Sreekumar Chelur, learned counsel for the appellant and the petitioner in the Original Petition (the third respondent in the appeal) respectively submitted that the sale in favour of the first respondent was a private sale and the purchaser at a private sale is not entitled to maintain a delivery application under Order 21 Rule 95 of the Code of Civil Procedure. In support of their argument they rely on the decision of the Gujarat High Court in **Balubhai Dahyabhai Shroff v. Govindbhai Dayalbhai (AIR 1963 Gujarat 117)** and of the Bombay High Court in **Ganesh Narayan Kulkarni v. Ganesh Ramchandra Joshi (AIR 1971 Bombay 16)**. In both these decisions it was held that the right obtained by a purchaser at a private sale cannot be the subject matter of the execution proceedings as he is neither a decree holder, nor an auction purchaser. The present case and the above two cases can be easily distinguished on facts. Moreover, those two cases were decided before the insertion of Explanation II to Section 47 of the Code of Civil Procedure in 1976.

11. It is also submitted that as decided by the Supreme Court

in **K.R.Lakshminarayana Rao v. New Premier Chemical Industries (2005)9 SCC 354**), no proceedings can be taken after the decree has been fully satisfied with the sale of the property in court auction.

12. On the other hand, learned senior counsel Sri.Renjith Thampan relies on the decision of the Supreme Court in **Harnandrai Badridas v. Debidutt Bhagwati Prasad (AIR 1973 SC 2423)** to buttress his argument that delivery of the property also relates to execution, discharge and satisfaction of the decree. Further, he relies on explanation II to Section 47 of the Code of Civil Procedure also.

13. In **Harnandrai's** case (supra) the Supreme Court agreed with the view taken by the Full Bench of the Calcutta High Court in **Kailash Chandra Tarafdar v. Gopal Chandra Poddar (AIR 1926 Cal.798)** that the duty of the executing court does not end with the confirmation of the sale and that delivery of property to the auction purchaser also is a part of the execution proceedings. It was subsequent to this judgment explanation II to Section 47 was incorporated in the Code of Civil Procedure. The explanation is extracted below:

Explanation II-(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.

14. The learned senior counsel submits that explanation II(b) to Section 47 Code of Civil Procedure makes it clear that a question raised even by a representative of the auction purchaser should be determined by the executing court and the first respondent who purchased the property from Kochamma who had bought it from the decree holder-purchaser also is a representative and the question raised by him as to the identity of the property should be determined by the executing court.

15. To attract Explanation II to Section 47 of the Code of Civil Procedure a question relating to delivery of property should arise, failing which, the proceedings should be held to have come to an end. There may be cases in which delivery of the property is not necessary. For instance, if the purchaser is already in possession of the property, there is no question of his filing an application for delivery. In such cases execution proceedings cannot be continued after the sale. Only if it is necessary to deliver the property pursuant to the sale, the execution proceedings do not come to an end with the sale as provided in Explanation II to Section 47 of the Code of Civil Procedure.

16. Learned counsel for the appellant submits that the executing court should have closed the delivery application (E.A.No.132 of 1997) filed by the decree holder-purchaser after the property was sold to the judgment debtor Kochamma. This, in fact, is the prayer made by the third respondent (petitioner in the O.P) in his E.A.No.851 of 2011.

17. With the sale of the property to the judgment debtor Kochamma the decree holder-auction purchaser lost title to the property, and, thereafter, it had no right to maintain the delivery application. The application became infructuous. Merely because the court did not close it, it cannot be said that the proceedings were pending. Kochamma was in possession of the property, which is specifically mentioned in Ext A3 sale deed executed by her. Moreover, she could not have maintained an application against herself, she being the only person against whom delivery could have been asked for. She could not have proceeded with the delivery application filed by the decree holder. The first respondent, who is her transferee, did not get a better right than she had. The executing court did not apply its mind when it allowed the first respondent to get himself impleaded in the delivery application filed by the decree holder-auction purchaser. The impleadment in a proceedings which had lost its life is illegal and the subsequent proceedings are nothing but a nullity.

18. The learned Sub Judge also failed to take notice of the statement in Ext A3 sale deed by which the first respondent purchased the property from Kochamma that he was put in possession of the property. There was no question of his maintaining an application for delivery of property even if it is assumed that he is a representative of the decree holder-purchaser. The application filed by him is a fraud upon the court. It can be only with malicious intention he prayed for delivery of the property though he had obtained its possession from his vendor Kochamma.

19. Learned senior counsel appearing for the first respondent submits that the decisions in the earlier proceedings operate as res judicata. The only earlier proceedings in which the appellant was a party was O.P 34961 of 2004 filed by him. The subject matter of the suit was not the executing proceedings, but the validity of the decree. Since the issues involved in both proceedings are different, the decision in OP No.34961 of 2004 does not operate as res judicata. The appellant was not a party to the other proceedings. The decision in those proceedings also do not operate as res judicata so far as he is concerned.

20. In the light of the discussion made above, I hold that the orders passed by the executing court in E.A.No.981 of 2003 and E.A.No.1538 of 2004 for delivery of the property covered by the sale deed of the first respondent are illegal.

21. The prayer in the Original Petition 3081 of 2011 filed by the third respondent in the appeal is to set aside the order refusing to close E.A.No.132 of 1997 filed by the decree holder for delivery of the property. He is not directly affected by the order of refusal to close the execution application as he was not the owner of the property. But the order which is being passed in the appeal will have the effect of allowing his prayer, which cannot be avoided.

In the result, this appeal and the Original Petition are allowed. The orders passed in E.A.No.981 of 2003 and E.A.No.1538 of 2004 are set aside. E.A.No.132 of 1997 will be treated as closed.

Sd/-

**K.ABRAHAM MATHEW,
JUDGE**

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/True copy/

P.S.to Judge