

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRONOUNCED ON :30.01.2017

RESERVED ON :08.02.2017

CORAM

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

S.A.Nos.978 and 979 of 1999

Vijayalakshmi Ammal

.. Appellant in both
appeals

/versus/

1.Krishnaveni Ammal

2.Azhagu Sambasivam

3.Azhagu Bangaru

4.Muthuraman

5.Perumal

(Respondents 2 and 3 have been exonerated
by the court below and hence, not shown as
parties to this second appeal)

.. Respondents in
S.A.No.978 of 1999

1.Krishnaveni Ammal

2.Azhagu Sambasivam

3.Azhagu Bangaru

4.Muthuraman

(remained exparte in both the Courts and
hence, given up).

.. Respondents in
S.A.No.979 of 1999

Prayer in S.A.No.978 of 1999:

Second Appeal filed under Section

100 of the Civil Procedure Code against the judgment and decree of the learned Subordinate Judge, Panruti, dated 27.01.1999 passed in A.S.No.139 of 1996 dismissing the appeal confirming the decree and judgment of the District Munsif of Panruti O.S.No.74 of 1996, dated 30.09.1996.

Prayer in S.A.No.979 of 1999: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree of the learned Subordinate Judge, Panruti, dated 27.01.1999 passed in A.S.No.150 of 1996 dismissing the appeal confirming the decree and judgment of the District Munsif of Panruti O.S.No.74 of 1996, dated 30.09.1996.

For appellants :Mr.R.Gururaj
(both appeals)

For Respondents :Mr.Mr.S.Balasubramanian for R1 and R2
(both appeals) R3-dismissed by order dated 04.12.2009
R4 and R5-given up -S.A.No.978 of 1999
R4-given up-S.A.No.979 of 1999

COMMON JUDGMENT

The second defendant is the appellant in both the appeals. The real dispute in this case is whether the plaintiff purchased 0.50 cents (or) 1 acre 50 cents of land in survey number 27 of the suit village, through Court auction sale.

2. For the sake of convenience, the parties are described as per their rank and status shown in the original suit.

3. The suit property and 6 other items of land were originally owned

by the first defendant. Pursuant to the decree passed in O.S.No.468 of 1971 filed by one Sagunthala ammal against the first defendant, the suit property along with 6 other properties were brought for sale in two lots. The plaintiff is the purchaser of those properties in the court auction held on 1.7.1982. The auction sale was confirmed on 7.12.1982 and he got the delivery of possession on 1.4.1987. While so, the second defendant claiming himself as the purchaser of the suit property from the first defendant through a sale deed dated 06.01.1988 has taken possession of the land forcibly. Hence, the suit for declaration of title and possession. The third defendant is arrayed as a party, since he styling himself as a leasee under first defendant trying to create revenue record as if he is the registered tenant of the suit property.

4. The first and third defendants remained absent. The second defendant alone contested the suit.

5. While the case of the plaintiff is that he was sold 1.50 acres of land in survey number 27/1, the contention of the second defendant was that, there is no survey number as 27/1 on the field. The property purchased by the plaintiff in the court auction does not contain borewell or motor pumpset. The property purchased by the plaintiff is described 0.50 cents in S.No. 27/1. Whereas, the second defendant purchased 1 acre 50 cents in S.No.27 for sale consideration of Rs.38,500/- on 6.1.1988 and got it registered. Since the suit property does not bear correct description, the plaintiff has no case for declaration or possession.

6. The Trial Court, after considering the depositions of PW-1, PW-2, DW-1 and DW-2, Exhibits A-1 to A-6 and B-1 to B-6, held that as per sale certificate and delivery receipt, the plaintiff was delivered only 50 cents in S.No. 27, so, the declaration of title was restricted to 0.50 cents in S.No.27.

7. Aggrieved by the Trial Court judgment, both the plaintiff for the disallowed portion and the 2nd defendant against the allowed portion preferred first appeal in A.S.No.150/1996 and A.S.No.139/1996 respectively.

8. The First Appellate Court in its common judgment, pointing out that, the first defendant got the suit property bearing Survey Number 27 measuring to an extent 1 acre 50 cents through a settlement deed. He has mortgaged that property and his other properties to one M.Krishnaveni ammal on 10.07.1966 vide Ex A-2. The plaintiff has purchased the same in the court auction subject to the encumbrance created in Ex.A-2. Even in the subsequent suit O.S.No.380/1983 filed by the wife of the first defendant, the suit property has been referred only as survey number 27, 1 acre 50 cents and not survey number 27/1, 50 cents. Since he had no doubt that the plaintiff has purchased 1 acre 50 cents of land along with 7 1/2 HP motor pumpset, allowed the appeal A.S.No.150/1996 filed by the plaintiff as against the disallowed portion and dismissed the appeal A.S.No.139/1996 filed by the second defendant as against the allowed portion. As a result, the suit of the plaintiff claiming 1 acre 50 cents

in S.No.27 was allowed. The plaintiff was granted the relief of declaration of title and possession in respect of 1 acre 50 cents in survey number 27.

9. Aggrieved by the judgment of the First Appellate Court, the second defendant has preferred two appeals 1) S.A.No.978/1999 against A.S.No.139/1996 and 2) S.A.No.979/1999 against A.S.No.150/1996.

10. At the time of admitting these two appeals, this Court has formulated the following Common Substantial Questions of Law for consideration in both appeals:-

1)Whether the sale certificate marked as Ex.A5 and dated 17.12.1982 confers title on the plaintiffs?

2)Whether in the face of plaintiff's claim that tenant was in possession the physical delivery allegedly effected and prayed for was correct or whether only symbolical delivery under Order 21, Rule 95 C.P.C., could have been asked for and given?

3)Whether the suit is barred by Section 47 C.P.C.?

11. The learned counsel for the appellant contented that, in the suit

schedule, the property is referred as Survey No.27, 1.50 acres without any boundaries. Whereas the sale certificate and delivery receipts refer the property as S.No.27/1, which admittedly not in existence. The Court sale leading to issuance of sale certificate and the delivery receipts are not warranty of title. As the survey number mentioned in the sale certificate is not found in the field map, the Courts Below ought not to have given any credence to the sale certificate. Without boundaries to the property and with non existing survey number, the sale of an immovable property has been brought on auction by the Court and the same has been purchased by the plaintiff. If at all the plaintiff is aggrieved in mis-description of property, he ought to have resorted to Section 47 of the Code of Civil Procedure instead of filing a declaration suit claiming right over the defendants property, which the defendants have purchased through Ex.A-6 from its lawful owner for valuable consideration. Though under Exs.A-1 and A-5, the plaintiff purchased only 50 cents of land, the First Appellate Court has granted the relief for 1 acre 50 cents, which is three fold than what the plaintiff actually purchased under the Court auction. The Courts below have failed to appreciate that with wrong survey number and wrong extent of property, it is impossible to take actual delivery and what is recorded is only a paper delivery. The alleged delivery of possession of property purchased in auction, is after 3 1/2 years from the confirmation of auction. This is beyond the limitation prescribed. Hence, on that score also the delivery in O.S 468/1971 results in Ex.A-1 void.

12. The learned counsel appearing for the appellant referred to the following judgments, in support of his submission.

(i). In Judgment of this Court reported in ***Dina Malar Publications, a Tamil daily, repled., by its partner, R.Krishnamoorthy v. The Tiruchirapalli Municipality, repled., by its Executive Authority, the Commr., and others***[1984 (1) MLJ 306], para 9 reads as under:

"9.The property in question bears a subdivided town survey No.371/2, with an extent of 2,400 sq.ft. The property in question is not an unsurveyed area or an area in respect of which the extent is in doubt. In laying down the principle that the boundaries should prevail over the extent, in the above decisions, the learned Judges have applied the following principles:-(1)In case of doubtful or varying extents in the documents of title relating to the property, boundaries should be preferred to the extent; (2)Only in the absence of definite materials to show the action extent intended to be sold the boundaries should outweigh the doubtful extent mentioned in the document; (3)If the recitals in the documents and the circumstances of the case show that a lesser extent only was conveyed than the area covered by boundaries, and there is clear evidence as to the intention of the parties with reference to the extent conveyed then the extent should prevail over the boundaries. Bearing in mind the abovesaid principles, we will have to examine the facts of this case."

(ii). In the judgment of the Hon'ble Supreme Court reported in ***The Ahmedabad Municipal Corporation of the City of Ahmedabad v. Haji Abdul Gafur Haji Hussienbhai***[AIR 1971 Supreme Court 1201](V 58 C

241), para 3 reads under:

“3.To begin with it was contended that there is no warranty of contention seems to us to be well founded because it is axiomatic that the purchaser at auction sale takes the property subject to all the defects of title and the doctrine caveat emptor(let the purchaser beware) applies to such purchaser. The case of the judgment debtor having no saleable interest at all in the property sold such as is contemplated by Order 21, Rule 91 C.P.C., however, different and is not covered by this doctrine.”

(iii). In the judgment of the Hon'ble Supreme Court reported in ***Sita Ram v. Radha Bai and others [Air 1968 Supreme Court 534](V 55 C 116)***, para 12 reads as follows:

“12.The principle that the Courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud is expressed in the maxim in pari delictor potiores conditio defendants. But as stated in Anson's Principles of the English Law of Contracts', 22nd Ed., p.343: “there are exceptional cases in which a man will be relieved of the consequences of an illegal contract into which he has entered-cases to which the maxim does not apply. They fall into three classes(a)where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it (b)where the plaintiff is not in pari delictor with the defendant;(c) where the plaintiff does not have to rely on the illegality to make out his claim”.

13. Per contra, the learned counsel appearing for the respondent submitted that, it has been proved through documentary evidence that the property, which was put to auction was not 50 cents, but 1 acre and 50 cents. All along, the suit property has been dealt as one unit with extent of 1 acre 50 cents in survey No.27 and same is surrounded by the lands of the plaintiff on the three sides. When there is no sub-division of the suit property and when it was brought to sale by the Court along with several other items of properties, it has to be presumed that the purchase is in respect of entire extent of 1 acre 50 cents. Under Section 114 of the Indian Evidence Act, 1872 it has to be presumed that the judicial act has been performed regularly. Therefore, the First Appellate Court has rightly considered on these aspects and passed the decree in his favour, which requires no interference.

14. To the contention of the appellant that the plaintiff should have resorted to Section 47 of the Civil Procedure Code, filing a fresh suit is not a remedy. The learned counsel appearing for the respondents submitted that, the plaintiff being the auction purchaser in the execution proceedings, after confirmation of sale and delivery of possession, the Execution Court becomes functus officio and there is no need (or) scope to invoke Section 47 of the Civil Procedure Code, once the execution is completed on satisfaction of the decree. If at all the first defendant had any grievance over the identity of the property (or) its extent, it is he who should have resorted to the legal remedy available. Contrarily, he has created a sham and nominal illegal sale deed in favour of the

second defendant and conveniently remained absent in this suit.

15. The analysis of the facts and law, in the light of the rival submissions, this Court finds that the total extent of the property bearing Survey No.27 is 1 acre 50 cents. Though there is no records to show that it was sub-divided at any point of time, the decree Ex.A-4, the certificate for confirmation of sale Ex.A-5 and the delivery receipts Ex A-1 all refers the property as S.No.27/1, 0 Acre 0.50 cents.

16. The answer for the questions raised by the appellant counsel lies in the judgment of this Court reported ***Nagoor Rowthet -vs- Abdul Rahim***[1973 MLJ 198], wherein this Court has held in para 12, which reads as:

"The learned counsel for the appellant contended that even assuming that E. P. 96 of 1964 in which delivery was ordered was filed beyond the period of 12 years, it was not open to the second defendant to challenge the delivery in the E. P. in these collateral proceedings. He cited a passage at page 256 of Vol. I of Mullah's C. P. Code, and relied on the decision in [Prakash Chandra Chakravarti v. Barada Kishore Chakravarti](#), 38 Cal WN 348 = (AIR 1934 Cal 282) and Venkatalinga v. Raja Dhanaraj, AIR 1929 Mad 826. Of course, these two decisions are clear authorities for the proposition that where an application for the execution of a decree is entertained after 12 years in contravention of the provisions of Section 48 C. P. Code, the executing court

does not exercise a jurisdiction which it did not possess but decides a question erroneously. Such a decision, if not appealed against, is binding between the parties who are represented before it or had notice of the proceedings and cannot be questioned collaterally. The only question then will be whether the judgment-debtor had notice of the execution proceedings. In this case, though the second defendant in his written statement, contended that the execution proceedings were barred by limitation, he did not state that he did not have any notice of the execution proceedings (sic) were not valid. Therefore, we have to proceed on the basis that the second defendant had notice of the execution proceedings. If that were so, then even if E. P. 96 of 1964 had been in fact filed after the expiry of the period of 12 years, the order passed thereon could not be challenged in this suit.

5. But the real question that arises for consideration is whether there was any delivery of possession of the suit properties to the plaintiff on 4-5-1964 and whether Ex. A-2 evidence only a mere paper delivery and not actual delivery of possession. The learned counsel for the appellant strenuously contended that Ex. A-2 being a public document, it shall be presumed to be a recording of a proceeding taken in conformity with the provisions of law."

17. In the light of the above observation, this Court looks at the fact of this case. In E.A.No.266/1987 in E.P.No.70/1982 filed for execution of the decree in O.S.No.468/1971, the plaintiff has purchased 7 items of properties comprised in two lots, wherein the suit property is shown as 7th item in the

second lot. Though it appears to be only 50 cents, it is only an error of punctuation. (S.No. 27/1, 50 cents instead of S.No.27, 1 acre 50 cents). This conclusion is well fortified by the own conduct of the appellant. In Ex A-6, executed in favour of the appellant which is subsequent to the auction sale, the property is described only as survey No. 27, renumbered as 12/2 and extent 1 acre 50 cents. This Ex.A-6 is the sale deed, which is relied by the appellant. It is executed by the first defendant in favour of the second defendant. It is a settled fact admitted by all the parties concerned that the survey number 27 was never sub-divided. While so, Muthuraman the first defendant in this suit, who is also the judgment debtor in O.S.No.468/1971 never disputed the Court auction purchase (or) delivery of the suit property to the auction purchaser on the ground that there is no land referring survey number 27/1. Therefore, the first defendant is estopped from acting contrary to his admission. It is pertinent to point that, even in this suit, the first defendant did not appear and contest the suit. He has remained absent after conveniently creating Ex.A-6 dated 6.1.1988 a sham document for the entire extend of 1 acre 50 cents in favour of the second defendant de hors of the fact that the property was already sold in the court auction. To add, the second defendant is none other than the first defendants sister's daughter.

18. In this case, no doubt, there is discrepancies but, never a doubt over the identity of the property. In the light of the evidence before this Court, the so called discrepancy in the description of the property is very insignificant

since the parties had consensus about the identity of the property. The property which the plaintiff purchased falls in S.No 27 and he had purchased with 7 1/2 HP motor and pump shed. There can be no doubt over the extent in the sale certificate Ex A-5 issued by the Court as a result of auction conducted by it.

19. Similarly, the delivery of possession through court should be presumed as actual possession unless, it is recorded other wise or proved through evidence that no delivery was effected. The suit property being immovable property and when the actual delivery is vouchsafed through the delivery receipt Ex.A-1. The exhibits B-1 to B-7, which are bills for purchase of motor, pro-notes, statement of accounts do not indicate anything related to the ownership of the suit property. While so, the second defendant just based on Ex.A-6 sale deed executed after the delivery of suit property to the plaintiff by the court, cannot question the title of the plaintiff which he has obtained through court auction.

20. For the aforesaid reasons, this Court does not find any error in the finding of the First Appellate Court, which has on careful consideration of the evidence and on reconciling the discrepancies, in the light of the other documents and conduct of th parties to arrived at the righ conclusion. The Substantial Questions of Law are answered accordingly.

21. In the result, these Second Appeals are dismissed. No order as to costs.

08.02.2017

Index:Yes/No
Internet:Yes/No
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To

- 1.The Subordinate Judge, Panruti.
- 2.The District Munsif, Panruti.

Dr.G.Jayachandran,J.

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Judgment made
in S.A.Nos.978 and 979 of 1999

08.02.2017

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