

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.04.2018

C O R A M

THE HONOURABLE MR.JUSTICE M. GOVINDARAJ

C.M.S.A.NO.37 OF 2016
AND CMP NO.19504 OF 2016

Irshadul Islam Safhiya Ahlus
Sunnath Valjamath Madrasha &
Computer Centre and Tailoring Training Centre
Rep. by its Imam Md. Ibrahim
Athupalam, Palghat Main Road,
Coimbatore. Appellant

Vs.

1.Noyyal River Sulthan Awulia Dargha Wakf
Muttavalli, Syed Mohideen (Died)
Rep. by its present Mutavalli S.M.Mahaboob Basha
Door No.83/99, V.G.Rao Nagar,
Ganapathy,
Coimbatore - 641 006.

2.Coimbatore Athupalam Shafia
Ahalul Sunnath Jamath
Rep. by its President
Mr.Farook
Athupalam, Palghat Road,
Coimbatore.

... Respondents

PRAYER: Civil Miscellaneous Second Appeal filed under Section 100 read with Order 21 Rule 97 of Civil Procedure Code against the decree and judgment passed in A.S.No.47 of 2016 dated 22.10.2016 on the file of the IV Additional District Judge, Coimbatore, by confirming the order and decreetal order passed in E.A.No.101 of 2015 in E.P.No.48 of 2008 in O.S.No.607 of 1980 dated 06.04.2016 on the file of the Principal District Munsif, Coimbatore.

For Appellant : Mr.V.Manohar

For Respondent-1 : Mr.N.Damodaran

J U D G M E N T

The present Civil Miscellaneous Second Appeal is preferred against the order dated 22.10.2016 passed in A.S.No.47 of 2016 by the learned IV Additional District Judge, Coimbatore, in terms of Order 41 Rule 11 of Civil Procedure Code.

2. The appellant claims themselves as a Madarasa running Muslim Educational School and Computer Training Centre. When the first respondent / decree holder sought for removal of the superstructure, through Court appointed Advocate Commissioner, they filed an interlocutory application under Order 21 Rule 97 of Civil Procedure Code.

3. Background of the case is that there was a dispute over the title of the property between the first and second respondents. The first respondent was declared as title holder and it was confirmed by this Court in S.A.Nos.1850 and 1851 of 1989 and removal of construction was also decreed. The first respondent filed an execution petition in E.P.No.48 of 2008 for removal of the superstructure lying in the suit property. At that juncture, the appellant filed an application under Order 21 Rule 97 of Civil Procedure Code, to register the obstruction. The second respondent filed a counter stating that at the request of the Jamath, the appellant is running the Madarasa for the welfare of their community people. But the imam is conducting the school independent of the judgment debtor.

4. The contention of the first respondent is that the appellant is none other than tool engaged by the judgment debtor and they have no independent right. Considering the rival contentions, the Execution Court has dismissed the application holding that transferee pendente lite is not entitled to raise a question as to right, title and interest, who is nothing but an extension of judgment debtor. Therefore, the execution application filed under Order 21 Rule 97 of Civil Procedure Code was dismissed with costs. Against which, the appellant preferred the present Civil Miscellaneous Second Appeal.

5. The Appellate Court having elaborately discussed the issue and after affording opportunity to the appellant, dismissed the appeal as per Order 41 Rule 11 of Civil Procedure Code. Aggrieved over the judgment and decree passed in the appeal, the third party obstructor has preferred this appeal.

6. The question of law relevant to the present appeal is that whether the Appellate Court misconstrued the provisions under Order 41 Rule 11 of Civil Procedure Code contemplated for the purpose other than the reason taken out in the matter of appeal before him. Order 41 Rule 11 of Civil Procedure Code

clearly laid down the procedure for dismissing the appeal without sending notice to the Lower Court. As per the provision, the Appellate Court had fixed a day for hearing the appellant and after hearing him, has passed a detailed order dismissing the appeal summarily.

7. The crux of the issue is that whether the appellant has set out an independent right to maintain the application under Order 21 Rules 97 to 103 of Civil Procedure Code. According to the appellant, unless an opportunity is given to adduce evidence, their independent right cannot be proved and therefore, the matter has to be remanded to adduce evidence. But, on a perusal of the records available before the Court, it could be seen that the admitted facts are that the first respondent is the decree holder and the declaration has reached finality by virtue of decree and judgment of this Court in S.A.Nos.1850 and 1851 of 1989 dated 17.06.2006. The judgment debtor himself admits that at his request, the appellant is running the school. In other words, the right to run the school is assigned by the judgment debtor in favour of the appellant. Therefore, he shall be construed as a transferee pendente lite.

8. It is well settled that as per provisions under Order 21 Rules 97, 98 and 102 of Civil Procedure Code, a person who is not having an independent right, cannot raise the issue of title, in the obstruction petition.

9. Order 21 Rule 98(2) of Civil Procedure Code reads as under:

" 98. Orders after adjudication. - (1) Upon the determination of the questions referred to in Rule 101, the Court shall, in accordance with such determination and subject to the provisions of sub-rule (2), -

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

(2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made

during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment debtor or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days. "

10. As per which, if the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment debtor or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

11. In the instant case, it is categorically proved that the appellant has no independent right. But, a person stepping into the shoes of the judgment debtor claiming right under Order 21 Rule 102 of Civil Procedure Code, which clearly mandates that Rules 98 and 100, shall not apply to a person to whom the judgment debtor had transferred the property after the institution of the suit, in which, the decree was passed or to the dispossession of any such person. In the instant case, as mentioned above, the applicant can be construed only as a transferee pendente lite and therefore, he does not have any independent right to maintain this application. What is binding on the judgment debtor is automatically binds on the applicant also. Therefore, the finding of the Execution Court that the applicant has no independent right to maintain the application is well founded.

12. Further, in N.S.S.NARAYANA SARMA AND OTHERS VS. GOLDSTONE EXPORTS (P) LTD., AND OTHERS [2002 AIR (SC) 251] the Hon'ble Supreme Court has held as under:

"When a decree-holder complains of resistance to the execution of a decree it is incumbent on the execution court to adjudicate upon it. But while making adjudication, the court is obliged to determine only such question as may be arising between the parties

to a proceeding on such complaint and that such questions must be relevant to the adjudication of the complaint.

The words all questions arising between the parties to a proceeding on an application under Rule 97 would envelop only such questions as would legally arise for determination between those parties. In other words, the court is not obliged to determine a question merely because of the resister raised it. The questions which the executing court is obliged to determine under Rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties, e.g., if the obstructor admits that he is a transferee pendente lite it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by a decree-holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceedings. Hence, it is necessary that the questions raised by the resister or the obstructor must legally arise between him and the decree-holder. In the adjudication process envisaged in Order 21 Rule 97(2) of the Code, the execution court can decide whether the question raised by a resister or obstructor legally arises between the parties. An answer to the said question also would be the result of the adjudication contemplated in the sub-section."

13. Therefore, the appellant cannot plead ignorance and collusion between the decree holder and the judgment debtor. In the considered opinion of this Court, the Lower Appellate Court has elaborately discussed all these issues, with the support of judgments of the Hon'ble Supreme Court as well as this Court, and dismissed the appeal summarily, as per Order 41 Rule 11 of Civil Procedure Code. Therefore, I do not find any infirmity in the order passed by the Lower Appellate Court and accordingly, the question of law raised is answered in the negative against the appellant.

14. In fine, the Civil Miscellaneous Second Appeal is dismissed. No costs. Consequently, connected civil miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

TK
To

1. The IV Additional District Judge
Coimbatore.
2. The Principal District Munsif
Coimbatore.

Copy to: The Section Officer
VR Section,
High Court, Madras

+1cc to Mr.V.Manohar, Advocate SR.NO.31941

GJ(CO)
sm:24.9.2018

C.M.S.A.NO.37 OF 2016

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