



S.A.(MD) No.1145 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 23.09.2022

PRONOUNCED ON: 30.09.2022

CORAM : JUSTICE N.SESHASAYEE

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K.Palanichamy Gounder

...Appellant/1st respondent/plaintiff

Vs

1.Kandasamy Gounder
Chinnappa Gounder (Dead)

...1st respondent/appellant/1st respondent

2.P.Rajendran

3.P.Kaliappan

4.P.Kandhasamy

5.C.Kaliappan

6.C.Dhandapani

7.Muthammal

8.K.P.Dhandapani ... Respondents 2 to 8/Respondents/Defendants 1 to 7

Prayer:- Second Appeal is filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 04.07.2011 in A.S.No.38 of 2007 passed by the Sub-Court, Palani reversing the judgment and decree dated 22.03.2007 in O.S.No.15 of 1997 passed by the District Munsif Court, Palani.

For Appellant : Mr.S.Anand Chandrasekar
for M/s.Sarabhuman Associates

For respondents : Mr.S.Arunachalam for R1



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Mr.J.Barathan for R8
No-appearance for R2 to R7

JUDGMENT

The plaintiff is the appellant. He laid a suit in O.S.15/1997 for partition of two out of three items of properties and for declaration and recovery of possession for the remaining property. He was successful before the trial court, but suffered a reversal in his fortune before the first appellate court. For narrative convenience, the parties are referred to as per their rank before the trial Court.

2.1 This appeal throws up two questions for determination: (a) Does Explanation II(b) of Sec.47 CPC bar a suit for recovery of property by an auction purchaser; and (b) Is there a period of limitation for an auction purchaser of a fractional share of the judgement debtor's property to seek partition vis-a-vis the other co-sharers or co-owners?

2.2 These are issues not unfamiliar to the Court, as they not infrequently visit its corridors. And they have been differently addressed. What adds a difference to the present case however, is that this Court is specifically required to interpret the nature of questions that would fall within the



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Explanation II(b) to Sec.47 CPC that might invite bar of suits under Sec. 47(1). It calls for an interpretative understanding of the phraseology employed by the legislature and to gather its import in the context of the scheme of the Code.

3.1 Before the core issue, if not the soul-issue is addressed, the facts of the case are briefly stated as under:

- A decree for payment of money was passed in O.S.638 of 1978. In an Execution Proceedings initiated by the decree-holder, the properties of the defendant/Judgement-debtor were brought to court-auction sale. It comprised of (i) undivided 2/3 share in item No.1, (ii) 1/4 in item 3 of the suit properties, and (iii) the whole of item No.2 property.
- The court-auction took place on 14.11.1983 in which the plaintiff herein was declared as the successful bidder. On 18.01.1984, the sale was confirmed by the Execution Court, and Ext.A.1, sale certificate was issued to the plaintiff.
- The plaintiff then filed an Execution Petition under Order XXI Rule 95 CPC for delivery of the properties covered under Ext.A-1. This petition is stated to have been filed on 21.01.1985, and there is no controversy



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on this. However, the petition was returned by the Execution Court, presumably on the ground that it was laid beyond one year period provided under Article 134 of the Limitation Act for invoking Order XXI Rule 95 CPC. The petition was re-presented vide E.A.No.356 of 1988 but only after 37 months and 2 days.

- On 30.06.1989, the Execution Court dismissed E.A.No.356 of 1988. This was challenged by the plaintiff in CRP.No.3160 of 1989. Vide Ext.A.2, order dated 13.01.1995, this Court dismissed the revision and confirmed the order of the Execution Court dated, 30.06.1989.
- Thereafter, on 19.12.1996, the plaintiff laid the present suit for partition of the 2/3 share in item No.1 and 1/4 share in item No.3 and for declaration and recovery of possession of item No.2 property. In effect, what the plaintiff did was, when the procedural remedy for obtaining delivery through the Execution Court under Order XXI Rule 95 CPC was foreclosed to him, he resorted to the common law remedy on the basis of his title to the properties that he had purchased in the court auction.

3.2 The first defendant is the judgment debtor in O.S.No.638 of 1978. The defendants 2 to 5 are the co-sharers *vis-a-vis* the properties described in item



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Nos.1 and 3. During the pendency of the suit, the second defendant died, and his legal heirs were brought on record as defendants 6 to 8. Ninth defendant is the brother of the first defendant. The suit was essentially contested by the defendants 1, 6 and 9. The principal plank of their defence is that the suit was barred by limitation. What is of contextual significance is that neither of these defendants had pleaded adverse possession.

3.3 The dispute went to trial where the plaintiff was successful in defying the defence of the defendants as the trial Court decreed the suit. The matter was taken in first appeal in A.S.No.38 of 2007, where the Court found favour with the plea of limitation and non suited the plaintiff by invoking the Article 65 of the Limitation Act. The First Appellate Court reasoned that the suit is laid beyond 12 years from Ext.A1 dated 18.01.1984 and therefore, is barred by limitation . Hence, the second appeal at the instance of the plaintiff.

4. This Second Appeal is admitted for considering the following substantial questions of law:

(i) Was not the First Appellate Court in error in invoking the Article 65 of the Limitation Act to non-suit the plaintiff?



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(ii) Was not the First Appellate Court in error in invoking the Article 65 of the Limitation Act in the absence of plea of adverse possession by the defendants?

(iii) Was not the First Appellate Court entitled to overlook the fact that the plaintiff is entitled to benefit under Section 14 of the Limitation Act?

The Arguments:

5. The submissions of Mr. Anand Chandrasekar, the counsel for the appellant are twofold : (a) So far as items 1 and 3 are concerned, the suit for partition is not barred under Article 65 of the Limitation Act, more so when the contesting defendants have not pleaded adverse possession; and (b) Regarding item 2, while the suit is laid beyond 12 years from the date of sale or from the date of Ext.A-1 sale certificate, still the first Court below ought to have deducted the time lost by the plaintiff in prosecuting his E.P. for delivery before the Execution Court and the allied proceedings in E.A.356 of 1988 for condoning the delay of about three years in representing the execution petition and also the time during which his CRP No.3160 of 1989 was pending before this Court. And, if terminus quo is reckoned from 13-01-1995, the date on which this Court dismissed the CRP Vide Ext.A2



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order, the suit is within time. Here, again the absence of a plea of adverse possession will weigh against the defendants. He placed reliance on ***India Electric Works Limited Vs. James Mantosh*** [AIR 1971 SC 2313].

6. Mr.J.Barathan, the learned counsel appearing for the eighth respondent approached the issues slightly differently. He argued:

- Explanation II (a) and (b) to Sec.47 CPC, inasmuch as it declares that an auction-purchaser is a deemed party to the suit, and that all questions relating to delivery of the property in an execution proceedings shall be treated as those involved in execution, discharge or satisfaction of a decree, the suit itself is barred under Sec.47(1) CPC. This impliedly bars a suit for recovery of possession by an auction purchaser and hence the suit as regards item 2 cannot be maintained. While the Courts have held that failure of the auction purchaser to obtain delivery of the auctioned property under Order XXI Rule 95 CPC would not bar a suit for possession by the auction-purchaser based on his title, yet no Court has addressed the issue as to the nature of questions relating to delivery of property that will fall within the meaning of Explanation II(b) CPC. Reliance was strongly placed on the decision of the Hon'ble Supreme Court in



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K.R.Lakshminarayana Rao Vs.New Premier Chemical Industries

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- Sec.14 of the Limitation Act cannot be invoked since the plaintiff has neither been diligent, nor can he be considered as bonafide prosecuting a proceeding in a wrong forum as he had approached the right forum namely the Execution Court for seeking delivery but was prosecuting a matter unmindful of the one-year limitation provided under Article 134 of the Limitation Act.
- So far as items 1 and 3 are concerned, a suit for general partition by an auction purchaser of a fractional share against the other co-sharers or co-owners should have been filed within 12 years from the date of vesting of title of the auctioned property in the auction purchaser. Reliance was placed on ***V.C.Thani Chettiar (Died) and another Vs Dakshinamurthy Mudaliar and others*** [(1955) 68 L.W 166 : AIR 1955 Madras 288 (FB)]

7. In response, the learned counsel for the appellant submitted that in ***Balakrishnan Vs Malaiyandi Konar*** [(2006)3 SCC 49], the Hon'ble Supreme Court had restored the original position of twin remedies to which an auction



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purchaser is entitled to, and this Court had followed the dictum in *Malayandi Konar case* along with the ratio in *Harnandrai Badridas Vs Debidutt Bhagwati Prasad and others* [(1973) 2 SCC 467], and had held in *T.Muthukumarasamy Vs J.Selvasundarraaj* [2017 (6) CTC 602] that a suit by an auction purchaser for possession is maintainable.

Discussion & Decision:

8.1 Two preludial statements may have to be made. The first is on the point which this Court is required to engage in; and, the second is setting the facts for an ultimate decision in this case, the last paragraph of this judgment in which the litigants invest their interest.

8.2. Turning to the second aspect first, there are three items of properties, and the plaintiff has only a fractional share in items 1 and 3, and the whole of item 2. He invoked Order XXI Rule 95 CPC but beyond the statutorily stipulated period of one year provided in Article 134 of the Limitation Act. Now, so far as items 1 and 3 are concerned, the only right the plaintiff has for obtaining actual physical possession is to institute a suit for general partition of the suit properties. This would be the case even if he was successful in obtaining delivery through the Court under Order XXI Rule 95 CPC, for all



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that he would have then obtained is a mere symbolic delivery of the share of the judgement-debtor that he had purchased. This is because, a purchaser of a share of a co-sharer or a co-owner does not have the right to be in physical possession, or share space in enjoying the share he/she has purchased along with other co-sharers or co-owners, no matter whether it is a voluntary transfer *inter vivos* between the parties, or a forced transfer as in a court-auction sale.

8.3 So far as item 2 is concerned, it stands on a slightly different footing, since this property belonged absolutely to the judgement-debtor and his title has vested absolutely in the plaintiff, the auction-purchaser thereof.

8.4 The strategy of the counsel for the defendants/respondents is to pin down the plaintiff to the remedy under Order XXI Rule 95 CPC and to the one year period of limitation under Article 134 of the Limitation Act. This relates to item 2. This is the first part. The second part relates to items 1 and 3, and here again his strategy is founded on a point of limitation, but it is different from the one he projected for defending the claim regarding item 2. Of them his approach to item 2 is significant, and this has engaged this court more as will be seen in the subsequent paragraphs.



8.5 What the counsel for the respondent has managed to achieve is to shift the narrative from a consideration of the substantial questions raised to the more fundamental question on the maintainability of the suit under Sec.47 CPC.

Maintainability of the Suit – Item 2:

9. Here, the contention of the learned counsel is founded on an interpretation of Explanation II of Sec.47 CPC along with Sec.47(1) consequences. Sec.47 reads:

"Sec.47. Questions to be determined by the Court executing decree.

1. *All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.*
2.
3. *Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.*

Explanation 1. *For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.*

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



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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."

The argument of the respondents' counsel is that as per Explanation II(a) to Sec.47 CPC, an auction purchaser is deemed to be a party to the suit, and in terms of Explanation II(b) as inserted by CPC (Amendment) Act, 1976, all questions pertain to delivery of property shall have to be treated as questions relating to execution, discharge or satisfaction of the decree. Its implication is that inasmuch as a suit for possession based on the title of the auction-purchaser is an aspect relating to delivery of property, and since Explanation II(b) has brought all the questions relating to delivery of property as those involved in the execution of a decree, it will necessarily imply that an auction purchaser does not have a choice to obtain possession other than the course provided under Order XXI Rule 95 CPC. In other words, if the auction purchaser is interested in obtaining possession, then the clock will start ticking for him when the sale becomes absolute under Order XXI Rule 92, and the auction-purchaser must have to invoke it within one year there from as stipulated in Article 134 of the Limitation Act. Since a specific provision is made for delivering the property to an auction purchaser, and since the



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Code has authorised the Court that executes a decree to deal with all the issues that might arise in the process as an aspect of execution of decree, Sec.47 and Order XXI Rule 95 combo will be the only option under which an auction purchaser might have to seek possession. And, it thus impliedly bars the auction purchaser's right to resort to common law remedy of instituting a suit for recovery of possession.

10. Notwithstanding the plethora authorities to the contrary, many of them pronounced post 1976 amendment to CPC (to which reference would be made shortly), the learned counsel would argue that a decision is yet to be rendered based solely on an interpretation of the very expressions which the legislature has used in Explanation II(b). The learned counsel now exhorts this Court to delve into what this Court considers as no longer *res integra*. A question is raised and the point is argued, and here the learned counsel appears to have a point for consideration. This Court therefore, cannot shy away from addressing the question posed to it.

11. If the strategy of the respondents' counsel is dissected, it all revolves around the difference between Article 134 and Article 65 of the Limitation Act. This can be explained:



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- Jurisprudentially, the right to possession and right to be in possession is an inalienable aspect of ownership. Necessarily the auction-purchaser is entitled to be in possession. As any owner of an immovable property, he will have the right to institute a suit for possession. But the Code makes a provision under Order XXI Rule 95 for him to take possession through the Execution Court. Whereas a suit for recovery of possession based on title can be laid any time but subject to Article 65 of the Limitation Act, an application for seeking delivery under Order XXI Rule 95 CPC has to be filed within one year from the date of sale under Article 134 of the Limitation Act. (As regards the terminus quo for invoking Order XXI Rule 95, question arose as to whether it is the date of confirmation of sale or the date on which the sale certificate was issued. In ***United Finance Corporation Vs M.S.M.Haneefa*** [(2017) 3 SCC 123], the Hon'ble Supreme Court had considered its earlier judgements and held that the sale becomes absolute on termination of proceedings initiated to set aside the order of confirmation of sale under Order XXI Rule 92(1) CPC, and it left open the issue as to whether the issuance of sale certificate is *sine qua non* for invoking Order XXI Rule 95 CPC. Contextually, this issue is



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besides the point here, since the plaintiff had made his earlier attempt to take delivery by invoking Order XXI Rule 95 CPC beyond one year from both the dates).

- Turning to the common law remedy of instituting a suit for recovery of property based on title, this is governed by Article 65 of the Limitation Act. It provides that the suit must be laid before the expiry of 12 years since the defendant's possession has become adverse to the title of the plaintiff. It in effect does not bar a suit, but it leaves it to the ability of the defendant to establish the non-maintainability of the suit with his pleading and proof of adverse possession. Divestiture of title by adverse possession cannot be presumed merely because the defendant was in possession of the property for more than twelve years either if he does not plead, or having pleaded, fails to prove *nec vi, nec clam and nec precario* vis-a-vis his possession for an uninterrupted twelve years.
- The difference between Articles 134 and 65 of the Limitation Act are not just confined to the period of limitation that they prescribe, but also on the point of their operation. While Article 134 operates right at the point when the auction purchaser invokes Order XXI Rule 95 CPC to obtain delivery, there is no such impediment when



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a regular suit for possession is filed, since there is no period of limitation for instituting the suit as explained above.

12.1 The law as it stood prior to Civil Procedure Code (Amendment) Act, 1976, provided twin options to the auction-purchaser: He could either seek delivery under Order XXI Rule 95 within one year, or alternatively can file a suit for recovery of possession. See: ***Harnandrai Badridas Vs Debidutt Bagwati Prasad & Others*** [(1973)2 SCC 467]. The current pursuit is to understand if on the arrival of Explanation II(b) in the legislative scene, whether the equation is altered, and whether the judgements rendered post 1976 amendment to the CPC which retained the original idea of twin remedies (available to the auction-purchaser), have overlooked the express terms of Explanation II(b)? In ***K.R. Lakshminarayana Rao Vs New Premier Chemical Industries*** [(2005)9 SCC 354], a two Judges Bench of the Hon'ble Supreme Court had held:

"8. A bare perusal of the aforementioned provisions would leave no manner of doubt and in particular having regard to the amendments carried in CPC by reason of the CPC Amendment Act, 1976 that the steps for obtaining delivery of property in occupancy of the judgment-debtor is required to be taken by the auction purchaser in terms of Order 21 Rule 95 CPC and, thus, a separate suit to enforce such a right would, therefore, be not maintainable."



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Does it now mean that after the insertion of Explanation II(b) to Sec.47 CPC, has Order XXI Rule 95 CPC become the sole repository of the right of the auction purchaser to take delivery of the property that he had purchased in a court-auction? And, has this procedural provision wiped away the alternative right of the auction purchaser to seek recovery of possession through a regular suit which he had prior to 1976 amendment to the CPC?

12.2 Couple of years after the judgement in ***K.R.Lakshminarayana Rao case*** [(2005) 9 SCC 354], in ***Balakrishnan Vs Malaiyandi Konar*** [(2006)3 SCC 49 (paragraph 13)], another co-equal Bench of the Hon'ble Supreme Court has held after placing reliance on its earlier dictum rendered in ***Pattam Khader Khan Vs Pattam Sardar Khan*** [(1996) 5 SCC 48] that, “*On his (auction purchaser's) failure to avail such a quick remedy (under Order XXI Rule 95) law relegates him to the remedy of a regular suit for possession. based on title, subject again to limitation.*” This will show, that the Supreme Court has held both before and after its judgement in ***K.R.Lakshminarayana Rao case*** [(2005)9 SCC 354], that a suit for recovery of possession is maintainable, and that the remedy under Order XXI Rule 95 only provides for ***a speedier mechanism for obtaining possession*** to the auction purchaser. In the decisions delivered thereafter, this Court has consistently taken the



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view that a suit for recovery of possession is maintainable even if the auction purchaser's remedy under Order XXI Rule 95 is time barred or not invoked.

See *Nazarath Co-operative Building Society Ltd., Vs Kanakaraj (died) through Lrs.* [2003 (3) CTC 217], *Vaenda Vs D.G.Nrasimhan* [2009 (2) TNLJ 465] *S. Sivasubramanian Vs N. Chinnasamy & another* [2012-2-LW 839], *Vedanthipillai & Others Vs C. Kaja Mohideen* [2016 SCC Online Mad 20422] and *T. Muthukumarasamy Vs J Selvasundarraaj* [2017(6)CTC 602].

13. What emerges from the above narrative is that the predominant judicial view is to preserve and sustain the substantial right of the auction purchaser to take delivery of the property through a regular suit, with an exception in *K.R.Lakshminarayana Rao case* [(2005) 9 SCC 354].

14. But as earlier indicated, the contention of the counsel for defendants/respondents is that in none of the judgements both before and after *K.R. Lakshminarayana Rao case* [(2005)9 SCC 354] which are referred to above, the Courts have explored the interpretative width of Explanation II(b) to Sec.47 CPC and tried to identify those questions that would fall within the phrase, "all questions relating to the delivery of possession," within the meaning of Explanation II(b).



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15.1 This brings into focus the judgement in ***K.R. Lakshminarayana Rao case***. It is set to the following facts: A decree holder-auction purchaser had instituted a suit instead of resorting to delivery under Order XXI Rule 95 CPC, for obtaining possession of the property. It was resisted for its maintainability under Sec.47 CPC as is now done by the defendants in the present case. This plea found favour with both the trial court and the first appellate court and consequently the suit came to be dismissed. When the matter reached the High Court, it relied on the ratio in ***Nandarani Mazumdar Vs Indian Airlines*** [(1983)4 SCC 461 : AIR 1983 SC 1201], wherein the Hon'ble Supreme Court has held that in appropriate cases the suit filed for recovery of possession can be *ex debito justitiae* converted into an application under Order XXI Rule 95 CPC, and did convert the suit before it to an application for delivery under Rule 95. When the matter reached the Supreme Court, the issue became one of limitation. In terms of Article 134 of the Limitation Act, an application under Rule 95 has to be filed within one year from the date on which the sale becomes absolute under Order XXI Rule 94 CPC, whereas the High Court had applied Article 136 of the Limitation Act which provides for 12 years for executing the decree. The Hon'ble Supreme Court held that this was impermissible. In other words, the issue



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which the Hon'ble Supreme Court has pointedly dealt with was not on the import of Explanation II(b) as impacting the maintainability of the suit under Sec.47(1) CPC, but one involving limitation. Earlier, even in ***Ganapat Singh (dead) by Lrs., Vs Kailash Shankar & Others*** [(1987) 3 SCC 146], the Hon'ble Supreme Court refers to Explanation II(b) of Sec.47 CPC, but the opinion of the court drifts towards the point of limitation.

15.2 If closely read, even ***K.R. Lakshminarayana Rao case*** does not attempt to interpret Explanation II(b) to Sec.47, more particularly the phrase “*all questions relating to the delivery of possession of such property*”, and how bar of suit under Sec.47(1) operates, more particularly if it bars the substantive right of the owner of the property to obtain possession of the same.

16.1 The larger question raised still remains: Whether Order XXI Rule 95 is a mere procedural facility offering a speedier remedy to an auction purchaser, or is it the sole repository of his right to obtain possession? In ***Velmurugan & Others Vs Perumal Gounder*** [2011 (4) CTC 720] a learned single Judge of this court has come within the striking distance to address the point, but the facts of that case took the court away from it.



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16.2 In **Danish Varghese Vs Jancy Danish** [(2021)1 KLJ 755 : (2021) 2

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had an occasion to decide substantially the same issue posed before this

court. The questions referred to the Full Bench for its opinion were twofold:

“(a) What is the starting point of one year limitation period prescribed under

Article 134 of the Limitation Act? and, (b) Is it mandatory for the auction

purchaser to take delivery of the property purchased by him in court

auction?” This Court however, is more concerned with the second of the two

questions raised. Negotiating the dictum in **K.R. Lakshminarayana Rao**

case, the learned Judges have held:

"34. Whether a fresh suit is hit by Explanation II to Section 47 was never placed before the Hon'ble Supreme Court in Pattom Khader Khan's case. Supreme Court did not have occasion to consider the question whether it was barred by section 47 CPC. The above observation of the Supreme Court, which was followed in Balakrishnan's case as a precedent was without reference to the spirit of sections 12 and 47 CPC, provisions relating to sale as contemplated under Order XXI CPC and the amendment to Art. 134 of Limitation Act. The period of limitation of 3 years provided in Art.180 of the old Act was reduced to one year pursuant to Law Commission (III-report) recommendation. Though the reason for reducing the period is not mentioned in the report, it appears that Law Commission was persuaded by the reason that property is brought for sale after a



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prolonged litigation. Providing 3 years for taking delivery itself was found to be too long a period. Applying that rationale, the argument that even after failure to apply for delivery, fresh suit can be filed is contrary to the above referred provisions of CPC. The underlying principle of CPC was to provide for a fast and effective remedy for all issues that may arise in the course of execution, discharge and satisfaction of a decree. Further, interpreting that, if the relief which could be availed under Order XXI Rule 95 CPC was barred by limitation, same relief can be sought thereafter by way of a fresh suit will virtually make section 47 CPC redundant, in such cases. In the light of the above, Pattam Khader Khan's case cannot be considered to lay down binding precedent of law, in this regard. Balakrishnan's case neither referred to Manikayala Rao case or precedent in Lakshminarayana Rao's case which were anterior in time to Balakrishnan's case. Hence, regarding claims which arise from the execution discharge and satisfaction of decree, the view laid down in Lakshminarayana Rao's case and Manikayala Rao's case should prevail.

35. This issue can be viewed from another perspective. Whether the same proposition will apply to claims and/or disputes outside S.47 CPC. and which arise from independent cause of action and thereby do not offend S.47 CPC?. The question involved is, if for some reason, the auction purchaser is unable to seek for delivery of possession, whether he will be precluded from recovering possession of the property on the strength of title.

37. Therefore, when the sale had become absolute, the property is deemed to have vested in the purchaser from the time when the



property is sold. In other words, there is a vesting of property in favour of the purchaser as on the date of sale, though the sale becomes absolute only at a later date.....

40. We are concerned with an instance where after the sale has become absolute, entitling the auction purchaser to have title to the property and he does not seek delivery of property within the specified time, what would be the nature of possession of the judgment debtor or any other person in possession of the property requires to be considered. One of the issues which had been referred for consideration is whether a separate suit for recovery of possession was maintainable after the period specified for delivery of possession under Article 134 of the Limitation Act.

41. It is relevant to note that in terms of Section 47, matters relating to “delivery of possession”, is deemed to be a question relating to the execution, discharge or satisfaction of the decree. The words “delivery of possession” appears in Order XXI Rule 95 as well. Taking into account the scope of enquiry to be conducted by the Execution Court, which apparently is a power of the Court to permit the auction purchaser to acquire possession of the property, the said words have to be given a narrow meaning. Therefore, if a narrow interpretation is given to the words “delivery of possession”, what is prohibited by filing a separate suit is only an attempt to seek “delivery of possession” as a sequel to court sale and not a suit for possession on the strength of title. In fact, in the judgment of the Apex Court in Ganapat Singh's case (supra), the question considered was whether an application under Order XXI Rule 95 of CPC for delivery of possession of the property purchased by the auction purchaser was barred by limitation under



Article 134 of the Limitation Act. Apparently, the said application was filed after one year from the date when the sale had become absolute. Contention urged was that the application was within the limitation period prescribed under Article 136 which prescribes limitation period of 12 years for execution of the decree. This contention was negated by the Apex Court. Article 136 of Limitation Act was with reference to the period prescribed for executing a decree, which is 12 years. It was held that Article 136 will not apply to an application under Order XXI Rule 95. There cannot be any quarrel regarding the said position.

44. Even though an application under Order XXI Rule 95 is barred by limitation, what is the nature of right that a title holder will have in respect of a property requires to be considered. Reference can be made to Article 65 of the Limitation Act.

48....In the judgments in Ganapat Singh (supra) and K.R. Lakshminarayana Rao (supra), the Apex Court had only considered the question whether Article 136 would apply to a petition under Order XXI Rule 95 but has not considered whether a suit for possession on the strength of title would be maintainable or not. We feel that such a view is also possible in the case, or else, the auction purchaser, who will have a valid title, will not be in a position to recover possession of the property at any point of time and his title will become a dead paper.

49. The above discussion leads to the conclusion that in the case of failure on the part of the auction purchaser to file an application under Order XXI Rule 95 CPC, within the limitation period provided under Article 134, his right to seek same relief by a fresh suit is hit by Section 47 of CPC. The law has been correctly laid down in



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Lakshminarayana's case and followed by the Division Bench of this Court in Anjaneyan's case. However, in relation to the claims which do not arise in relation to discharge, satisfaction or execution of the decree, and a suit for possession on strength of title which fall within Article 65 of the Limitation Act, a fresh suit may be maintainable.... Evidently, in case of a person who procures an undivided right over the auctioned property, his right under Order XXI CPC terminates with delivery of symbolic possession of the undivided right. That will not preclude him from seeking partition of the property by a suit.” (emphasis supplied)

Any search for an understanding of Explanation II(b) of Sec.47 CPC must end here, even though the question raised by the respondents' counsel is before this Court is worded differently from the one which the Kerala High Court addressed in **Danish Varghese case**. The difference however, is only in the form and not in the substance. Having stated thus, this Court considers that the dictum in **Danish Varghese case** can be supplemented with a view from another perspective as it left some space to demonstrate why Explanation II(b) cannot accommodate an interpretation that a suit for recovery of possession is barred by the combined operation of Sec.47 and Order XXI Rule 95 CPC.

17. Let the basic premise be stated: Alongside the execution of a decree, the Code also recognises satisfaction of a decree. Execution of the decree



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therefore becomes necessary only when satisfaction of a decree does not happen. This implies that the execution of a decree is but a mere option available to the decree holder and it is not mandatory in all cases. It is now possible to derive that as long as execution remains an option, the title of the auction purchaser (vested under Sec.65 CPC) cannot depend on it for working the ownership. Once title is properly vested, law presumes in its continuation till it is proved otherwise. (This is the foundation of law on adverse possession, where the burden is on the defendant to prove the contrary, and the owner is required to do nothing.) It only shows, ownership and the procedure for execution of a decree are two unrelated aspects, and the former is not dependent on the latter.

18.1 This aspect is now telescoped into another realm where a perceptual shift in conceptualising right to property as a facet of human right and hence a fundamental right to life under Article 21 of the Constitution is happening. See: *Vidya Devi Vs State of H.P.*, [(2020) 2 SCC 569], *Lalaram Vs Jaipur Development Authority*, [(2016) 11 SCC 31]. Indeed, in *State of Haryana Vs Mukesh Kumar* [(2011)10 SCC 404], the Hon'ble Supreme Court chose not to hide its anguish, though in a different context, over the statutory patronage the law of adverse possession is accorded in our legal system. It



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quipped that, “*the Govt. should protect the property of a citizen – not steal it*”. Given the exalted position which right to property is accorded, it will be nigh difficult to visualise an interpretation that a pure procedural provision in Explanation II(b) to Sec.47 can rob the substantial right of the auction purchaser to sue for possession based on title. That will be a terrible mismatch of concepts. And, if ever it is attempted, it is cautioned, it may easily work its way, may be unwittingly, to create two classes of vested right involving the sale of an immovable property: those in whom title vests in a transfer *inter vivos*; and another in a court auction sale.

18.2(a) If title as understood in jurisprudence is considered as a fact by which right is vested in a person, then the title vested in a transferee in a sale *inter vivos* between the parties under Sec.54 of the Transfer of Property Act, and the title vested in an auction purchaser in a court auction sale under Sec.65 CPC are merely different modes of vesting of title. And, the mode of vesting of title is not the same as vesting of very ownership. It is this vesting of ownership, as distinguished from mode of its vesting which clothes the owner of a property with all the allied rights associated with it, principally the right to possess the property.



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18.2(b) Once the title in an immovable property is vested in a purchaser, there can be no discrimination between a purchaser in a court auction sale and in an *inter vivos* transfer, based merely on the mode of vesting. There neither is, nor can there be a rationale for discriminating one class of owners from the other without breaching the rule of equality to which both classes of purchasers are entitled to. If every auction-purchaser's right to obtain possession of the auctioned property is confined to Order XXI Rule 95, then he will be stranded without possession if he misses the one-year timeline stipulated under Article 134 of the Limitation Act. Nothing can be more unfair to this particular class of title holders and it will plainly stare on the face of equality-doctrine. It now underscores the relevance of the imputation that a procedural law is but a maid to aid the substantive law in enthroning justice, and not to be its death-trap.

19. An adjunct aspect is that right to property cannot be forfeited to its holder unless there is an express sanction in law. And, where there is any ambiguity in its application, benefit should always go to the right-holder. Here, a procedural law cannot be kept alongside an expropriatory statutes such as a Land Acquisition Act, those on land ceilings or reforms. If viewed from this angle, there is nothing within the scheme of Sec.47 CPC to indicate that it



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purports to deal with the substantive right of the auction purchaser to obtain possession by a regular suit based on his title. In ***Danish Varghese case***, this precisely is termed as cases falling outside the ambit of Rule 95.

20. There is another way of looking at it. The only difference between a sale *inter vivos* and a court-auction sale is that while the former carries a warranty of title of the vendor under Sec.55 of the Transfer of Property Act, in a court auction sale there is no warranty of title of the judgement debtor. Since a court-auction sale does not carry a warranty of title, the Code perhaps assumes the responsibility of dealing with the third party obstructions to the delivery of property attempted under Order XXI Rule 95. In that sense Rule 95 can be considered as a manifestation of the moral obligation which the Court and the Code have assumed to secure to the auction purchaser as easy a mode of obtaining possession of the property as they could, since the auction purchaser walks in to bid a property only at the invitation of the court. To expatiate it, the questions that may ordinarily arise during delivery of property under Rule 95 are a rival claim of title to, or a derivative title under the judgement-debtor from a third party obstructor, or those involving identity of the property required to be delivered to the auction-purchaser and the like. For instance, if there is an obstruction to the delivery of the



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auctioned-property, the Code provides a mode of dealing with it under Order XXI Rule 97 CPC, and has also enabled that any order which the Execution Court passes while resolving any such issue will be an appealable decree under Order XXI Rule 103 CPC. Hence there is logic in barring a suit on any issue which an Execution Court is invited to decide. However, there is hardly any logic in confining or limiting an auction purchaser's right to obtain possession in assertion of his ownership to Order XXI Rule 95 CPC when he does not want it. If an auction-purchaser says thanks to the Court and the Code, and wants to deal with his ownership and the associated rights in a manner of his choice, more particularly the right to obtain possession, is it permissible to interfere with the said freedom of choice and to tie him down to Rule 95 and also to a shorter period of limitation?

21. It now leads to one conclusion: that Order XXI Rule 95 CPC cannot be construed as the exclusive repository of options available to the auction purchaser to take delivery of the property, and that it is merely one of the options. Hence, the phraseology employed in Explanation II(b) to Sec.47 CPC can do no damage to the common law remedy to seek possession which is inherent in, and incidental to the ownership of an auction purchaser. And, the questions that would fall within the purview of Explanation II(b) and Sec.



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47(1) CPC are those questions of which the Execution Court has taken cognizance of while dealing with an application under Order XXI Rule 95 CPC, and has actually dealt with it, and not any other. Necessarily, the bar under Sec.47(1) taken along with Explanation II(b) CPC cannot be extended to cases where the Execution Court's jurisdiction is neither invoked, or having invoked, the Court refuses to take cognizance due to bar of limitation under Article 134 of the Limitation Act (as has happened to the plaintiff in this case), or where it dismisses an application for default.

22. This Court therefore finds least difficulty in holding that the suit is maintainable vis-a-vis Item-2.

23. Turning to facts of this case, so far as item 2 property is concerned, even though the suit is maintainable, the suit was laid beyond 12 years both from the date of confirmation of auction sale, and also from the date of Ext.A-1 sale certificate. On facts, this will have no impact on the right of the plaintiff to obtain possession of item 2 unless the defendants had pleaded and proved adverse possession. And, the defendants neither troubled themselves nor the Court as they did not plead adverse possession in the manner that law requires as a line of their defence. The plaintiff therefore, reaches his shore



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safely with no need to navigate through Sec.14 of the Limitation Act. In view of the above the substantial question (iii) does not arise for consideration.

Maintainability of suit - Items 1 and 3:

24.1 The next point involved is about the maintainability of the suit for partition vis-a-vis items 1 and 3. Here the defendant relied on the ratio in *V.C.Thani Chettiar (Died) and another vs. Dakshinamurthy Mudaliar and others* [(1955)68 L.W 166 (FB) (at page 173)], where this Court had held that limitation for filing a suit for partition by a purchaser of a fractional share of a coparcenary property will commence from the date of purchase.

24.2 This view however, may not be good law in view of the dictum in *Sidheshwar Mukharjee Vs Bhuvaneshwar Prasad Narain Singh & Others* [AIR 1953 SC 487] and followed in *M.V.S.Manikayala Rao Vs M. Narasimhaswami & Others* [AIR 1966 SC 470], where the Hon'ble Supreme Court had set the clock for reckoning the *terminus quo* for the purpose of Article 144 of the Limitation Act, 1908 (now Article 65), only upon allotment of specific share to the plaintiff. As has been stated a few times earlier, Article 65 of the Limitation Act, 1963, depends for its application on the quality of defence and not on the facts constituting the cause of action for



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the suit. The onus is on the defendant to prove non-maintainability of the suit and it does not impact the plaintiff's right to sue. To conclude on this point, the defendants lose yet another point to the plaintiff.

Conclusion:

25.1 This litigation now ends on a slightly different note. More than the plaintiff/appellant winning the case, the respondents have given the advantage to the appellant with their inability to sustain the plea on maintainability of the suit. It implies that both the substantial questions (i) and (ii) are decided in favour of the plaintiff/appellant.

25.2 To conclude, this appeal is allowed, and the judgement and the decree of the first appellate court in A.S.38 of 2007 is set aside, and the decree of the trial court in O.S.15/1997 is restored. No costs.

30.09.2022

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N.SESHASAYEE.J.,

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To:

- 1.The Sub Court, Palani
- 2.The District Munsif Court, Palani.

Pre-delivery Judgment in
S.A.(MD) No.1145 of 2011

30.09.2022