
C. Murugan Vs Thilagavathy and Others

C.R.P. (NPD) Nos. 2620 and 2621 of 2014

Court: Madras High Court

Date of Decision: Dec. 22, 2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Order 21 Rule 100, Order 21 Rule 101, Order 21 Rule 102, Order 21 Rule 103, Order 21 Rule 105#Constitution of India, 1950 " Article 227#Transfer of Property Act, 1882 " Section 52

Citation: (2015) 1 CTC 516

Hon'ble Judges: K. Kalyanasundaram, J

Bench: Single Bench

Advocate: R. Bharath Kumar, Advocates for the Appellant; M.S. Krishnan, Senior Counsel for P.T. Asha and Sarvabhauman Associates, Advocates for the Respondent

Judgement

K. Kalyanasundaram, J.

These Revision Petitions arise out of the Orders passed by the II Additional Sub-Judge, Coimbatore in E.A. No.

198 of 2009 in E.P. No. 179 of 2008. For the sake of convenience and for easy understanding, the Petitioner herein C. Murugan will be

hereinafter as Decree-holder, the First Respondent Dr. Thilagavathy will be referred as 3rd Party Obstructor and the Second Respondent-K.

Sekaran will be referred as Judgment-Debtor.

2. The Petitioner/Decree-holder instituted a Suit against K. Sekaran/Judgment-Debtor in O.S. No. 764 of 1993 for Specific Performance of the

Sale Agreement dated 30.9.1991. The Suit was decreed ex parte on 6.1.2006. On the basis of the decree, a Sale Deed was executed in favour of

the Decree-holder and thereupon he laid an Execution Petition E.P. No. 179 of 2008 for delivery of possession. In the Execution Petition, 3rd

Party Obstructor filed E.A. No. 198 of 2009 under Order 21, Rules 97 & 98 of C.P.C., r/w. 151, C.P.C., seeking adjudication of her right and

title over the Petition mentioned property and record the resistance and obstructions of delivery of possession of the property in pursuance of the

Decree passed in O.S. No. 764 of 1993.

3. The 3rd Party Obstructor has averred that the Judgment-Debtor-Mr. K. Sekaran became the owner of the property by the Sale Deed dated

25.9.1983. He borrowed money from one Mohan, since the amount was not paid, the said Mohan filed a Suit in O.S. No. 951 of 1991 on the file

of the Principal District Munsif, Coimbatore for recovery of the amount. The Suit was decreed on 28.7.1992 and on the basis of the Decree

Execution proceedings in E.P. No. 207 of 2006 was initiated by Mohan against Sekaran to realise the Decree amount by way of attachment and

sale of property. The Executing Court attached the property on 16.4.1998 and in the Auction Sale held on 18.6.2003, the said Mohan himself

purchased the property. The learned District Munsif issued the sale certificate in favour of the said Mohan on 5.11.2003.

4. In E.A. No. 314 of 2004 the property was taken delivery by the said Mohan on 21.2.2005 and the Executing Court recorded the delivery on

17.3.2005 and terminated the Execution proceedings. It is further contended that the Decree-holder and the Judgment-Debtor colluding

themselves created a Sale Agreement and instituted the Suit for Specific Performance, so the Decree obtained is a illegal and invalid. The

Application was resisted by the Decree-holder by filing a detailed Counter stating that the Attachment Order made in E.P. No. 207 of 2006 in

O.S. No. 915 of 1991 is void and unenforceable and the decree obtained in O.S. No. 915 of 1991 is a fraudulent one, and also it is also hit by the

Doctrine of lis pendens.

5. The parties have not let in oral evidence, but marked Ex. P1 to P24 and Ex. R1 to R3. After considering the documents the learned District

Judge allowed the Application in E.A. No. 198 of 2009 and consequently dismissed the Execution Petition. Question the orders these Revisions

have been filed.

6. When the Revision Petition were taken up for hearing Mr. M.S. Krishnan learned Senior Counsel for the 3rd Party Obstructor submitted that

these Revision Petitions are not maintainable as an Appeal remedy is available as per Rule 103 of Order 21, C.P.C. In view of the submission of

the learned Senior Counsel, this Court heard the arguments of the Counsel on maintainability of the Revision Petitions.

7. Mr. R. Bharat Kumar learned Counsel for the Petitioner submitted that the Application filed by the 3rd Party Obstructor itself is not

maintainable. Under Order 21, Rule 97 of C.P.C., an application could be filed only by the Decree-holder and if any person other than the

Judgment-Debtor is removed from the Suit property, he can approach the Court under Order 21, Rule 99, C.P.C., complaining about such

removal and to seek for adjudication of his rights. So the present Application filed by the 3rd Party Obstructor under Section 21, Rule 97, C.P.C.,

to record the resistance and obstruction of delivery of possession of Suit property is not maintainable in law and therefore, the Order is liable to be

set aside.

8. The learned Counsel further submitted that the Decree-holder had entered into an Agreement for Sale with the Judgment-Debtor on 30.9.1991,

for non-fulfillment of his obligation, the Decree-holder filed a Suit on 9.6.1993 and the Suit was decreed on 16.1.2006. While so, the Suit filed by

the said Mohan against the said Judgment-debtor on 28.7.1992 and the subsequent Attachment Order passed in E.P. No. 207 of 1996 dated

16.4.1998 and the Court Auction sale in favor of the said Mohan on 18.8.2003 and the purchase made by the 3rd Party Obstructor on 15.7.2005

are all hit by the Doctrine of lis pendens. In such circumstances, the Executing Court has to see whether the Obstructor is a pendente lite and once

the answer is in affirmative, there need not any further adjudication of her right and the Executing Court has to simply dismiss the Obstruction

Application.

9. The learned Counsel for the Petitioner further submitted that the Executing Court has committed jurisdictional error and the adjudication itself is

illegal. Further the Executing Court failed to exercise its jurisdiction to find out whether the 3rd Party Obstructor is a pendente lite or not, hence the

Revision is maintainable.

10. Per contra, Mr. M.S. Krishnan learned Senior Counsel submitted that the Decree-holder is the neighbour of the obstructor. The Decree-

holder had knowledge about the attachment of the property, subsequent sale on 18.8.2003 and the issuance of Sale Certificate on 15.11.2003.

The Decree-holder is also aware of the facts that the Court Auction purchaser namely Mohan took delivery of possession of the Suit property on

21.2.2005 from one Tenant Kabibrehman, change of mutation of Property Tax assessment in his name and payment of Property Tax and

Electricity Consumption charges and Water charges in his name; the 3rd Party Obstructor had purchased the property on 13.7.2005 from the

Court Auction purchaser and subsequently, obtained property assessment in her name and on 13.4.2007 obtained a planning permission; and that

thereafter, she demolished the old building and constructed a new building at cost of Rs. 20 lakhs. But the Petitioner/Decree-holder all along was

keeping quiet and also did not implead her in the Execution Petition.

11. The learned Counsel further submitted that the Court Auction sale in favour of the said Mohan is an involuntary one, so the subsequent

purchase by the 3rd Party Obstructor is not affected by doctrine of lis pendens. In other words, the learned Senior contended that if the original

owner/Judgment-Debtor in this case transferred his right in favour of the said Mohan and the sale in favour of the obstructor would be termed as

transferee pendente lite. But in the case of auction sale by the Court or sale by officials under the Revenue Recovery Act or Customs Act cannot

be characterised as direct sale and in such case the theory of lis pendens will not apply.

12. The learned Senior Counsel would further submit that the Decree passed in the money Suit is not a fraudulent one, because the said Monhan

instituted the Suit in the year 1991 and the Suit was decreed on 28.7.1992, the Execution Petition was filed in the year 1996 and the property was

sold in Court Auction on 18.8.2003 and therefore, the time gap would establish that the sale is a genuine one.

13. The learned Counsel further submitted that the 3rd Party Obstructor is a bona fide purchaser of the Suit property for a valuable consideration

and as per Rule 101 to Order 21, C.P.C., a separate Suit is not maintainable and her right in the property has to be adjudicated only under Order

21, Rule 97, C.P.C. It is further submitted that Order 21, Rule 102, would apply only to the simple sale made by the Judgment-debtor and it will

not apply to the involuntary sale or sale by operation of law.

14. First I would like to consider the Judgments relied upon by the Counsel for the Respondent:

(a) In Brahmedo Chaudhary, Adv. Vs. Rishikesh Prasad Jaiswal and another, , the Hon"ble Apex Court has held as follows:

11. In view of the aforesaid settled legal position, therefore, and in the light of the statutory scheme discussed by us earlier it must be held that

Respondent No. 1-Decree-holder"s Application dated 6th May 1991 praying for issuance of warrant for delivery of possession with the aid of

armed force, was in substance for removal of obstruction offered by the Appellant and others under Order 21, Rule 97, C.P.C., and had to be

adjudicated upon as enjoined by Order 21, Rule 97, sub-rule (2) read with Order 21, Rule 101 & Order 21, Rule 98. In this connection the Court

had also to follow the procedure laid down by Order 21, Rule 105, which enjoins the Executing Court to which an Application is made under any

of the foregoing Rules of the Order to fix a date of hearing of the Application. As the Executing Court refused to adjudicate upon the obstruction

and the claim of the Appellant who obstructed to the Execution proceedings it had clearly failed to exercise jurisdiction vested in it by law. The

High Court in Revision also committed the same error by taking the view that such an Application was not maintained. It is of course true as

submitted by learned Counsel for the Decree-holder that in Paragraph 4 of the Judgment under Appeal the High Court has noted that there was

some discrepancy about the Khasra Number. But these are passing observations. On the contrary in the subsequent paragraphs of the Judgment

the High Court has clearly held that such an Application by the objector was not maintainable and his only remedy was to move an Application

under Order 21, Rule 99, after handing over possession and consideration of objection to delivery of possession by a stranger to the Decree at

any earlier stage was premature. It must, therefore, be held that neither the Executing Court nor the High Court in Revision had considered the

objection of the Appellant against execution or merits. Consequently the impugned Judgment of the High Court as well as the order of the

Executing Court in Civil Execution Case No. 25 of 1990 dated 15th February 1996 are quashed and set aside and proceedings are remanded to

the Court of Munsif II, Munger to re-decide the Application of Respondent No. 1-Decree-holder dated 6th May 1991 by treating it to be one

under Order 21, Rule 97, for removal of obstruction of the Appellant and after hearing the decree-holder as well as the Appellant to adjudicate the

claim of the Appellant and to pass appropriate Orders under Order 21, Rule 97, sub-rule (2), C.P.C., read with Order 21, Rule 98, C.P.C., as

indicated in earlier part of this Judgment.

(b) Three-Judges Bench of the Hon"ble Apex Court in the Judgment reported in Silverline Forum Pvt. Ltd. Vs. Rajiv Trust and another, ,

observed that a third party to the decree including the transferee pendente lite can offer resistance or obstruction and his right has to be adjudicated

under Order 21, Rule 97, C.P.C. Paragraphs 9, 10 & 14 are extracted hereunder:

9. At the outset, we may observe that it is difficult to agree with the High Court that resistance or obstructions made by a third party to the Decree

of Execution cannot be gone into under Order 21, Rule 97 of the Code. Rules 97 to 106 in Order 21 of the Code are subsumed under the caption

Resistance to delivery of possession to decree-holder or purchaser"". Those Rules are intended to deal with every sort of resistance or

obstructions offered by any person. Rule 97 specifically provides that when the holder of a Decree for possession of immovable property is

resisted or obstructed by-""any person"" in obtaining possession of the property such decree-holder has to make an Application complaining of the

resistance or obstruction. Sub-rule (2) makes it incumbent on the Court to proceed to adjudicate upon such Complaint in accordance with the

procedure laid down.

10. It is true that Rule 99 of Order 21 is not available to any person until he is dispossessed of immovable property by the decree-holder. Rule

101 stipulates that all questions ""arising between the parties to a proceeding on an Application under Rule 97 or Rule 99"" shall be determined by

the Executing Court, if such questions are ""relevant to the adjudication of the Application"". A third party to the Decree who offers resistance

would, thus, fall within the ambit of Rule 101 if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the

execution of the Decree. No doubt if the resistance was made by a transferee pendente lite of the Judgment-debtor, the scope of the adjudication

would be shrunk to the limited question whether he is such transferee and on a finding in the affirmative regarding that point the Execution Court

has to hold that he has no right to resist in view of the clear language contained in Rule 102. Exclusion of such a transferee from raising further

contentions is based on the salutary principle adumbrated in Section 52 of the Transfer of Property Act.

14. It is clear that Executing Court can decide whether the Resistor or Obstructor is a person bound by the decree and he refused to vacate the

property. That question also squarely falls within the adjudicatory process contemplated in Order 21, Rule 97(2) of the Code. The adjudication

mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on admitted facts or

even on the averments made by the resistor. Of course the Court can direct the parties to adduce evidence for such determination. If the Court

deems it necessary.

(c) In Shreenath and Another Vs. Rajesh and Others, , a question arose in that case, whether the Application filed by the Tenants under Order 21,

Rule 97, who were not parties to the Suit, can maintain Application. The Hon^{ble} Apex Court while interpreting the words ""any person"" occurring

in Rule 97(1) held that ""Any Person"" includes even persons not bound by the decree placing reliance on the Judgment in the case of Brahmdeo

chaudhary referred above, Paragraph 13 reads thus:

75. So far sub-clause (1) of Rule 97 the provision is same but after 1976 Amendment all disputes relating to the property made under Rules 97 &

99 is to be adjudicated under Rule 101, while under unamended provision under sub-clause (2) of Rule 97, the Executing Court issues summons

to any such person obstructing possession over the decretal property. After investigation under Rule 98 the Court puts back a decree-holder in

possession where the Court finds obstruction was occasioned without any just cause, while under Rule 99 where obstruction was by a person

claiming in good faith to be in possession of the property on his own right, the Court has to dismiss the Decree-holder Application. Thus, even

prior to 1976 right of any person claiming right on his own or as a Tenant, not party to the Suit such person's right has to be adjudicated under

Rule 99 and he need not fall back to file a separate Suit. By this, he is saved from a long litigation. So a tenant or any person claiming a right in the

property, on his own, if resists delivery of possession to the decree-holder the dispute and his claim has to be decided after 1976 Amendment

under Rule 97 read with Rule 101 and prior to the amendment under Rule 97 read with Rule 99. However, under the old law, in cases order is

passed against the person resisting possession under Rule 97 read with Rule 99 then by virtue of Rule 103, as it then was, he has to file a Suit to

establish his right. But now after the amendment one need not file Suit even in such cases as all disputes are to be settled by the Executing Court

itself finally under Rule 101.

(d) In Ashan Devi and Another Vs. Phulwasi Devi and Others, it is held as follows:

The question raised in that case was whether the Objector cannot claim adjudication of his claim being third party to the Decree under execution

until he is "actually dispossessed". The argument advanced was that Application under Order 21, Rule 97, at the instance of Objector is not

maintainable to the Executing Court because such Application complaining "resistance and obstruction" by the third party could be filed only by the

Decree-holder under Order 21, Rule 97 of the Code. It was argued that the remedy of the third party to the Executing Court is only after he

suffers dispossession in execution of the Decree. Thereafter, he has to complain under Order 21, Rule 99, and seek adjudication of his claims and

rights. This Court negated that contention and observed thus:

"On the contrary the statutory scheme envisaged by Order 21, Rule 97, C.P.C., clearly guards against such a pitfall and provides a statutory

remedy both to the decree-holder as well as to the obstructionist to have their respective say in the matter and to get proper adjudication before

the Executing Court and it is that adjudication which subject to the hierarchy of Appeals would remain binding between the parties to such

proceedings and separate Suit would be barred with a view to seeing that multiplicity of proceedings and parallel proceedings are avoided and the

gamut laid down by Order 21, Rules 97 to 103 would remain a complete code and the sole remedy for the parties concerned to have their

grievance once and for all finally resolved in Execution proceedings themselves.

(e) In the recent Judgment in Har Vilas v. Mahendra Nath and others 2011 (15) SCC 377, the same question of maintainability of the Application

filed by 3rd party under Order 21, Rule 97, came up for consideration, The Supreme Court has held as follows:

4. The Full Bench decision of the Madhya Pradesh High Court in Usha Jain case has been overruled by this Court in Shreenath v. Rajesh. It has

been held that a third person claiming to be in possession of the property forming the subject-matter of decree in his own right can resist delivery of

possession even by filing an objection under Order 21, Rule 97, of the Code of Civil Procedure in the Executing Court itself and if that is done, the

objection shall have to be determined by the Executing Court itself. The provisions of Rule 100 (of the old CPC, the equivalent provision whereof

if Rule 99 in the new CPC) will not defeat the right of such person to get his objection decided under Rule 97, which is a stage prior to his

dispossession. In view of the decision of this Court in the case of Shreenath the impugned view of the High Court based on the Full Bench decision

of the High Court of Madhya Pradesh in the case of Usha Jain cannot be sustained.

5. However, during the course of hearing, it was brought to our notice that the Appellant herein has already filed a Suit for permanent injunction,

registered as Suit No. 286 of 1990, in the Court of Civil Judge, Shikohabad and therein a Temporary Injunction has been obtained by the Plaintiff

protecting his possession. However, we are of the opinion that in view of the decision of this Court in the case of Shreenath as also in Anwarbi v.

Pramod D.A. Joishi the objections should have been heard and decided by the Executing Court itself.

15. In the above referred cases the Hon"ble Supreme Court, has consistently held that the Application filed by the Third Party Obstructor under

Order 21, Rule 97, is maintainable.

16. In Devaraja Pillai and Another Vs. K.R. Purushothama Chettiar and Others, , this Court has held the order under Order 21, Rule 98, being

appealable, the Revision does not lie.

5. Mr. D.K. Srinivasagopalan, learned Counsel for the Respondents herein further states that only an Appeal will lie and not a Revision. It is clear

from the order that the same has been passed Order 21, Rule 98, Civil Procedure Code. Order 21, Rule 103, states as follows:

Where any Application has been adjudicated upon under Rule 96 or 100, the Order made thereon shall have the same force and be subject to the

same conditions as an Appeal or otherwise as it were a Decree.

17. The Hon"ble Apex Courts in the Judgment reported in S. Rajeswari Vs. S.N. Kulasekaran and Others, , has held that the order passed under

Order 21, Rule 97, must be treated as Decree against which only an Appeal will lie and the order cannot be challenged under Section 115 of

C.P.C. In Paragraph 13 of the Judgment it runs thus:

Learned Senior Counsel for the Appellant-Obstructor submitted before us that the Application filed under Section 151, C.P.C. being not

maintainable nothing survived for further consideration. Having regard to the fact that the Executing Court substantially followed the procedure laid

down by Rules 98 to 100 and thereafter passed an Adjudicatory Order, we may hold in favour of the Respondent No. 1 to the extent that the

Application though filed with the label of Section 151, C.P.C. was in fact treated as one under Order 21, Rule 97. This, however, does not resolve

the controversy before us because even if we treat the said Application under Section 151, C.P.C. as one under Order 21, Rule 97, C.P.C. the

Order passed in that proceeding must be treated as a Decree against which only an Appeal lay to the Appellate Court. The Respondent No. 1 did

not Appeal to the High Court and instead preferred a Revision Petition under Section 115, C.P.C. We have no doubt that in view of the provisions

of Order 21, Rule 103, C.P.C. which provide for Appeal against the Order passed by the Executing Court in such matters, no Revision could be

entertained by the High Court against that order in view of the clear prohibition contained in Section 115(2) of the C.P.C., which in clear terms

provides that the High Court shall not under Section 115, vary or reverse any decree or order against which an Appeal lay either to the High Court

or to any other Court subordinate thereto. The High Court appears to have interfered with the Order of the Executing Court because it was under

the impression that a long drawn litigation, perhaps engineered by the Judgment-Debtor would result in great injustice, and therefore, if some relief

could be granted by cutting short the procedure of Appeal, etc., the power under Section 115 could be exercised to do justice between the

parties. In our view the High Court could not have acted in a manner contrary to the express provision of Section 115(2) of the Code of Civil

procedure. Since an Appeal was provided under Order 21, Rule 103 of the Code of Civil Procedure which treated the Order passed by the

Executing Court as a Decree subject to the same conditions as to Appeal against such Decree, a Revision Petition under Section 115, C.P.C.

against such an order is not maintainable. We must, therefore, hold that the High Court exceeded its jurisdiction in entertaining a Revision Petition

under Section 115, C.P.C. against an Order passed in proceeding under Order 21, Rule 97, C.P.C., even if we treat the application filed under

Section 151, C.P.C. to be an Application under Order 21, Rule 97, C.P.C.

18. The Counsel for the Petitioner placing reliance on the Sameer Singh Vs. Abdul Rab, , contended that the Revision is maintainable. In that case,

an Application was filed before the Executing Court under Order 21, Rules 97, 99 & 101 C.P.C., challenging the Order of Executing Court of

delivery of possession of the property to the auction purchaser. But the Executing Court dismissed the Application holding that the it has become

functus officio. In the above facts the Hon"ble Apex Court held that the summary rejection of the Application without proper adjudicating the

issues on merits cannot be treated as Decree.

19. In Annapoorni v. Janaki, 2013 (2) MWN (Civil) 847 : 1995 (1) LW 141, a Suit was filed by a daughter-in-law against her mother-in-law

claiming entire right over the property of her deceased husband. The mother of the deceased remained ex parte and Decree for declaration was

granted in favour of the Plaintiff. In the above facts this Court held that the mother of the deceased is a Class I heir under Hindu Succession Act

and therefore, the Decree in the Suit declaring excessive right of the Plaintiff and directing the Defendant to deliver possession was unsustainable in

law. This Court in exercising suo motu powers under Section 115, C.P.C., and also the superintendence power under Article 227 of the

Constitution of India set aside the Decree.

20. In the Judgments reported in Banumathi @ Karunaammal Vs. A.P. Athanari, A.P. Karumalayan, Dhanammal and Guruval, ; Shri Rajasthani

Jain Samaj Educational Trust Vs. V. Subramanian, G. Srinivasan, G. Venugopal and Smt. Vatsala Ravi, ; and M.S. Mansoor Deen and Others

Vs. Mrs. Fathimuthu Beevi and Others, , this Court held that as per Section 52 of Transfer of Property Act and the object and scope of Order 21,

Rule 102, C.P.C. The transferees pendente lite from the Judgment-Debtor have no independent right and their Application does not require

adjudication under Order 21, Rule 97, C.P.C.

21. Keeping in mind the principles laid down in the Judgments relied on by the Respondent referred supra, in my considered opinion the Judgments

are not helpful to the Petitioner.

22. Considering the facts and circumstances, I am of the opinion that the Revision is not maintainable as held by the Hon"ble Apex Court in S.

Rajeswari Vs. S.N. Kulasekaran and Others, . In fine the Revision Petitions are dismissed with liberty to the Petitioner to file an Appeal. If any

Appeal is filed the Appellate Court shall decide the same on merits and in accordance with law after affording opportunity the parties to lead

further evidence in this case.