

MOHAMED MASTHAN

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v.

SOCIETY, CONGREGATION, BROS. S. HEART AND ANR.

MARCH 10, 2006

[S.B. SINHA AND P.K. BALASUBRAMANYAN, JJ.]

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*Possession—Determination—First party in possession of land on the strength of compromise decree between first party and second party—Decree not questioned—Subsequent suit, by the second party for declaration of compromise decree as null and void, pending—Agreement of sale of land by second party to third party—Suit by third party, for specific performance of sale, decreed—Land not found in possession of second party—Possession delivered to third party under Order 21 Rule 35 CPC—Dismissal of application of first party stating to be in possession of the land—Pendency of suit by first party seeking declaration of sale to third party as null and void—In Revision Petition against dismissal of application of first party, High Court holding the suit filed by appellant as collusive and directed joint trial of all the suits—On appeal, held: First party being in possession of the suit land in terms of the compromise decree, could not be dispossessed pursuant to decree in favour of the third party, unless the compromise decree is set aside—Correctness of the decree passed in the suit filed by the third party can be decided only in the pending suits and not by Executing Court—The pending suits directed to be tried jointly.*

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**The property in question was sold by the Superior General of the first respondent-society to one 'S'. After the death of the purchaser, his wife sold the property to second respondent. Respondent-society filed a suit in 1987 praying for declaration of title, possession and consequential injunction. Therein a compromise was entered into and decree was passed in terms thereof. In 2003 second respondent filed a suit against the respondent-society on the ground that the compromise decree was null and void as the same was to her ignorance. The suit is still pending. Second respondent entered into agreement for sale with the appellant. Appellant filed suit for specific performance. The suit was decreed and deed of sale was executed. In Execution Petition for obtaining possession, Central Nazir noticed that the property was not in possession of the second respondent**

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**A** and hence possession was given to the appellant through Senior Bailiff who in his report had stated that the second respondent herein was not there. Respondent-society filed an execution application stating that they were actually in possession of the property. The same was dismissed. During pendency of the application, the Society had also filed two suits but the same were withdrawn. Thereafter Society filed a suit in 2003 and the same is pending. Against dismissal of Execution Application Society filed Revision Petition. High Court went into the question of correctness of delivery of possession of the property and opined that decree passed in the suit of the appellant was collusive. It directed joint trial of all the suits. Hence the present appeal.

**C** Disposing of the appeal, the Court

**D** HELD: 1. The consent decree passed in 1987 has not yet been set aside. It is furthermore not in dispute that in terms of the consent decree, the first respondent herein is in possession. A decree for permanent injunction has been passed in its favour. The Appellant herein in terms of the decree passed in his favour in 2003 in the suit filed by him and the purported sale deed pursuant thereto, merely has stepped into the shoes of the second respondent. He cannot claim a better title than her. Thus, so long the decree passed in 1987 is not set aside, and/ or the original suit of 2003 filed by the second respondent is not decreed, the possession of the first respondent herein could not have been interfered with. The Central Nazir did notice that the schedule property was not in possession of the judgment - debtor in suit of 2003 filed by the appellant, but still the possession thereof was purported to have been taken through Senior Bailiff under Order 21, Rule 35 of CPC. Even the Senior Bailiff in his report states that he went to the plaintiff's place. The defendant was not there. How the land was identified had not been shown. Even the Village Administrative Officer refused to sign. In that view of the matter, when the first respondent in its application under Section 151 CPC stated that it continued to be in possession, the same cannot be disbelieved. In any event, having regard to the fact that the first respondent could not have been dispossessed pursuant to or in furtherance of the decree passed in the suit of 2003 filed by the appellant, it would be entitled to continue to possess the said property and in the event, possession has been taken symbolically or otherwise, possession should be restored to the first respondent. [6-G-H; 7-A-D]

**H**

2. High Court was not correct in dealing with the question as to whether the decree passed in suit of 2003 filed by the appellant was collusive or not. Such a question did not and could not have arisen before the Executing Court. The question may have to be decided in the pending suits. Until there is a decree in favour of the assignor of the appellant in those suits, the compromise decree passed in the suit of 1987 would have to prevail and *prima facie*, the title of the land is with the first respondent. Interests of justice will be subserved if, in modification of the order passed by the High Court, both the suits of 2003 filed by the second respondent and the first respondent are directed to be tried jointly by a competent court. As the appellant herein is a party in the suit of 2003 filed by the first respondent, all rival contentions could be gone into therein. [7-E-G]

3. It is not necessary, to reopen the decree passed in the suit filed by the appellant. The fate of the decree passed in the said suit evidently would depend upon the outcome of the pending two suits. The purported delivery of possession in execution of suit of the appellant will stand nullified and the possession of the first respondent is recognized subject to the result of the suits. [7-G-H; 8-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1617 of 2006.

From the Judgment and Order dated 17.4.2004 of the Madras High Court in C.R.P. No. 1827 of 2003.

V. Krishna Murthy for the Appellant.

P.S. Mishra, Mrs. Swarupa Reddy, Vallinayagam, S. Chandra Shekhar and T. Harish Kumar for the Respondents.

The Judgment of the Court was delivered by

**S.B. SINHA, J.** Leave granted.

The properties in question are said to be belonging to the Society of Congregation of the Brothers of the Sacred Heart. Brother Lawrence, who was then Superior General of the First Respondent-Society (Society) transferred 8 acres and 44 cents of land to one Siluvai Rajan by a deed of sale dated 18.10.1979. According to the Society, the said sale was illegal. After the death of the said purchaser, his wife sold the property to her sister Juliet Mary, Second Respondent herein by a deed of sale dated 23.7.1986. The

A First Respondent filed a suit against the Second Respondent in the Court of District Munsif, Tirunelveli which was marked as OS No. 1220 of 1987 praying for declaration of title and possession and consequential injunction. The parties entered into a compromise in terms whereof right, title and interest of the First Respondent was accepted. A compromise memo was also filed.

B The suit of the Society was decreed in terms thereof. A decree was prepared on the basis of the said settlement declaring that the suit property belonged to the plaintiff-Society, and granting permanent injunction restraining the Second Respondent herein or her agent or her men from in any way interfering with the peaceful possession and enjoyment of the Society.

C After a lapse of about fourteen years from the date of passing the said decree, the Second Respondent filed a suit against the Society for a declaration that the aforementioned consent decree passed in OS No. 1220 of 1987 was null and void. According to her, she did not appear in the said suit nor put her signature on the memo of settlement. She was allegedly even not aware of the institution of the said suit. The said suit admittedly is still pending.

D In the meanwhile, the Second Respondent entered into a purported agreement for sale with the Appellant herein on or about 1.10.2002. The Appellant filed a suit for specific performance of the contract in the Court of Subordinate Judge, Tirunelveli being OS No. 140 of 2003. The said suit was decreed on 11.4.2003 and in execution of the said decree, a deed of sale was executed and registered on 17.6.2003. The Appellant filed an Execution Petition for obtaining possession on the said lands. The Central Nazir, while purporting to deliver possession on 19.10.2003, in his report stated:

F "Most respectfully submitted, to the Sub Judge, Tirunelveli by the petitioner/ plaintiff, on 19.10.2003 on the orders of N. Ganesan, Senior bailiff District Court, Tirunelveli along with the under signed, I visited the schedule property and it was noticed that on the above schedule property was not in the possession of the respondent/ defendants, I explained the nature of order to the persons who accompanied me and the property was vacant land, I took possession through senior bailiff of the Court under Order 21 Rule 35 CPC."

G The Senior Bailiff in his report to the court recorded :

H "I went to the petitioner's place, at Munearpalam Village, Palai T.K., along with the witnesses, the respondent was not there, I explained the nature of order regarding the vacant land under possession of

respondent and under order 21 rule 35 CPC, and gave possession to petitioner, attested copy of Sale Deed, decree copy is enclosed with this return. Village Administrative order (sic) refused to sign.” A

The First Respondent contends that they are still in possession. It filed an application in the said Execution Application being EA No. 1222 of 2003 before the Executing Court on the next day i.e. on 29.10.2003 stating: B

“Now I came to understand records have been created as though the 2nd respondent had delivered the possession of the property to the 1st respondent. Even though no such thing had happened in reality. Because I alone is in the possession and enjoyment of the property.” C

The said Execution Application was dismissed. During pendency of the said Execution Application, the First Respondent filed two suits being OS No. 271 of 2003 and OS No. 276 of 2003. The first suit was filed for restraining the defendant (Second Respondent herein) from giving possession of the suit property whereas in the second suit, the prayer made was for cancellation of the decree passed in OS No. 140 of 2003 and declaring the sale deed borne out of the said decree as null and void. Both the suits were withdrawn. The First Respondent thereafter filed a suit for declaration of title and consequential permanent injunction in the Court of District Munsiff, Tirunelveli being OS No. 641 of 2003. The said suit again indisputably is still pending. D E

Against the order dismissing the said EA No. 1222 of 2003, the First Respondent filed a Civil Revision Petition before the High Court. By reason of the impugned judgment, the High Court not only went into the question as regard correctness or otherwise of the purported delivery of possession of the land in question in favour of the Appellant herein but also opined that the decree passed in the aforementioned OS No. 140 of 2003 was collusive. Having held so, it directed: F

“In the above said circumstances, the power given to the Court under Article 227 of the Constitution of India to have the superintendence over all the Courts had got to be exercised to set aside the very decree and judgment passed in O.S. No. 140 of 2003 and the first respondent is not entitled to execute the decree and take possession of the suit property. But, however, the parties to the proceedings in O.S. No. 140 of 2003 shall take trial of that suit along with other suits in O.S. No. 641 of 2003, District Munsif Court, Tirunelveli, and O.S. No. H

A 381 of 2003 on the file of the District Munsif Court, Tirunelveli. As  
the matters are inter related with each other in respect of the very  
same subject matter of the suit properties and also to avoid further  
multiplicity of proceedings, I come to the conclusion that all the suits  
have got to be tried jointly. Hence, I do hereby withdraw the suits  
B pending before the District Munsif Court, Tirunelveli, and post these  
suits before the Sub Court, Tirunelveli for a joint of all the suits  
which alone appears to me as more appropriate.”

Mr. V. Krishna Murthy, learned counsel appearing on behalf of the  
Appellant raised a short question in support of this appeal. It was urged that  
C having regard to the fact that in the Execution Application, the bailiff delivered  
possession of the suit land in favour of the Appellant, the First Respondent  
herein could not have maintained an application purported to be under Section  
151 of the Code of Civil Procedure for the reliefs prayed for therein. Having  
not filed an application in terms of Order 21, Rule 97 of the Code of Civil  
D Procedure, the First Respondent, thus, could not have raised a contention as  
to whether the decree obtained by the Appellant in the said OS No. 140 of  
2003 was collusive or not. Such a contention, Mr. Krishna Murthy would  
submit, should have been raised in a duly constituted suit.

Mr. P.S. Mishra, learned senior counsel appearing on behalf of the  
E Respondent, on the other hand, submitted that as the First Respondent  
continued to be in possession of the suit property, the High Court rightly  
went into the question as regards legality or otherwise of the decree passed  
in the said OS No. 140 of 2003. It is not a case, Mr. Mishra would submit,  
where a suit for specific performance was filed impleading the owner of the  
F property. Evidently, the Appellant and the Second Respondent herein had  
entered into the said purported agreement for sale dated 1.10.2002 only in an  
attempt to get rid of the compromise decree dated 27.4.1989 passed in OS  
No. 1220 of 1987.

It is not in dispute that the consent decree passed in O.S. No.1220 of  
G 1987 has not yet been set aside. It is furthermore not in dispute that in terms  
of the consent decree, the First Respondent herein is in possession. A decree  
for permanent injunction has been passed in its favour. The Appellant herein  
in terms of the decree passed in his favour in OS No. 140 of 2003 and the  
purported sale deed pursuant thereto on 17.6.2003, merely has stepped into  
the shoes of the Second Respondent. He cannot claim a better title than her.  
H Thus, so long the decree passed in the said OS No. 1220 of 1987 is not set

aside, and/ or the original suit No. 381 2003 is not decreed, the possession of the First Respondent herein could not have been interfered with. The slipshod manner in which the purported delivery of possession was sought to be effected has been noticed by us. The Central Nazir did notice that the schedule property was not in possession of the judgment debtor in OS No. 140 of 2003 but still the possession thereof was purported to have been taken through Senior Bailiff under Order 21, Rule 35 of the Code of Civil Procedure. Even the Senior Bailiff in his report states that he went to the plaintiff's place. The defendant was not there. How the land was identified had not been shown. Even the Village Administrative Officer refused to sign.

In that view of the matter, when the First Respondent in its application under Section 151 of the Code of Civil Procedure stated that it continued to be in possession, the same cannot be disbelieved. In any event, having regard to the fact that the First Respondent could not have been dispossessed pursuant to or in furtherance of the decree passed in the said OS No. 140 of 2003, it would be entitled to continue to possess the said property and in the event, possession has been taken symbolically or otherwise, possession should be restored to the First Respondent.

The High Court, however, was not correct in dealing with the question as to whether the decree passed in OS No. 140 of 2003 was collusive or not. Such a question did not and could not have arisen before the Executing Court. The First Respondent also filed a suit which is pending. The question may have to be decided in OS No. 381 of 2003 and OS No. 641 of 2003 which are still pending. Until there is a decree in favour of the assignor of the Appellant in those suits, the compromise decree passed in OS No. 1220 of 1987 would have to prevail and prima facie, the title of the land is with the First Respondent. We are, therefore, of the opinion that interests of justice will be subserved if, in modification of the order passed by the High Court, both OS No. 381 of 2003 and OS No. 641 of 2003 are directed to be tried jointly by a competent court. As the Appellant herein is a party in OS No. 641 of 2003, indisputably, all rival contentions could be gone into therein.

It is not necessary, as has been directed by the High Court, to reopen the decree passed in OS No. 140 of 2003. The fate of the decree passed in the said suit evidently would depend upon the outcome of the aforementioned OS No. 381 of 2003 and OS No. 641 of 2003. We will, however, request the concerned court to consider the desirability of disposing of the aforementioned two suits as early as possible, preferably with a period of six months from

A the date of communication of this order. The purported delivery of possession in execution of OS No. 140 of 2003 will stand nullified and the possession of the First Respondent is recognized subject to the result of OS Nos. 381 of 2003 and 641 of 2003. If necessary, the executing court will redeliver the property to First Respondent, if applied for in that behalf.

B This appeal is disposed of with the aforementioned directions. The parties shall bear their own costs.

K.K.T.

Appeal disposed of.