

APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Wadsworth
and Mr. Justice Krishnaswami Ayyangar.

K. V. KRISHNA AYYAR (PLAINTIFF), APPELLANT,

v.

K. G. SUBRAMANIA AYYAR (SECOND DEFENDANT),
RESPONDENT.*

1938,
December 13.

Code of Civil Procedure (Act V of 1908), sec. 47—Sale of immovable property in execution of decree of Court—Judgment-debtor not in possession of property—What passes to purchaser at such sale—Purchaser getting sale certificate in his name—Sale by purchaser of the property to another who in turn sold it to another—None of the purchasers getting actual or symbolical possession of the property—Judgment-debtor getting possession from his tenant and letting it to others—Sale by judgment-debtor of the property—Suit by successors in title from the original purchaser for recovery of possession of the property from persons in possession—If barred by sec. 47.

In execution of a decree against S his property was purchased in 1917 by K, to whom the usual sale certificate was issued. K conveyed the property to two persons in 1918. In 1927 they sold the property to K.V.K. Neither K nor K.V.K. ever obtained actual or symbolical possession of the property. At the date of the Court sale in 1917 the property was in the possession of L, a sister of S, as his tenant. In 1919, L *bona fide* surrendered the possession of the property to S who thereupon granted a monthly tenancy of it to K.P., who assigned his rights to K.G.S. in 1923. K.G.S. remained in possession as tenant of S until 1927 when he purchased the property from S. In 1927 a suit for possession of the property was filed by K.V.K. against S and K.G.S. The suit was resisted on the ground, *inter alia*, that section 47 of the Code of Civil Procedure was a bar to the suit.

* Letters Patent Appeal No. 108 of 1935.

Held by the Full Bench.—At the time of the auction sale in 1917 S was seized of the property but was not in possession of it and the auction sale took away from him his seisin and gave it to the auction purchaser. The moment the sale took place his rights in the property ceased and, when his sister put him in possession in 1919, he went into possession without any rights unless in the circumstances he could be deemed to be assignee of the tenancy. So far as the property was concerned the execution was complete and he was no longer the judgment-debtor. As such the suit does not fall within the purview of section 47 of the Code of Civil Procedure.

KRISHNA
v.
SUBRAMANYA.

Case-law reviewed.

APPEAL under Clause 15 of the Letters Patent against the judgment and decree of VENKATARAMANA RAO J. passed in Second Appeal No. 1542 of 1931 preferred to the High Court against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in Appeal Suit No. 129 of 1929 (Appeal Suit No. 336 of 1929, District Court) preferred against the decree of the Court of the District Munsif of Palghat in Original Suit No. 319 of 1927.

P. S. Narayanaswami Ayyar and P. S. Ramachandra Ayyar for appellant.—When the property was sold in Court auction it was in the possession of a tenant of the judgment-debtor. Under section 65 of the Code of Civil Procedure the title to the property vested in the purchaser. No doubt he did not obtain symbolical possession under Order XXI, rule 96, of the Code. Nevertheless a suit for possession could be filed by the purchaser or his assignees; see *Hussan Ammal Bibi v. Ismail Moideen Rowther*(1). Section 47 of the Code is not a bar since the matter is not one relating to execution, discharge or satisfaction of the decree. The fact that after the sale the tenant surrendered possession to the person who let her into possession does not make any difference. Her landlord's title had been terminated by the Court sale. Under section 109 of the Transfer of Property Act the only right that is saved to him is a right to recover rent from his tenant if the latter was not aware of the auction sale. An ex-landlord has

(1) (1915) 28 M.L.J. 642, 645.

KRISHNA
v.
SUBRAMANIA.

no right to take possession from his tenant ; see *Ramachandra v. Shaikh Hussan*(1) and Mulla's Transfer of Property Act, page 603. Even if possession is given to an ex-landlord his possession will not clothe him with higher right than those of a trespasser.

[KRISHNASWAMI AYYANGAR J.—Surrender can only extinguish rights but cannot create rights.]

The facts in *Sandhu Taraganar v. Hussain Sahib*(2) are similar to the facts of the present case except as regards the point about lease and surrender.

[THE CHIEF JUSTICE.—We cannot go back on the decisions of this Court and hold that an auction purchaser is not a representative of the judgment-debtor within the meaning of section 47 of the Code.]

Veyindramuthu Pillai v. Maya Nadan(3) holds that the Courts, before coming to the conclusion that section 47 is a bar, should come to the conclusion that the matter comes within the purview of the section. The present suit being one for possession, a matter not contemplated by section 47, is not hit by the section. See also *Venkatakrishnayya v. Venkatanarayana*(4) and *Kailash Chandra Tarapdar v. Gopal Chandra Poddar*(5). No doubt the other High Courts take a different view.

Surrender by the tenant to his ex-landlord cannot have the effect of curtailing the twelve years limitation which the purchaser had against the tenant under article 138 of the Indian Limitation Act to the three years limitation against the ex-landlord who was the judgment-debtor.

[WADSWORTH J.—Article 180 is the general article and article 138 is a special one covering a single case.]

Articles 138 and 180 are couched in the same language with respect to the persons covered by the articles. So far as article 180 is concerned a stranger purchaser and a decree-holder purchaser are on the same footing ; see *Jainulabdin Sahib v. Krishna Chettiar*(6).

[THE CHIEF JUSTICE.—What is the article of the Limitation Act applicable to the present case ?]

(1) (1901) 3 Bom. L.R. 679.

(2) (1904) I.L.R. 28 Mad. 87.

(3) (1919) I.L.R. 43 Mad. 107, 116 (F.B.).

(4) A.I.R. 1936 Mad. 733.

(5) (1926) I.L.R. 53 Cal. 781 (F.B.).

(6) (1921) 41 M.L.J. 120.

It is either article 139 or article 144. After the surrender, the ex-landlord will be reduced to either the position of a representative of the tenant or that of a trespasser. See Mulla's Transfer of Property Act, page 632, last paragraph.

KRISHNA
v.
SUBRAMANIAM.

K. V. Ramaseshan for respondent.—Under section 65 of the Code, the title of the judgment-debtor is transferred to the purchaser. He also gets a right to possession. When the property is in the possession of a tenant, possession will be transferred to the purchaser if the procedure prescribed by Order XXI, rule 96, is followed. No such procedure was followed in the present case. The procedure is intended to give notice to the tenant. Until such notice is given, surrender of possession by the tenant to the person who let him into possession is lawful. The landlord was in possession through his tenant. That possession was not lost by the sale. Possession of the judgment-debtor could be determined only by the modes known to law. The sort of possession (actual or symbolical) which a purchaser is entitled to is determined with reference to the date when he seeks possession and not with reference to the date of sale or attachment.

[KRISHNASWAMI AYYANGAR J.—Do you contend that in spite of the Court sale the relationship of landlord and tenant continued between the judgment-debtor and his tenant?]

For the purpose of this case it is unnecessary to go so far. Possession continued in the judgment-debtor even after sale until formal possession is given to or taken by the purchaser according to the procedure prescribed by the Code. See *Juggobundhu Mukerjee v. Ram Chunder Bysack*(1) which is approved in *Thakur Sri Radha Krishna v. Ram Bahadur*(2).

[THE CHIEF JUSTICE.—When property is in the hands of a tenant, the landlord has only a right to possession after the term though the landlord, under a fiction, is supposed to be in possession through his tenant. The fiction changes with the title to property. When such a property is sold, the right to possession is lost with the loss of title and the assignee gets the right to possession from the tenant after the term. When a tenant is in possession the landlord has seisin of the property and that is described as the landlord remaining in possession through the tenant who has actual possession.]

(1) (1880) I.L.R. 5 Cal. 584, 588 (F.B.).

(2) (1917) 34 M.L.J. 97 (P.C.).

KRISHNA
v.
SUPRAMANIA.

The Transfer of Property Act is not *per se* applicable to Court sales though the general principles are applicable. Rightly or wrongly the landlord (judgment-debtor) got possession.

[WADSWORTH J.—When the property was surrendered to the ex-landlord he got possession under a new right and not as judgment-debtor or as the person who let the tenant into possession.]

Execution is not complete until the purchaser gets possession in execution. So a matter contemplated by section 47 was outstanding between the purchaser and the person in possession of the property. So section 47 is a bar to the institution of the suit.

Cur. adv. vult.

JUDGMENT.

LEACH C.J.

LEACH C.J.—This appeal adds another case to the long list of cases which have reference to the effect of section 47 of the Code of Civil Procedure. The facts of the present case are of an unusual nature and there is no reported decision which directly covers it. In execution of a small cause decree passed by the Court of the District Munsif of Palghat the property which is the subject-matter of this appeal was purchased on 17th September 1917 by one Krishnier to whom was issued the usual sale certificate. On 7th January 1918 Krishnier conveyed the property to two persons, Krishna Pattar and Subbalakshammam, who by a deed dated 3rd February 1927 sold it to K. V. Krishna Ayyar, the present appellant. At the time of the sale the property was in the possession of Lakshmi Ammal, a sister of Sankaranarayana Ayyar, the judgment-debtor. She held the property as a monthly tenant of her brother. In 1919 she surrendered the possession of the property to Sankaranarayana Ayyar, who thereupon granted a monthly tenancy of it to a person named Kuppiyah Pattar. In 1923 Kuppiyah Pattar assigned his rights to one

K. G. Subramania Ayyar who remained in possession of the property as a monthly tenant of Sankaranarayana Ayyar until 1927 when he purchased the property from Sankaranarayana Ayyar. Neither Krishnier nor the appellant ever obtained actual or symbolical possession of the property. The suit out of which this appeal arises was filed by the appellant against Sankaranarayana Ayyar and K. G. Subramania Ayyar for possession. In his plaint the appellant treated the surrender of the property by Lakshmi Ammal to Sankaranarayana Ayyar as an assignment to him of her tenancy and Sankaranarayana Ayyar and K. G. Subramania Ayyar as successive holders of the tenancy. One line of defence was that the appellant had acquired no interest in the property. It was said that the transfer by Krishnier to Krishna Pattar and Subbalakshammammal was a *benami* transaction and that the real title remained with Krishnier. The main contention, however, was that section 47 of the Code of Civil Procedure barred the suit. The District Munsif found against the plaintiff on both issues and dismissed the suit. On appeal to the Subordinate Judge of South Malabar the decree of the trial Court was reversed, the Subordinate Judge holding that the transaction was not *benami* and that section 47 did not apply. A second appeal to this Court followed and was heard by VENKATARAMANA RAO J., who agreed with the District Munsif on the question of the application of section 47, but granted him leave to file an appeal under Clause 15 of the Letters Patent. The decision of the Subordinate Judge was final on the question whether the transaction between Krishnier and Krishna Pattar and Subbalakshammammal was of a *benami* nature.

KRISHNA
v.
SUBRAMANIA,
LEACH C.J.

The question which falls for decision is, in what capacity did Sankaranarayana Ayyar obtain possession

KRISHNA
 v.
 SUBRAMANIA.
 LEACH C.J.

of the property from his sister? If he obtained possession of the property in the same capacity as he held at the time of the sale in execution, the appeal fails; but if he obtained it in another capacity, the appeal succeeds. As VENKATARAMANA RAO J. has pointed out in his judgment, so far as this Court is concerned, it is well settled that proceedings by a decree-holder who has become the auction-purchaser for delivery of possession must be deemed to relate to the execution or discharge or satisfaction of the decree within the meaning of section 47 of the Code of Civil Procedure. It is considered that the section bars a suit by a decree-holder for possession of the property purchased by him in execution of his own decree not only against the judgment-debtor or any one claiming under him but the bar is equally applicable to a purchaser from the decree-holder. The learned Judge referred in this connection to the decisions of this Court in *Sandhu Taraganar v. Hussain Sahib*(1) and *Sornam Pillai v. Tiruvazhiperumal Pillai*(2). In *Veyindramuthu Pillai v. Maya Nadan*(3) it was held by a Full Bench that a purchaser at a Court auction who is a stranger to the suit comes within the purview of section 47 as the representative of the judgment-debtor. There are numerous earlier decisions which support the judgments in the cases just cited. The Calcutta High Court shares the view of this Court; *Kailash Chandra Tarapdar v. Gopal Chandra Poddar*(4). Other High Courts have, however, interpreted section 47 in a different sense. The effect given to section 47 by this Court has not been accepted without criticism by all the learned Judges who have had to consider the question. In *Kattayat*

(1) (1904) I.L.R. 28 Mad. 87.

(2) (1926) 51 M.L.J. 126.

(3) (1919) I.L.R. 43 Mad. 107 (F.B.).

(4) (1926) I.L.R. 53 Cal.781 (F.B.).

KRISHNA
v.
SUBRAMANIAM
LEACH C.J.

Pathumayi v. Raman Menon(1) BENSON and BHASHYAM AYYANGAR JJ. doubted whether proceedings taken by a decree-holder who had purchased property to obtain possession did relate to the execution, discharge or satisfaction of the decree, but in view of the earlier decisions they felt constrained to follow them. In *Sandhu Taraganar v. Hussain Sahib*(2) WHITE C.J. observed that, if the matter were *res integra*, he would be disposed to hold that the right to sue for possession was not a question relating to the execution, discharge or satisfaction of the decree, where the plaintiff represented a decree-holder who had purchased land in execution of the decree. It has, however, been the practice of this Court for over fifty years to treat section 47 as having the application which I have indicated and in my opinion it is now far too late in the day to re-open the question. This appeal must, therefore, be decided on the basis that a decree-holder who purchases property in execution cannot institute a suit to recover possession from the judgment-debtor or some one who stands in the shoes of the judgment-debtor and his remedy is confined to an application where the period of limitation is only three years.

As I have already pointed out, the appellant's case is based on the assumption that Sankaranarayana Ayyar got possession of the property in 1919 as the assignee of the tenancy. It is common ground that a suit for possession will lie if this was the position, as a tenant cannot be regarded as a representative within the meaning of section 47 where, as in this case, the tenancy had commenced before the attachment. In the plaint it was alleged that Lakshmi Ammal fraudulently colluded with Sankaranarayana Ayyar in surrendering

(1) (1902) I.L.R. 26 Mad. 740.

(2) (1904) I.L.R. 28 Mad. 87.

KRISHNA
v.
SUBRAMANIA.
LEACH C.J.

the property to him, but no attempt was made to prove this and for the purposes of this appeal it must be taken that her action was *bona fide*. The appellant contends that a tenant can only surrender his tenancy to the landlord or if the landlord has parted with his rights in the property to the person who has acquired the landlord's rights and as by reason of the provisions of section 65 of the Code of Civil Procedure the property in suit vested in Krishnier from the time he bought it at the Court auction, Lakshmi Ammal could not in law surrender the tenancy to her brother. At the time she purported to do so he had no interest in the property. It is said that at the most her action put Sankaranarayana Ayyar in the position of an assignee of the tenancy. There is substance in the argument, but it is not necessary for the purpose of deciding this appeal to pause to inquire whether there is any flaw, because if Sankaranarayana Ayyar cannot in law be deemed to have entered into possession of the property in 1919 as the assignee of the tenancy he entered into possession without right and was, therefore, in the eye of the law a trespasser. A trespasser clearly cannot rely on section 47 to support his possession.

The fact that Krishnier did not apply for and obtain symbolical possession of the property under the provisions of Order XXI, rule 96, of the Code of Civil Procedure, could not affect his right to the property. The property vested in him absolutely, with or without symbolical possession, as soon as he became the auction purchaser. Rule 96 is there to assist an auction purchaser to secure recognition of rights already acquired. VENKATARAMANA RAO J. considered that it was obligatory on the part of the appellant to obtain symbolical possession, and that Lakshmi Ammal was bound in law to surrender the property to the person who had granted her the tenancy, but the learned

KRISHNA
D.
SUBRAMANIAM.
—
LEACH C.J.

Judge overlooked the provisions of section 65. The fact that Lakshmi Ammal was unaware of the Court auction would excuse her from liability in surrendering possession of the property to her brother, but the surrender could not put him in any better position. It must be remembered that there is a great difference between possession and seisin. The owner of property who has created a tenancy is seised of the property but the possession is with his tenant. In *Doe v. Finch*(1) DENMAN C.J. observed that where it is said that the possession of a tenant for years is the possession of the party entitled to the freehold, that imports that such person is seised of the estate of freehold. At the time of the auction sale Sankaranarayana Ayyar was seised of the property but was not in possession of it and the auction sale took away from him his seisin and gave it to the auction purchaser. The moment the sale took place his rights in the property ceased, and when his sister put him in possession in 1919 he went into possession without any rights unless in the circumstances he could be deemed to be assignee of the tenancy. So far as the property was concerned the execution was complete and he was no longer the judgment-debtor.

For the reasons indicated I am firmly of the opinion that the case does not fall within the purview of section 47 of the Code of Civil Procedure and I would allow the appeal with costs throughout.

WADSWORTH J.—I agree.

KRISHNASWAMI AYYANGAR J. —I also agree.

G.R.

(1) (1832) 4 B. & Ad. 283; 110 E.R. 462.