

(1925) 12 MAD CK 0014
In the Madras High Court

Angadi Mallappa and Others

APPELLANT

Vs

Neelana Gowdra Kare Gowd and Another

RESPONDENT

Date of Decision : 01-12-1925

Acts Referred:

Citation : AIR 1926 Mad 487 : (1926) 50 MLJ 442

Hon'ble Judges : Ramesam, J

Bench : Division Bench

Judgement

Ramesam, J.—These second appeals arise out of two suits which are connected and similar in nature. The plaintiffs are the same in both the

suits and defendants 2 to 13 are the same in both the suits, only the 1st defendant is different. The facts are: One Linganna Gowd died about the

end of 1915 The defendants 2 to 13 of these suits alleging themselves to be the creditors of Kare Gowd, the deceased, in respect of certain

promissory notes, filed a suit, O.S. No. 176 of 1916 to recover the amount. In that suit there were 6 defendants. First and second defendants

were the sisters of Kare Gowd; the third defendant was the sister's son and defendants 4, 5 and 6 were impleaded as parties on the ground that

they were in possession of some of the properties of the deceased. Defendants 1 to 5 never appeared. The sixth defendant alone filed a written

statement but he too did not appear at the time of the trial. A decree was given on the notes. Some time after the present plaintiff's tiled O.S. No.

697 of 1919 for a declaration that they were the heirs of Linganna Gowd. In that suit the creditors abovementioned and all other persons in

possession of the properties of the deceased were made parties and they obtained a decree. The decree-holders in that promissory notes suit

began to execute their decree and in execution sales the 1st defendant in each of these suits purchased the properties. There was then a scramble

for possession. An order was made sustaining the possession of the 1st defendant in each case and referring the plaintiffs to a regular suit. The

present two suits are the consequences of those orders.

2. One technical objection in S.A. No. 199 of 1925 may be disposed of. That suit originally related only to two items. It was riled within one year

of the order maintaining the defendants's possession. The plaintiffs then discovered that they omitted another item. They then applied for

amendment of the plaint which was ordered with the result that the third item to the schedule was added. Even then they did not amend the body of

the plaint by putting the number of the execution application relating to that item but otherwise the history of that item is the same as that of items 1

and 2. Above all the application for amendment was not opposed by the defendants. It was ordered without any objection. The effect of that

amendment is to date back the suit as no new party is added. In the result the suit is, I think, within time in respect of the three items and this

objection fails.

3. We now come to the main point in this case, which has been elaborately argued by Mr. Govinda Rajachar for the appellant. He contends that

the decree in O.S. No. 176 of 1916 having been obtained by him bona fide against the two sets of defendants in that suit, the 1st set being

believed by him to be the heirs and the second set being persons in possession, the decree is binding on the present plaintiffs who no doubt have

since been held to be the actual heirs of Linganna Gowd.

4. Incidentally I may mention there is a finding of the Subordinate judge that the decree in O.S. No. 176 of 1916 has been obtained fraudulently

and collusively. But on reading the judgment of the Subordinate Judge, his reasons only show that there is collusion between the plaintiff and the

6th defendant. He has not adverted to the case of the 4th and 5th defendants and this has to be settled first before the main question is discussed.

As the Subordinate Judge has not discussed this, I think it is open to me to give a finding in second appeal.

5. The 4th, 5th and 6th defendants are brothers. The plaint in O.S. No. 176 of 1916 alleged that all three were in possession of the properties of

Linganna Gowd, that Linganna Gowd died in their house, that they usurped Linganna's properties, and that they said they would discharge the debts of the deceased. In fact, wherever they are mentioned, they are mentioned together. The 4th and 5th defendants did not appear but the 6th defendant only appeared saying that he was appointed guardian under Linganna Gowd's will. Just before the written statement was filed, the plaintiff obtained an injunction against the 6th defendant on the ground that he was trying to alienate the properties. The District Munsif in his finding also says that defendants 4 to 6 were in possession of certain properties, putting them together and without separating them. On these facts it seems to me to be plain that defendants 4 to 6 were always acting together and never made a distinction between themselves, Even for appearing in Court they were content that only one of them should appear and even that one did not appear at the trial. If the inference of collusion is justified, I think it applies to all. I would therefore find that the collusion was between the plaintiff and defendants 4, 5 and 6. I do not mean to say that the promissory note was really fabricated as the Subordinate Judge seems to think nor that the suit was filed as a result of collusion. What strikes me is that between the framing of the issues and the trial, the plaintiff seems to have squared up the matter with defendants 4, 5 and 6 and by some arrangement, they were to be absent so that he may get a decree very easily seeing that the other defendants did not appear. To that extent it may be said to be collusive. But beyond this point I am not prepared to go. There is nothing to show that there is any collusion between the plaintiff and defendants 1 to 3 who were not said to be in possession of Linganna Gowd's properties. They were sued only as heirs. The question therefore now reduces itself to this, whether the decree obtained against them on the ground that they were supposed to be the heirs, will now be binding on the real heirs. I do not think it was open to the Courts below to go into the question of the genuineness of the promissory note until this question was decided and I do not think the Subordinate Judge was justified in finding the promissory note as not genuine without deciding the binding nature of the decree. If the decree is binding, he cannot go into the question of the genuineness of the promissory note. If the decree is not binding, it is unnecessary. Mr. Govindarajachar relied on *Gnanambal Ammal v. Veeraswami Chetty* (1915) 29 M L J 698 to show that the decree is

binding on the present plaintiffs. In that case the illegitimate son of the deceased was in possession. Sadasiva Aiyar, J., who was one of the Judges

who decided it, explained it in *Bachu Soorayya v. Toomuloori Chinna Anjaneyalu* (1918) 36 M L J 106. As so explained, it seems to me that the

ratio decidendi of that decision is that where the decree is against the person in possession of the deceased's estate, it is binding on the real heir but

where there is no such possession, however bona fide the suit, the decree is not binding on the real heir. The actual decision in *Bachu Soorayya v.*

Toomuloori Chinna Anjaneyalu (1918) 36 M L J 106 is against the appellant. Another decision relied upon by the appellant is *Ramaswami*

Chettiar v. Oppilamani Chetti I L R (1909) M 6 This was a case in which a wrong legal representative was brought on record in execution. On

that ground I think this case does not help the appellant. I entirely agree with the observations of Sadasiva Aiyar, J. in *Bachu Soorayya v.*

Toomuloori Chinna Anjaneyalu (1918) 36 M L J 106 where he says that all cases in which the defendant died pending the suit and a wrong

representative was brought on record or cases of death pending execution are irrelevant for considering the point in that case, where the suit itself

was filed against a wrong person. This is also the view of Bhashyam Aiyangar, J. in *Kadir Mohideen Marakkayar Vs. Muthukrishna Aiyar* and

Another, In that case he observes that the decisions" cited by the Lower Courts were cases of suits being filed against a wrong person and

therefore they had no bearing on the case before him which was that of a defendant dying after suit. The cases he so eliminated are those pertinent

for our purpose now. One of these is *Subbanna v. Venkatakrishnan* I L R (1888) M 408 That is directly against the appellant and it has never

been disapproved. It is referred to with approval in *Manchharam v. Kalidas* (1894) 19 Bom 821 and I see no reason to dissent from it. However

honest or bona fide a person's belief may be in bringing such a suit, the danger of allowing it to bind the real heir lies in this consideration, namely,

that however false or unjust the suit may be, where the defendant is neither in possession nor an heir, there is really nobody interested in defending

the suit. The argumentum ab inconvenienti in the case of an honest plaintiff unable to find the real heir ought not to make us oblivious of this

danger. I think the honest plaintiff should rather suffer rather than a judgment obtained by dishonest person bind the heirs who were never parties

to the suit. This view was also held in *Shaik Abdulla Saiba v. Haji Abdulla and Anr.* (1880) 5 Bora 8 where only one heir was sued. It was held

there that it was open to the other heirs to redeem the mortgage. In *Ambashankar Harprasad v. Sayad Ali Rasul* I L R (1894.) Bom 273 a money

decree was obtained only against one of the heirs and it was held that the decree binds only that heir and the property in possession of that heir.

This view was also taken in *Jafri Begam v. Amir Muhammad Khan* (1885) 7 All 822 though it was also held that the heirs who. were not parties

could not recover possession of the property without paying their share of the debts. The last three cases are cases of Muhammadan heirs and are

not consistent with the decisions in *Muttyjan v. Ahmed Ally* (1882) 8 Cal 370 and *Khurshetbibi v. Keso Finayak* I L R (1887) . 12 Horn jot

where it was said that a suit against one of several Muhammadan heirs must be regarded as an administrative suit and binds others. It is true it is

difficult to reconcile all these cases, as observed by *Bashyam Aiyanger, J.*, in *Kadir Mohideen Marakkayar v. Muthuktistina Aiyar* (1902) Mad

230 But I prefer the former class. The decision in *Kaliappan Servaikaran v. Varadarajulu* (1909) 19 M L J 659 is also against the appellant but I

do not want to rely upon it as it seems to go too far and is inconsistent with *Gnanambal Ammal v. Aeeraswami Chetty* (1916) 29 M L J 698 and

would seem to decide that a decree obtained even against a person in possession would not bind the real heir, a position which I am not prepared

to accept and which does not arise in the present case. The cases in *Sotish Chunder Lahiry v. Nil Comul Lahiry* (1884) 11 Cal 45 and *Hari Sara*

Moitra v. Bhubanesivari Debi (1888) 16 Cal 10 are peculiar" as in those cases there was an adoption after the suit divesting the widow and they

do not help us. The decision of the Privy Council in *The General Manager of Raj Durbhunga v. Maharajah of Coomar Ramaput Singh* (1872) 14

M I A 605 was very much referred to in many of these cases. The head note shows that the original debtor was sued as defendant and he died

after suit. *Bhashyam Aiyanger, J.*, observed in *Kadir Mohideen Marakkayar Vs. Muthukrishna Aiyar and Another*, that the facts of the report did

not support the head-note. The second sentence in the report ""they had both taken out execution of their decrees after his death"" shows that the

head-note is right. Therefore on that ground it has been considered by *Sadasiva Aiyar, J|*, in *Bachu Soorayya v. Toomuloori Chinna Anjeneyalu*

(1918) 36 ML J 106 ns distinguishable. I think it is also distinguishable on the ground pointed out by Turner, C.J., in *Siva Baghiam v. Palani*

Padiachi (1881) 4 Mad 401 namely, the son denied that he was the legal representative on the ground of his adoption and afterwards turned round

and contended that the decree against the widow is not binding on him because his adoption turned out to be invalid. It was held that such a

contention ought not to be allowed. The following cases cited by Mr. *Narasimhachari* I think are also against the appellant *Premraj v. Javarmal*

(1912) 15 Bom LR 41 *Baswdntapa Shidapa v. Ramu and Malkhana* (1884) 9 Bom 86 *Ashi Bhusan. Dasi v. Pelaram Mondel* 18 C W N 173

and *Tanguturi Jaganadhan v. Seshagiri Rao* (1916) 20 M L T 479 Though *Madala Madavarayudu Vs. Tanikalla Subbamma*, is a case of the death

of the defendants after suit, it also helps the respondent as this would be an *af ortiori* case; for it was held there that even an honest belief does not

allow the bringing in of the wrong representative after suit, a point which it is not necessary for me to decide The decision in *Srinivasa Aiyangar v.*

Kanthimathi Amma I L R (1909) M 465 follows *Kaliappan Servaikaran v. Varadarajulu* (1909) 19 M L J 659 and is subject to the same

observations I have made about the latter case.

6. For all these reasons I think the contention of the appellant must be disallowed and the Second Appeals dismissed with costs.