

(1944) 09 MAD CK 0021
In the Madras High Court

A.T.S. Sankaralingam Pillai

APPELLANT

Vs

Ramaswami Naicker and Others

RESPONDENT

Date of Decision : 08-09-1944

Acts Referred:

Citation : AIR 1945 Mad 25 : (1944) 57 LW 552

Hon'ble Judges : Kuppuswami Ayyar, J;Kuppuswami Aiyar, J

Bench : Division Bench

Judgement

Kuppuswami Ayyar, J.—The appellant is the original decree-holder in O.S. No. 351 of 1929 on the file of the District Munsifs Court of Tuticorin. He assigned his decree in favour of one Ramaswami Naicker, respondent 8 in this appeal. The other respondents are the judgment-debtors and they were defendants 1 to 7 in the suit. E.P. No. 518 of 1941 out of which this appeal arises was filed by the assignee decree-holder, respondent 8 herein, for executing that decree. The amount due under the decree was more than Rs. 2000 and the entire amount as stated in the decree was sought to be recovered. The judgment-debtors pleaded that the assignee decree-holder was not entitled to recover more than Rs. 503-6-8 as that was the amount that was claimed in the previous execution petition. The learned District Munsif recognized the assignment in favour of respondent 8 and held that respondent 8 was entitled to recover the amount as claimed by him.

2. On appeal the learned Subordinate Judge of Tuticorin held that respondent 8 was not entitled to recover more than Rs. 503-6-8 and interest thereon in view of the fact that in the previous execution petition that was the amount that was claimed and the attempt made by the original decree-holder to have that corrected failed. He held that by the doctrine of constructive res judicata the assignee decree-holder who could be in no better position than his transferor was also barred by constructive res judicata. He accordingly modified the order of the first Court holding that respondent 8 was entitled to execute the decree only to the extent of us. 503-6-8. The assignee decree-holder has not appealed. Instead

he amended his execution petition and proceeded to execute the decree only for the smaller amount. This is clear from the petition as amended by him. But the original decree-holder who had already assigned his decree to respondent 8 has filed this appeal questioning the correctness of the order of the learned Subordinate Judge. Respondents to 7 raise a preliminary objection that the appeal does not lie at the instance of the appellant. It is stated that the appeal lies u/s 47, Civil P.C., as the appellant is a party to the decree, but then the contest now is not as between the appellant and the judgment-debtors. The appellant having assigned his decree to respondent 8, it is respondent 8 that has the right to execute the decree. The contest was as between respondent 8 and these respondents 1 to 7. But respondent 8 submitted to the order of the lower appellate Court, amended the petition accordingly and he has not filed any appeal. The question now therefore is only as between the appellant and respondent 8. It is therefore a dispute only as between a party and his representative. It was pointed out by a Full Bench of this Court in *Annamalai v. Ramaswami* AIR 1941 Mad. 161 that Section 47, Civil P.C., does not apply to a case where the dispute arises between a party and his own representative or between two persons who both represent the same party, and that the aggrieved party's remedy in such a case is by way of a suit. To the same effect is a later decision of this Court in *China Bapanna v. Jaggiah* AIR 1943 Mad. 407. In these circumstances it has to be found that the appeal by the appellant does not lie. It is accordingly dismissed with costs of respondents 1 to 7 alone.