

**(1962) 06 MAD CK 0003**  
**In the Madras High Court**  
**Case No : A.A.A. O. No. 115 of 1959**

|                                               |            |
|-----------------------------------------------|------------|
| Av. P.L. Ct. Ramanathan Chettiar and Another  | APPELLANT  |
| Vs                                            |            |
| N.L.P. Lakshmanan Chettiar (decd.) and Others | RESPONDENT |

**Date of Decision :** 25-06-1962

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 38  
Tamil Nadu Civil Courts Act, 1873 — Section 13

**Citation :** AIR 1963 Mad 175 : (1963) ILR (Mad) 183 : (1963) 76 LW 61 :  
(1963) 1 MLJ 46

**Hon'ble Judges :** S. Ramachandra Iyer, C.J.; Ramakrishanan, J.; Kunhamed Kutti, J

**Bench :** Full Bench

**Advocate :** R. Kesawa Iyengar, for the Appellant; M. Natesan, for the Respondent

**Final Decision :** Allowed

## Judgement

Ramachandra Iyer, C.J.—This appeal which concerns a question relating to the extent of properties sold in an execution sale, has been

directed to be posted before a Full Bench in view of a contention that the decision in In Re: Parthasarathi Naidu and Another, required

reconsideration. Before proceeding to deal with that point, we shall set out the facts which have given rise to this appeal.

2. Within the limits of the Karaikudi Municipality, certain number of persons (about 80 in number) owned in common a large extent of land

consisting of about 37 items. Disputes arose between the co-sharers regarding the partition of the properties. That was sometime prior to the year

1952. The matter was taken up by means of a suit for partition in the Sub-Court, Devakottai. While the litigation was pending, default was made in

the payment of the property tax that fell due for the property to the municipality. The municipality thereupon instituted O. S. No. 16 of 1952 in the

Sub-Court, Devakottai, for recovery of a sum of Rs. 5565-1-6 and prayed for a charge over the 37 items, of the properties for realisation of the

decree amount. One of the items in respect of which charge was claimed was T. Section 154, of an extent of 17 acres and 11412 sq. ft. By his

judgment dated 8-10-1953, the Subordinate Judge granted a decree in terms of the prayer contained in the plaint. Unfortunately a mistake crept in

the schedule to the decree while drafting. T. Section 154 whose actual extent is 17 acres and 11412 sq. ft. was shown as having an area of only

11412 sq. ft. That mistake was clerical and arose by wrongly shifting the number 17, which represented the extent of the property in acres, to the

preceding column which gave certain survey numbers as forming the western boundary.

But this mistake was, however, never rectified. Execution proceedings were then initiated by the municipality and one item of the charged

properties was brought up for sale. That item was described as the extent of 11412 sq. ft. in T. S. No. 154. That only that extent out of the entire

area covered by T. Section 154 was put up for sale is made clear by the various orders that were passed on the execution petition from time to

time. For example, the note made by the office for describing the property which was to be proclaimed and sold, said,

For sale of the immovable property T. Section 154 in Karaikudi Municipality one house site measuring 11412 sq. ft.

The value given by the decree-holder and also fixed by the Court at the time of settling the sale proclamation, was in conformity with the extent of

the property being 11412 sq. ft. So much is conceded. In the sale that took place on 13-6-1955, the respondent became the purchaser for Rs.

7258. That this price is appropriate and could be considered proper only if the property sold is taken to be 11412 sq. ft. has been recognised by

both the Courts below and indeed is not a matter of any doubt. The learned District Judge has stated that 17 acres and 11412 sq. ft. would be

worth several lakhs of rupees. The sale was duly confirmed and the sale certificate which was issued, while describing the property sold stated:

Situate in Kalanivasal second ward in the Sub-District of Karaikudi In the registration district of Pudukottai and lying to south of T. Section 130 to

135, 138, 140 to 152, west of the new Road of Kalanivasal and north of T. Section 160 to 162 and Muthupattinam Annamalai Chettiar Street,

east of Paruppa Corani and Kanadukanathan road, within these the vacant site bearing T. Section 154, measuring 11412 sq. ft. and belonging to

the samudayam of the defendant. The auction purchase price is Rs. 7526.

This description emboldened the auction-purchaser (respondent to the appeal) to make a claim for the entire area of 17 acres and 11412 sq. ft.

comprised in T. Section 154 and he applied to the Court on 5-12-1956 claiming possession of that extent. His application was resisted by the

appellants (the judgment-debtors) on the ground that what was brought to sale and what was actually sold was only an extent of 11412 sq. ft. and

not the entire area covered by T. Section 154. The learned Subordinate Judge in a careful judgment upheld the case of the appellants and finding

that it was not possible to localise the extent of 11412 sq. ft. at any particular part of the survey number 154, dismissed the application. The order

was passed on 29-9-1958. The auction-purchaser feeling aggrieved filed an appeal to the District Court of Ramanathapuram at Madurai. The

learned District Judge took the view that the boundaries set out in the sale certificate would comprehend the entire extent of 17 acres and 11412

sq. ft. notwithstanding the fact that he paid only for the smaller extent of property. The respondents' application for delivery of 17 acres and 11412

sq. ft. succeeded. This appeal has been filed by the judgment-debtors against the appellate order.

3. Mr. R. Kesava Iyengar, appearing for the appellants, first challenged the legality of the order of the lower appellate Court on the ground that it

had no jurisdiction to entertain the appeal, which according to the contention should have been filed in this Court. The objection to the jurisdiction

of the lower appellate Court is rested on the circumstances that on the date the respondent filed the application for delivery of possession which

was valued at Rs. 7526, an appeal from the order of the executing Court would lie only to this Court. But the Madras Civil Courts Act was

amended subsequent to that date and that became effective from 1-4-1957 as a result of which appeals from decrees or orders whose subject-

matter did not exceed Rs. 10,000 passed by Courts Subordinate to a District Court would lie only to the latter court. The contention urged on

behalf of the appellants, is that the amendment giving a larger appellate jurisdiction to the District Court is not retrospective and as a right of appeal

to the High Court from the order of the Sub-Court has to be determined as on the date of the application for delivery, the District Court had no jurisdiction to entertain the appeal.

4. Before dealing with the contention, reference must be made to the relevant statutory provisions. We shall first refer to the appropriate provision

in the Madras Civil Courts Act, as it stood on the date of filing of the application for delivery and then give the subsequent amending provision.

5. Section 13 of the Madras Civil Courts Act (III of 1873) in the original form stated,

Appeals from the decrees and order of Subordinate Judge and District Munsifs shall when such appeals are allowed by law lie to the District

Court except when the amount or value of the subject-matter of the suit exceeds Rs. 5000 in which case the appeal shall lie to the High Court.

An amendment was made to this section by the Madras Act XVII of 1956. The amending Act received the assent of the Governor on 10-10-

1956. By Section 2 the words Rs. 10,000 stand substituted for the words Rs. 5000 In Section 13 of the Civil Courts Act.

6. Section 1 of the Amending Act states that "the Act shall come into force on such date as the State Government may by notification appoint.

7. The State Government By a notification dated 3-1-1957 made under the foregoing section specified the appointed date for the Act coming into

force as 1-4-1957.

8. It will be seen from the above that while before the amendment appeals from decrees and orders of the Subordinate Judges in regard to

subject-matters of the value of over Rs. 5000 lay to the High Court; after the amendment appeals in those cases in which the value of the subject-

matter exceeded Rs. 5000 but fell below Rs. 10,000 could be filed only in the appropriate District Court and not in the High Court.

9. The enlargement of the jurisdiction of the District Courts to hear appeals on matters whose subject-matters fell below Rs. 10,000 came into

effect on 1-4-1957, that is earlier than the date of the order of the Subordinate Judge in the instant case, but subsequent to the date of the

presentation of the petition. The question is whether the forum of the appeal has to be determined on the law as it stood on the date of the petition

or the order thereon.

10. There are certain principles which can be taken as settled. A right of appeal is a creature of statute. Such a right and the right to appeal to a particular court is a vested right. Being a vested right it will be governed by the law prevailing at the time of the commencement of the suit or proceeding. A statute which interferes with an existing right of appeal generally or an appeal to a particular court would undoubtedly affect the vested rights aforesaid and such statutes whether original or amendatory cannot ordinarily be construed as having a retrospective operation. But as the right of appeal itself is the creature of a statute it will be open to the legislature by appropriate language to deprive or qualify such vested right of the suitor.

In *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, the Supreme Court laid down by a majority decision the following five propositions : (1) that

the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and

are to be regarded as one legal proceeding; (2) the right of appeal is not a mere matter of procedure but is a substantive right; (3) the institution of

the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit;

(4) the right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis

commences and although it may be actually exercised when the adverse judgment is pronounced such a right is to be governed by the law

prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing

of the appeal. (5) This vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary

intendment and not otherwise.

11. The point that falls for consideration, therefore, has to be narrowed down in the present case to this namely, whether the vested right of appeal

to the High Court which the parties had on the date when the application for delivery of possession was filed, has been taken away expressly or by

necessary intendment by the amending Act 17 of 1956.

12. The precise question came up for consideration in *In Re: Parthasarathi Naidu and Another*, . That case was heard by Rajamannar C. J. and

Panchapakesa Ayyar J. who held that the amending Act 17 of 1957 which substituted the District Court instead of the High Court as the forum of

appeal in the case of suits and proceeding the value of whose subject-matter was between Rs. 5000 and Rs. 10,000, was by necessary

intendment retrospective in its operation and would apply even to suits which have been instituted before the Act came into force but in respect of

which judgments were delivered subsequent to the amendment. There are, however no express terms in the amending Act to show that its

provisions were intended to act retrospectively to take away the right of appeal to the High Court which inhered in a party who had instituted a

proceeding in an original Court, the value of the subject-matter of which was above Rs. 5000 and less than Rs. 10,000. But is there anything by

way of implication to show a retrospective operation?

The learned Judges referred in this connection to the provision contained in Section 1(2) of the Amending Act showing that it was not intended to

come into force immediately but on a date to be notified by the State Government and observed that the postponement clause in an enactment was

indicative of a legislative intent to give retrospective force. In the course of his judgment Rajamannar C. J. referred to the following observations of

Pollock C. B. in *Wright v. Hale*, 1860 30 LJ Ex. 40,

I think where an Act of Parliament alters the proceedings which are to obtain in the administration of justice and does not specifically say that it

shall not apply to any action already brought but merely causing the operation to pause for a certain time and giving an opportunity for the parties

to retire from suits, it applies to actions already brought.

Mr. Kesava Aiyangar has contended that the decision in *In Re: Parthasarathi Naidu and Another*, , cannot be accepted as correct as the

observations in 1860 30 L. J. Ex. 40 which it followed were made with reference to a statute affecting procedure in which a postponement clause

has been regarded as an indication of the intention of the Legislature that the statute should have retrospective operation and that case could be no

authority for the construction of a statute which affected vested rights like a right of appeal to a particular Court. 1860 30 L J Ex 40 was no doubt

concerned with an Act which regulated procedure, namely, Section 34 of the Common Law Procedure Act of 1860, that enacted that when a

plaintiff in any action for an alleged wrong in any of the superior courts recovered by the verdict of a jury less than  $\frac{1}{2}$  he should not be entitled to any costs in case the Judge certified that the action was not really brought to try a right. A question arose whether that provision was retrospective in its operation so as to apply to actions tried after, although commenced before that Act came into operation. That question was answered in the affirmative. But we cannot for that reason agree, that the observations made in the course of the judgment of Pollock C. B. relate only to laws which affect the procedure in courts.

Statutes which relate to procedure are generally retrospective as no person has a vested right in procedure. It was unnecessary therefore for the eminent Chief Baron to resort to any rule of construction to find any intendment of the Legislature by considering the effect of the postponement clause, as even without it the statute (if there is nothing to indicate a contrary intention) affecting procedure will be considered as retrospective. The observation in the judgment is a statement of a rule of construction to be adopted for all statutes those affecting procedure as well as those affecting vested rights. That this is so, is clear from the following passage in Craies Statute Law 5th Edn. at page 363: "A postponement clause in an Act has been sometimes said to be an indication against the presumption that a retrospective intent is not to be inferred.

13. The effect of the amendment of the statute in the instant case is not to abrogate or even restrict the right of appeal; it only alters the forum of appeal in a specified category of cases. To such a case the following passage in Maxwell's Interpretation of Statutes at p. 223 will have particular significance:

But some stress is also to be laid on the circumstance that the Act did not come into operation until eight months after its passing for the concession of this interval seemed to show that the hardship in question has been in the contemplation and had been thus provided for.

We cannot see anything in the decision in *Sadar Ali and Others Vs. Doliluddin Ostagar*, , to which our attention was invited by Mr. Kesava

Aiyangar in conflict with the rule of construction stated above. That case was concerned with the effect of an amended Letters Patent which

restricted the right of Letters Patent appeal against the decision of a single Judge

of the High Court in its second appellate jurisdiction. The amended Letters Patent provided that it was to come into operation on the date of its publication in the Gazette. It was held that such a clause could not be taken as showing that retrospective operation was intended. It is obvious that there was no provision in that case which can be termed as a postponement clause properly so-called as the coming into effect of the amended Letters Patent was only on publication in the gazette.

14. But it does not follow that the mere existence of a postponement clause in a statute affecting vested rights should be construed always as an indication by the Legislature for its retrospective operation. Whether a statute is intended to have such an operation or not, has to be gathered from the terms of the statute itself. If there are express words to that effect then there will be no difficulty. But where there are no express words, one has to find whether there is clear indication from the subject-matter of the wording of the statute to show that the statute is to operate retrospectively. Dealing with that question Craies in his book on Statute Law says at page 362,

If it is a necessary implication from the language employed that the Legislature intended a particular section to have a retrospective operation the

Court will give it such an operation. Baron Parke said "Lord Hatherley in *Pardo v. Bingham*, (1869) 4 Ch. A. 735 did not consider it an invariable

rule that a statute could not be retrospective unless so expressed in the very terms of the section which has to be construed and said that the

question in each case was whether the Legislature has sufficiently expressed the intention. In fact we must look at the general scope and purview of

the statute and at the remedy sought to be applied and consider what was the former state of the law, what it was that the legislature

contemplated.

This rule, in our opinion, would apply not merely to original statutes but also to subsequent amending provisions as well. In the present case there

can be little doubt that the object of the Legislature in enacting Madras Act XVII of 1956 was to reduce the arrears in the High Court, that was

achieved by enlarging the appellate jurisdiction of the District Court to cases where the value of the subject-matter of the suits was below Rs.

10,000. That object could be achieved only if retrospective operation were given

to the amendment. The postponement clause in such cases would have a significance, as an indication of the intention of the Legislature that it should apply to all cases where appealable orders are passed subsequent to the appointed date. We are, therefore, in respectful, agreement with the decision in *In Re: Parthasarathi Naidu and Another*, .

15. On the merits of the case we have come to the conclusion that the judgment of the learned District Judge cannot be sustained. The decree created a charge only in respect of 11412 sq. ft. of land in T. Section 154. That was, no doubt, a mistake. No. 17 which represented the acreage of the remaining extent of land in T. Section 154 was included in the column relating to the western boundary. But so long as that mistake remained unrectified, the decree can be said to cover only that extent of the land. The execution petition, sale proclamation etc. make it clear that it was only the extent of 11412 sq. ft. in T. Section 154 that was brought to sale. The order for sale too proceeded on the footing that it was only that extent that was put up for sale and the court fixed its valuation on that basis. The price that was obtained at the auction, as stated earlier, also shows that the entire extent was not intended to be sold. The sale certificate in terms shows that it was only a smaller area, namely, 11412 sq. ft. that was sold, albeit the boundaries of the property sold would take in the entire survey number. The question now is not so much as to whether there has been a misdescription of a property, but rather what is the property, that was sold and purchased. The learned Dist. J. assumed that there was a misdescription when the property situate within the boundaries was shown as having an area of only 11412 sq. ft. But he failed to realise that the very existence of a conflict between the boundaries and the area would show that the terms of the sale certificate were not clear and that it was for him to ascertain first as to the precise extent of the property sold. It is obligatory under these circumstances to refer to the antecedent proceedings to ascertain the identity of the property sold. In *Thakur Barmha v. Jiban Ram* ILR 41 Cal 590 (PC) a certain property which was sold under a decree was described in the application for proclamation of sale as being ""subject to encumbrance"". After purchase the auction-purchaser applied for a certificate of sale praying that there was a mistake in the description of the property as the word ""not"" was omitted with reference to the

encumbrance in the sale proceedings and that he should be granted a sale certificate describing the property as not encumbered. This claim though

upheld by the courts in India was rejected by the Privy council. Lord Moulton observed:

That which is sold in a judicial sale of this kind can be nothing but the property attached and that property is conclusively described in and by the

schedule to which the attachment refers. In the present case that property was six annas subject to an existing mortgage.

The effect of the certificate of sale granted by the order of the Subordinate Judge is to make the sale that of a property not attached, namely the six

unencumbered annas, a property which could not be sold in such proceedings inasmuch as it was not the property attached. An attempt was made

to treat the matter as a case of a misdescription which could be treated as a mere irregularity. But in this case we have to deal with identity and not

description. A property fully identified in the schedule may be in some respects misdescribed but that is not the present case. Here we find an

existing property accurately described in the schedule and the order of the Subordinate Judge grants a sale certificate which states that another and

a different property has been purchased at the judicial sale. It was beyond the powers of the court to make such an order inasmuch as there was

no power to sell in these proceedings the property thus certified to have been purchased ....If by a mistake, the wrong property was attached and

an order made to sell it, the only course open to the decreeholders on the discovery of the mistake was to commence the proceedings over again.

They could not turn an authority to sell one property into an authority to sell another and a different one.

16. These observations apply with force to this case where the decree charged only an extent of 11412 sq. ft. in T. S. No. 154 for the decree

amount. There was no attempt to put up any property other than the charged one for sale.

17. In our opinion the conclusion arrived by the learned Subordinate Judge is the correct one and what was sold to the respondent was only an

extent of 11412 sq. ft. The appeal succeeds and is allowed with costs through out.