

(1961) 07 MAD CK 0004
In the Madras High Court

Govindammal

APPELLANT

Vs

Chidambara Mudaliar

RESPONDENT

Date of Decision : 12-07-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (1962) 1 MLJ 309

Hon'ble Judges : Jagadisan, J

Bench : Division Bench

Judgement

Jagadisan, J.—The appellant in this appeal is the lawfully wedded wife of the respondent. She filed the suit for recovery of maintenance, past

and future, against her husband, O.S. No. 133 of 1948 on the file of the Subordinate Judge's Court of Vellore and obtained a decree in the

following terms:

(1) That the defendant do pay to the plaintiff at the rate of Rs. 150 per mensem for her future maintenance from 9th September, 1948, the date of

plaint.

(2) That the defendant do pay to the plaintiff the sum of Rs. 3,480 as arrears of maintenance for 3 years prior to the date of suit.

(3) That the plaintiff is entitled to reside in family house at Kaniyambadi which is item No. i in the schedule of properties given hereunder.

(4) That the properties given in the schedule hereunder be a charge for the decree amount; and

(5) That the defendants do pay to the plaintiff her costs of suit Rs. 636-7-0 with interest thereon at the rate of six per cent, per annum from this

date till realisation.

2. The appellant executed this decree for maintenance, brought to sale certain items of the charged properties and purchased the same herself in

Court auction on 13th February, 1958. The respondent, the husband, filed a petition E.A. No. 371 of 1958 before the Sub-Court of Vellore,

purporting to be under Sections 47 and 151 of the Civil Procedure Code, seeking to set aside the execution sale in favour of the appellant held on

13th February, 1958. His main contention was that the sale was illegal as the decree in the case was not executable. The learned Subordinate

Judge of Vellore dismissed the application holding that the terms of the decree were sufficiently clear and were executable. The decision cited

before the learned Subordinate Judge in support of the contention that the decree was not executable, namely, the decision in Ramanuja Naicker

and Others Vs. Seethalakshmi Ammal alias Sellathayee and Another, , was distinguished by the learned Judge and was held to be inapplicable to

the facts and circumstances of this case.

3. The respondent preferred an appeal, A.S. No. 511 of 1958 before the District Court of North Arcot at Vellore and challenged the correctness

of the decision of the executing Court dismissing his application. The learned District Judge held that the decision in Ramanuja Naicker and Others

Vs. Seethalakshmi Ammal alias Sellathayee and Another, , was directly applicable, and that the decree in favour of the wife was not executable,

and he accordingly set aside the auction sale in favour of the wife, dated 13th February, 1958. The Civil Miscellaneous Second Appeal has been

preferred by the wife who contends that the decision of the executing Court was right, and that there are no grounds for setting aside the execution

sale in her favour.

4. The plain terms of the decree which have already been set out unmistakably direct the defendant in the suit, the respondent herein, to pay the

plaintiff-appellant future maintenance at the rate of Rs. 150 per mensem from 9th September, 1948, and past maintenance aggregating to Rs.

3,480. Under the decree the defendant is personally liable to pay the decree amount. The fact that the decree also provides for a charge for the

payment of the decree amount over the properties described in the schedule attached to the decree does not in any way operate to derogate from

the personal liability which the decree undoubtedly casts upon the defendant.

The decree is what may be called a composite decree, a simple money decree making the defendant personally liable, and a charge decree as against the properties described in the schedule attached to the decree. It was not incumbent upon the decree-holder to proceed against the charged properties even in the first instance. She could have proceeded against the other properties of her husband not charged under the decree and she could have even prayed for arrest and detention in a civil prison of the husband provided she was able to make out the requisite case that he is liable to be so arrested. Of course it will always be open to the executing Court to direct the decree-holder to proceed first against the charged properties but such direction need not be given necessarily in all cases as a rule of law. I am unable to see how it can at all be held that this decree which was put in execution by the decree-holder can be said to be incapable of execution.

5. I shall now refer to the decision in Ramanuja Naicker and Others Vs. Seethalakshmi Ammal alias Sellathayee and Another, . The decree that was the subject-matter of the decision in that appeal contained the following clause:

III(a) that the eighth defendant be and hereby is entitled to past maintenance due to her mother, seventh defendant for a period from 12 years prior

to suit up to 27th November, 1950, the date of death of seventh defendant, at Rs. 100 per mensem;

(b) for the return of Rs. 500 given by her husband's family to that of plaintiff and defendants 1 to 3;

(c) to be reimbursed by plaintiff and defendants 1 to 3 the sum of Rs. 500 spent by her for the funerals of her mother (seventh defendant).

This clause was followed by another clause which ran as follows:

IV. that the payments of the amounts declared under para. III supra be a charge on Items, 1, 13, 14, 20 and 52 to 62 of the plaint schedule.

6. The eighth defendant in the suit was the person in whose favour a declaration of her being entitled to the past maintenance was granted. There

was no clause in the decree, express or implied, directing any party to the suit to pay any amount to which she was declared entitled as and for

past maintenance, there was no clause directing that in default of payment of any amount any item of the charged properties should be sold. If I

may say so with respect, the learned Judges of this Court correctly held that the decree before them was one which was not capable of execution.

The following observation of the learned Chief Justice may be usefully quoted:

The decree does declare that the eighth defendant is entitled to the past maintenance due to her mother and to the other sums of money. But there

is no direction that the plaintiff or any of the defendants or all of the them do pay to the eighth defendant any amounts on or before a particular

date. The further clause also declares a charge on certain items, but there is no specific provision that in default of payment of the amounts declared

to be due to the eighth defendant, the charged items, or such of them as may be sufficient to discharge the amounts due under the decree, be sold;

on the language of the decree we cannot but hold that the decree is not executable.

7. The learned District Judge was in error in holding that the decree was one which was incapable of execution and it follows that his order

directing the setting aside of the execution sale in favour of the appellant is equally erroneous

8. The appeal is allowed. The Judgment and Decree of the learned District Judge are set aside and those of the learned Subordinate Judge are

restored. There will however be no order as to costs in this appeal or in the Courts below.