

(1952) 11 MAD CK 0004

In the Madras High Court

Case No : Second Appeal No. 614 of 1948

J. Natesa Sastri and Another

APPELLANT

Vs

K.S. Sundaram Chettiar (died) and Others

RESPONDENT

Date of Decision : 24-11-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3, 2(11), 50
Succession Act, 1925 — Section 303

Citation : AIR 1953 Mad 622 : (1953) 66 LW 449

Hon'ble Judges : Satyanarayana Rao, J

Bench : Single Bench

Advocate : G.R. Jagadisan, for the Appellant; T.R. Srinivasan, for the Respondent

Final Decision : Dismissed

Judgement

Satyanarayana Rao, J.—This second appeal is by defendants 1 and 2 against the decision of the Subordinate Judge of Kumbakonam

affirming the decree granted in favour of the plaintiff by the District Munsif setting aside a claim order. The dispute concerns the estate of one late

Sivaramakrishna Aiyar and he became liable to pay costs to one Sivagangai Achi as per the decree in O. S. No. 40 of 1928, Sub-Court,

Mayavaram. The present plaintiff obtained an assignment of that decree on 22-10-1931. Thereafter, the plaintiff applied to the Sub Court,

Mayavaram, for recognising the assignment in his favour and to transmit the decree for execution to the District Munsif's court, Kumbakonam. By

that time, the judgment-debtor died and his widow, Dharmambal, was impleaded as the legal representative. The decree was transmitted to the

District Munsif's court, Kumbakonam, and the suit house was attached on 2-4-1942.

Thereafter, in E. A. No. 750 of 1942 the present defendants who are the sons of one Kuppahi Ammal, the sister-in-law of Sivaramakrishna Aiyar

claimed that the property could not be attached as they obtained the property as a legacy under the will of the late Sivaramakrishna Aiyar dated 1-

12-1918 (Ex. D. 1). Under this Will, Dharmambal was given a life interest and it was alleged by the defendants that she had surrendered the

property to Kuppahi Ammal in 1933. The District Munsif who heard the claim petition held that the surrender was not proved and valid and that

the decree-holder could proceed only against the life-interest of Dharmambal in execution of the decree. There was an appeal against the order of

the Sub Court, Kumbakonam. Treating the order as one u/s 47, Civil P. C., the appeal was allowed and the matter was remanded to the District

Munsif's court on 16-8-1943 for proper inquiry u/s 47.

Against the order of the remand, the defendants preferred an appeal to the High Court and the High Court held, on 25-8-1944 that the matter

does not fall u/s 47. The plaintiff therefore instituted the suit to set aside the claim order and claiming that he was entitled to attach not only the life

interest but the property itself. It might be mentioned, that Kuppahu Ammal died in 1940 during the pendency of the proceedings and the sons were

sought to be impleaded as legal representatives. But it was held by the Court that they were mere legatees. The execution however, was

proceeded with on the basis of the prior attachment during the lifetime of Dharmambal, the heir-at-law of Sivaramakrishna Aiyar who would have

taken the estate in the absence of a will.

2. In the suit, the defendants raised various pleas; but the principal and the only question which is now outstanding is whether the suit properties

could be proceeded against in execution of the decree in O. S. No. 40 of 1926, without filing a separate suit against the defendants. Both the

courts held that execution could proceed against the house in the hands of the defendants.

3. In this second appeal, the sole question for decision therefore is whether the remedy of the decree-holder to realise his decree amount is only by

way of a suit against the defendants or the execution could be proceeded with against the property in their hands.

4. In a connected proceeding between the same parties, the question whether

legatees of part of the estate who have taken possession of the property could be deemed to be legal representatives within the definition of Section 2(11) Civil P. C., came up before a Bench consisting of Horwill and Balakrishna Aiyar JJ. in -- Natesa Sastrigal and Another Vs. Alamelu Achi by power agent, K.S. Sundaram Chettiar, . That was a Letters Patent Appeal against the judgment of Govindarajachari J. and the learned Judges, reversing the decision of Govindarajachari J. held that they could not be deemed to be legal representatives within the meaning of Section 2(11) Civil P. C. It is on this decision that strong reliance was placed on behalf of the appellants (defendants 1 and 2) by Mr. Jagadisa Aiyar, their learned advocate, the contention being that as the defendants are not the legal representatives of the judgment-debtor, execution could not be levied against the properties in their hands which they held as heirs of the legatee of a portion of the estate of Sivaramakrishna Aiyar. He does not, however, dispute and indeed he could not dispute, that the legatees are liable to pay the debts of the testators, since before the estate is distributed between 12 legatees by the executor or administrator the debts must be paid first. Even if the executor or administrator overlooking the claim of a creditor, distributes the estates to the legatees, there is the right of the creditor recognised u/s 381, Succession Act, to call upon a legatee who has received payment of the legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies; and this is irrespective of the question whether the payment of the legacy by the executor or administrator was voluntary or not. But this claim can be enforced only by a suit and cannot be enforced in execution of a decree, as such a legatee who had received payment of the legacy cannot be treated as a legal representative of the deceased testator. So much is not in dispute. But the question in this case is whether in view of the peculiar facts of this case the assets could not be seized in execution.

5. Apart from the question whether the legatees who have helped themselves into possession could be treated as legal representatives or not, in this case there is a complete answer to the contention of appellants, as the decree itself was obtained against the testator and by the time of the attachment the person who lawfully represents the estate in the absence of a

testament, namely, the widow, Dharmambal, was impleaded as legal representative in the execution proceedings, and the property was attached. The rights of the attaching creditor therefore have to be determined, it is not disputed and it is established law, as on the date of the attachment. If the assets come into possession of the legatees unauthorisedly, it would not affect the rights of the execution creditor to seize the property in execution of the decree.

Courts, at any rate in this Presidency, have gone to the length of holding that a true legal representative will be bound by a decree passed against the wrong legal representative, if the plaintiff decree-holder acted bona fide without fraud or collusion and the wrong legal representative was impleaded as representing the estate in ignorance of the true facts. An heir-at-law is undoubtedly a legal representative within the meaning of the definition in Section 2(11) Civil P. C., as he in law represents the estate of the deceased person. It has been held in this court in -- Sivasankara Mudaliar and Another Vs. Amaravathi Ammal and Another, , that the entire estate, both movable and immovable of a deceased person vests in the heir-at-law until an administrator is duly constituted and that such an heir-at-law is even competent to maintain a suit on behalf of the estate to recover possession.

It was held in that case that a widow, the heir of the deceased was competent to maintain a suit to recover possession of the estate left by the husband including properties not specifically bequeathed to her. The attachment therefore was validly made in the present case at a time when the estate was fully represented by Dharmambal and the rights of the execution creditor should be worked out as on the date of attachment by bringing the properties to sale in pursuance of that attachment. The mere fact that subsequently the property vested under the Will upon other persons is, in my opinion, of no consequence. Whatever may be the position, therefore, in other cases in which the legatees alone who have not received the legacy from the executor or administrator who is charged with duty of distributing the estate after discharging the liabilities on it may be, in the present case, in my opinion, the execution is valid and the property could be validly seized in execution of the decree so as to bind even the defendants; this is enough to dispose of the appeal.

6. It has, however, been urged on behalf of the respondent that the decision of the Bench in -- Natesa Sastrigal and Another Vs. Alamelu Achi by power agent, K.S. Sundaram Chettiar, ", overlooks the important circumstance that a legatee under a Will who helps, himself by taking possession of the estate of the deceased in satisfaction of his own legacy is an executor de son tort within the meaning of Section 303 of the Succession Act, as the illustration to the section clearly shows. In the said decision the learned Judges while referring to Section 303 containing the definition of an executor de son tort overlooked the illustration to that section. It is established law that until the executor or administrator assents to a legacy, the legatee's title is not perfected. It is an inchoate title heritable and transmissible and also vests from the moment indicated by the Will as interpreted in accordance with the sections of the Succession Act, But the executor's assent is necessary to perfect the title of the legatee. The assent, however, does not create a new title. If there is no executor or administrator, it has been held in this court that it is open to a legatee to sue for recovery of his legacy, -- "Vide Rajah Parthasarathi Apparao v. Rajah Venkatadri Apparao", AIR 1922 Mad 457 (C). The actual decision was reversed by the Privy Council in --Venkatadri Apparao v. Parthasarathi Apparao, but this point was not touched by it.

The executor or the administrator, before delivering the legacies, has to pay the funeral and testamentary charges and discharge the debts and then only pay the legacies. After distribution, as stated above, if there is a debt which was not discharged, the creditor has a right to follow the assets in the hands of the legatee u/s 361, Succession Act, by calling upon him to refund an amount to satisfy the debt. If, however, the legatee unauthorisedly lays his hands and takes possession of the estate of the deceased testator to satisfy his legacy, such an act is treated as an act of intermeddling, which act in law pertains to the office of an executor, as the distribution of the legacy is the function of the executor and belongs to that office. It is for that reason the illustration to Section 303 says that if "A" uses or gives away or sells some of the goods of the deceased to satisfy his own debt or legacy, he is an executor of his own wrong.

Though the learned Judges in -- Natesa Sastrigal and Another Vs. Alamelu Achi by power agent, K.S. Sundaram Chettiar, ", correctly defined an

executor de son tort as a person who takes upon him an office of executor by intrusion, not being so constituted by the testator, overlooked the fact that in the case these very defendants took unauthorised possession of the estate of the deceased to satisfy the legacy and therefore were persons who intermeddled with the estate and therefore, became executors de son tort as provided in the illustration. Out of curiosity, I have called for the judgment of Govindarajachari J. in order to find out whether that learned Judge noticed the illustration. I find that he based his judgment on the illustration and quoted it in his judgment; but somehow, the learned Judges on appeal did not consider the illustration at all and did not even refer to the fact that Govindarajachari J. relied upon the illustration to establish that the legatees were executors de son tort, as they intermeddled with the estate.

7. In Williams on Executors, 12th Edn. Vol. I, at page 155, the learned author enumerates the acts which constitute an executor de son tort:

A very slight act of Intermeddling with the goods of the deceased will make a person executor de son tort. Thus it is said, that milking the cows, even by the widow of the deceased, or taking a dog will constitute an executorship de son tort. So, in one case the taking a Bible and in another a bedstead, were held sufficient in as much as they were the indicia of the person so interfering being the representative of the deceased. So, if a man kills the cattle, or uses or gives away, or sells any of the goods or if he takes the goods to satisfy his own debt or legacy; or if the wife of the deceased takes more apparel than she is entitled to, she will become executrix de son tort. And there may be a tort executor of land, as where a man enters upon the land leased to the deceased, and takes possession, claiming the particular estate".

So that in that respect, the nature of the property whether it is moveable or Immovable does not matter, so long as there are acts of intermeddling which make the person an executor de son tort. These acts are really functions belonging to the office of an executor, and if the possessor usurps the functions unauthorisedly, he is within the definition of executor de son tort. Had it been necessary to rely upon the decision of the Bench in --

Natesa Sastrigal and Another Vs. Alamelu Achi by power agent, K.S. Sundaram Chettiar, , I would have been inclined to refer the matter to a

Fuller Bench for further consideration, but in view I take of the case, it is unnecessary to do so.

8. Reliance was placed for the position that the remedy of the creditor is only to institute a suit, on the decision of the Calcutta High Court in -- Joy

Chandra Roy and Others Vs. Satis Chandra Roy, . But that case it must be noticed is a case in which the administrator of the estate of the testator

with the Will annexed had put the legatees in possession of the property. Therefore, the administrator assented to the legacy and the legatee's title

was perfected. Of course, in such a case the only remedy of the creditor to follow the assets into the hands of the legatee can only be by a suit. He

cannot in execution of the decree seize the property which was delivered to the legatee by the duly constituted representative of the estate, as he is

in no sense the legal representative of the deceased. The decisions of the English Courts, relied on in that case support this view. At page 172 the

learned Judges were considering the right u/s 361, Succession Act, for they observed,

It is a right to call upon the legatee to refund. That right may be exercised by a creditor who remains unpaid"".

The English authorities referred to, on an examination it will be found, were cases in which the legacy was duly delivered by the legal personal

representative of the testator. They were really claims for refund and not attempts to seize the property in execution. The legatee's title became

perfected. It is unnecessary to subject those decisions to a detailed examination. The decision in "Re Eustace, (1912) 1 Ch. 561 (F)" decided by

Swinfen Eady J. was also a case where the estate was distributed and afterwards the creditor put forward the claim. Notwithstanding the

considerable delay in the claim that is put forward by the creditor, it was held that he was entitled to follow the assets of the deceased into the

hands of the legatees who have been fully paid.

Those classes of cases stand altogether apart and have nothing to do with cases in which the legatees did not receive the payment in due course of

administration of the estate either by the executor or administrator or even in a properly constituted administration suit, but helped themselves to the

legacies by unauthorisedly taking possession. In such a case undoubtedly they will be executors de son tort within the meaning of Section 303 as

they intermeddled with the estate and are liable to be proceeded in execution as the legal representatives of the deceased judgment-debtor. The

definition In Section 2(11), Civil P. C. will apply to such a case, as it is a case of intermeddling by a person claiming title to the property.

9. For these reasons, the second appeal must be dismissed with costs. No leave.