

(1943) 07 MAD CK 0003
In the Madras High Court

Jannalagadda Seetharamayya

APPELLANT

Vs

Kaja Sivaramakrishna Rao and Others

RESPONDENT

Date of Decision : 27-07-1943

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 66, Order 21 Rule 90

Citation : AIR 1944 Mad 145 : (1943) 56 LW 605 : (1943) 2 MLJ 536

Hon'ble Judges : Horwill, J

Bench : Division Bench

Judgement

Horwill, J.—A mortgage,suit was filed in the Court of the District Judge of Kistna and he transferred the suit for trial to the Court of the

Subordinate Judge of Masulipatam. One of the parties to the suit was the Co-operative Building Society, which was impleaded as the eighth

defendant. There were two mortgages in favour of the Society and the first was embodied in the second. The Society remained ex parte and in just

over two months after the suit had been filed, it brought the property to sale in execution of an award by the Registrar and it was purchased by the

present respondent. He did not however apply to be made a party in the mortgage suit and the transfer to him was of course, subject to the

doctrine of Us pendens. In execution of the mortgage decree, the decree-holder sought to bring all the properties to sale including a house in

Bezwada which is the subject of this appeal--and two items of land within the jurisdiction of the Subordinate Judge, Masulipatam and of the

District Judge, Kistna. The decree-holder then applied to the Subordinate Judge to transmit the decree for execution to the District Court. This

was done and proclamation was ordered. Some days before the sale took place, the respondent put in an application asking the Court not to sell

the house at Bezwada as he hoped that the sale of the lands would be sufficient to satisfy the, debt. The Court adjourned the sale for a few days in

order to hear this application and when it came up for hearing it was not pressed and was dismissed. Sale of the house and the lands was

consequently ordered, but only the Bezwada house was sold. Subsequently, the respondent put in an application under Order 21, Rule 90 asking

the Court to set aside the sale on the ground of material irregularity and also on the ground that it had no jurisdiction to sell the house at Bezwada.

The District Judge upheld both these contentions. He held that he had no jurisdiction to sell the house and that there was a material irregularity in

that no mention had been made of the prior mortgage in the proclamation, as was necessary under Order 21, rule 66, CPC and that the respondent

thereby sustained loss; because if the prior mortgage had been disclosed, the upset price would have been lower and the respondent himself would

have bid and secured the property for himself. He therefore set aside the sale.

2. The learned advocate for the appellant has raised a number of points. He says that there was no material irregularity and that even if there was,

no injury was sustained. Secondly, he says that the Court had no jurisdiction in an application under Order 21, Rule 90 to consider the question of

its jurisdiction to bring the Bez-wada house to sale. Thirdly, he contends that because the respondent, in his application on the day before the day

fixed for sale, did not refer to the want of jurisdiction in the Court, he is precluded by principles analogous to those embodied in Section 21, Civil

Procedure Code, from contending in later proceedings that there was want of jurisdiction in the executing Court. Finally, he contends that the

District Court had jurisdiction to sell the house.

3. Order 21, Rule 66(c) requires that the proclamation should contain mention of any prior incumbrances; and so the learned District Judge was

perhaps justified in holding that there was a material irregularity; but I do not agree with the learned District Judge that it thereby follows that the

respondent sustained substantial injury. He has not attempted to prove that he would have bid at the sale if the upset price had been lowered or

that any other person was prepared to bid. It therefore seems to me that there was no basis of fact upon which the learned Judge could come to

the conclusion that the respondent sustained substantial injury by reason of the

irregularity.

4. It is true that Order 21, Rule 90 makes no reference to objections based on "jurisdiction; but if the Court had ab initio no jurisdiction to set aside

the sale, it could not ignore that fact if its attention was drawn to it. If the Court knew that the sale was without jurisdiction, it could hardly order

confirmation of the sale.

5. The leading case on which all the other cases discussed by the learned Counsel as to the applicability of Section 21 or analogous principles to

proceedings in execution of a decree are based is Raja Jaga Veera Rama Venkateswar Ettapa Nayakar Avergal, Zamindar of Ettayapuram Vs.

Chidambaram Chetty and Others, . There an objection to jurisdiction to try a suit could have been taken in the trial Court, but it was not taken;

and a subsequent suit was filed to declare that the decree was null and void. It was held that although Section 21, Civil Procedure. Code did not

directly apply, yet if an appeal had been filed, the appellate Court would have been bound to hold that as the question of jurisdiction had not been

raised at the earliest opportunity in the suit, the appellate Court could not reverse the decree on that ground; so that the question of jurisdiction so

far as the parties were concerned must be deemed to have been finally settled by the defendants" not taking the objection at the earliest

opportunity; and so it was not open to them in a subsequent suit to raise that objection. Subsequent decisions carried the principle much further. In

Chokkalinga Pillay Vs. Velayudha Mudaliar and Others, , although it was not strictly necessary to go beyond Raja Jaga Veera Rama Venkateswar

Ettapa Nayakar Avergal, Zamindar of Ettayapuram Vs. Chidambaram Chetty and Others, it was held that "" waiver of territorial jurisdiction is

recognised by law, whereas it has been consistently held that other forms of jurisdiction, such as jurisdiction of the subject matter or pecuniary

jurisdiction cannot be waived by consent of parties."" Venkatasubba Rao, J., says:

The section in terms no doubt does not apply, because it refers to the disallowing of the objection by an appellate or revisional Court. But the

principle is of general application and if in appeal or revision the decree cannot be impeached it is equally reasonable that in a collateral proceeding

it should not be allowed to be attacked.

6. Venkatasubba Rao, J., was even more emphatic in Rajagopala Pandarathar v.

Thirupathia Pillai (1925) 50 M.L.J. 161 : ILR Mad. 746 which is a case which cannot be distinguished from the present in any material particular-- that Section 21 embodies but a particular application of, a general principle. He implies that apart from Section 21, there is a principle of more general application that objections as to want of territorial jurisdiction can be heard only if taken at the first opportunity. Madhavan Nair, J., was of the same opinion. Another case very similar to the present is Ayisa Beevi Ammal v. Nagaratna Mudaliar (1934) 40 L.W. 284. in which the learned Judges considered that there was an equitable principle of much wider application than Section 21, Civil Procedure Code. On the other hand, Ramesam and Devadoss, JJ., in Subramania Aiyar v. Swaminatha Chettiar (1928) 28 L.W. 885 were clearly of opinion that the principle of waiver must be limited to the cases specified by Section 21 itself. It is difficult to accept an argument that will make Section 21 redundant because of the existence of a wider principle not embodied in the Code; but it is seen that there is abundant authority for that view. Fortunately, on the facts of this particular case and in view of my decision on the next point, it is unnecessary for me to try to reconcile these conflicting views. Waiver is presumed from the conduct of the party who stands by and allows a proceeding to go on without taking any objection to it. In the present case, the respondent can scarcely be said to have stood by and allowed the sale to take place. As far as we are aware, he knew nothing of the execution proceedings till the day prior to that on which the sale was fixed. It seems inappropriate to apply the doctrine of waiver because a person within the short space of twenty-four hours has not thought of the most effective reason for opposing the sale. Moreover, the Court might well have told the respondent that he had no locus standi. He could no doubt have applied to be made a party, and if a decision had then been taken against him, he would have had a right to appeal. As it was, he was not a party to the execution proceedings and had no time to make himself one.

7. The learned District Judge has held that while it is undoubtedly true that a Court which passes a mortgage decree can execute that decree even against property which lies outside its jurisdiction, no other Court to which the decree might be transferred can do so. He considers that the rule that the Court cannot execute a decree against property not lying within its

jurisdiction has only one recognised exception, and that is in the case of a Court which has passed a mortgage decree. It seems to me, however, that a Court to which a mortgage decree has been transferred has the same powers as the Court which passed the decree. That is what Section 42, CPC says. It states that "" the Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself."" That seems to me to mean that when once a decree has been transferred, whatever the reasons for the transfer might be, the transferee Court may treat that decree as its own. It does not of course mean that because a transferor Court has jurisdiction to sell a particular item of property lying within its own jurisdiction, the transferee Court has power to sell the same piece of property, which lies without its jurisdiction. But if the transferee Court may treat a mortgage decree as if it had been passed by itself, it can execute it against all the property which is the subject of the decree, even though none of it might lie within its territorial jurisdiction. In Abdul Hafiz Saheb Vs. Abdul Sukkur Saheb and Another, , it was argued before Varadachariar, J., that as a decree was necessarily transferred to another Court for some specific purpose, the transferee Court would be limited in its powers to the purpose for which it was transferred; but Varadachariar, J., repelled that argument as placing an undue limitation on the powers of the transferee Court not warranted by any provision in the Code. Where the transferee Court is the District Court, another argument is available; for Section 24, CPC gives the District Court power to transfer to its own file any suit, appeal, or other proceeding pending in any Court subordinate to it and try it itself. It seems clear that Section 24 did not intend to limit the power of the District Court to cases in which it itself had territorial jurisdiction, the absurdity of any other view being pointed out by Venkatasubba Rao, J., in Rajagopala Pandarathar v. Thirupathia Pillai (1925) 50 M.L.J. 161 : ILR Mad. 746 above referred to.

8. Mr. Satyanarayana Rao seeks to argue from first principles and from Thakur Pershad v. Skeikh Fakirullah that Rajagopala Pandarathar v.

Thirupathia Pillai (1925) 50 M.L.J. 161 : ILR Mad. 746 and Abdul Hafiz Saheb Vs. Abdul Sukkur Saheb and Another, in so far as they hold that

Section 24 applies to execution proceedings, are wrong; but it is clear that I

cannot question the correctness or otherwise of these Bench

decisions. Moreover, the reasoning on which *Thakur Pershad v. Skeikh Fakirullah* proceeds scarcely helps in the interpretation of Section 24, Civil

Procedure Code.

9. I therefore hold that the learned District Judge was wrong in his conclusion that he had no jurisdiction to sell the house at Bezwada. The appeal

is allowed and the order setting aside the sale cancelled. The respondent will bear the costs of the appellant in both Courts.