

---

**(1968) 06 MAD CK 0005**  
**In the Madras High Court**

Kamakshi Ammal and Another

APPELLANT

Vs

M.C.A.R.S. Chockalinga Thevar Firm and Others

RESPONDENT

---

**Date of Decision :** 20-06-1968

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 47

**Citation :** (1970) ILR (Mad) 368 : (1969) 82 LW 388 : (1969) 2 MLJ 593

**Hon'ble Judges :** M. Natesan, J

**Bench :** Division Bench

---

**Judgement**

M. Natesan, J.—The second appeal has been heard along with Venkatasami Naidu Vs. Sornammal and Another, .

2. The suit properties and another house property, the subject of dispute in Venkatasami Naidu Vs. Sornammal and Another, , were purchased by

Lakshmiammal mother of the plaintiffs, under two registered sale deeds. The mother died in 1938. The father of plaintiffs Guruswami Nadar

executed two othi deeds over the properties, one in 1948 and another in 1953, in favour of Mahalinga Nadar, husband of the first plaintiff. The

second plaintiff in the present suit, second appellant before me instituted O.S.No. 195 of 1957 on the file of the District Munsifs Court,

Tirumangalam setting up title of the daughters, that is, the present plaintiffs, to the properties that were purchased in the name of their mother

Lakshmiammal, and impugning the validity of the mortgage effected by their father. Mortgagee Mahalinga Nadar and their father Guruswami

Nadar were parties to the suit. The second plaintiff claimed a half share in the properties by way of partition in assertion of her title. The trial Court

decreed the suit on 12th July, 1958, and an appeal therefrom by Mahalinga Nadar was dismissed on 29th October, 1960. The second respondent

in the second appeal had obtained a money decree against Guruswami Nadar in S.C. No. 266 of 1956 on the file of the Sub-Court, Madurai.

After the death of Guruswami Nadar, the second respondent sought execution of the decree in E.P.No. 672 of 1960 against the suit properties as

properties of the deceased judgment-debtor in the hands of the plaintiff and their brothers, the respondents 3 and 4 in the second appeal. The first

respondent herein, for moneys due to him from Guruswami Nadar and one Nataraja Nadar, instituted S.C.No. 504 of 1959 on the file of the

District Munsif Court, Tirumangalam, against the said Nataraja Nadar and the children of Guruswami Nadar, that is, the plaintiffs and respondents

3 and 4 herein. Having secured the decree, he sought execution of it against the suit properties in E.P.No. 158 of 1960. It transpires that in the

execution proceedings in S.C. No. 504 of 1959 the plaintiffs were set ex parte. They filed a petition for setting aside the ex parte order and that

was dismissed on 20th June, 1961. It is under these circumstances that the present suit was instituted by the plaintiffs on 21st August, 1961, for

setting aside the attachment of the suit properties in execution proceedings in the two suits. They contended that the properties were not assets of

the deceased Guruswami Nadar liable to be proceeded against in execution of the decree. In defence, on the merits, a plea of benami was set up.

It was contended that the properties were purchased in the name of Lakshmiammal benami for Guruswami Nadar. There was a substantial plea

that the suit was barred by res judicata. No plea was taken that Section 47, Civil Procedure Code, was a bar to the suit. The trial Court accepted

the plea of benami. It also held without any discussion that the plaintiffs are barred by the principle of constructive res judicata from claiming title to

the suit properties. In the result, the suit was dismissed. On appeal, the learned Subordinate Judge rejected the plea of benami set up by the decree

holders. However, he agreed with the trial Court that the suit was barred by the principle of constructive res judicata.

3. On the merits, I see no reason to differ from the lower appellate Court. The question of benami is a pure question of fact. The ostensible owner

is presumed to-be the real owner and in the present case evidence is wholly wanting to rebut the presumption. On the other hand, there is a judicial

determination that the properties belonged to Lakshmiammal and the plaintiffs have succeeded to the same on her death. The judgment in this

regard may not be res judicata and cannot bind the present decree holders who are not parties to the suit. But it certainly recognises. the title the plaintiffs now assert. The inference of the learned Subordinate Judge that the properties did not belong to Guruswami Nadar, the debtor, is unimpeachable and has to stand.

4. Before I take up for consideration the question of res judicata I may immediately say that learned Counsel for the respondents is perfectly

justified in his contention that the dispute raised in the present case is a matter falling u/s 47, Civil Procedure Code, and the suit is barred. But this

will not be a serious obstacle, as the Court may, subject to any objection as to limitation or jurisdiction, treat the suit as a proceeding u/s 47. The

question of res judicata in a case of the kind where representatives of the debtor assert their title to the property sought to be proceeded against,

has been considered by me at length in the judgment in Venkatasami Naidu Vs. Sornammal and Another, , just now pronounced. There is a vital

distinction between that case and the present one. In that case, the present plaintiffs had stood by and allowed the property to be sold in execution

and the sale confirmed. Long afterwards they came forward with the suit impugning the Court sale. In the present case all that happened is

attachment of the properties. The suit O.S.No. 504 of 1959 was instituted against the present plaintiffs, their brothers and one Nataraja Nadar.

The decree is against the assets of the deceased in their hands. In the other suit, S.C. No. 266 of 1956, the decree was against Guruswami Nadar

himself and the plaintiffs and their brothers were proceeded against in execution u/s 50, Civil Procedure Code. A reference to the execution

petition in S.C. 504 of 1959 exhibited in this case shows that the execution was sought against properties admittedly belonging to Guruswami

Nadar and the disputed suit items. The notice that has been taken to the plaintiffs has not been exhibited. It is not known whether the notice taken

to the plaintiffs contained a schedule of properties and their attention was drawn to the fact that execution was sought against the disputed

properties in respect of which they had, long prior, obtained a declaration of their title. Much has been made by the lower appellate Court of the

application by the plaintiffs for having the ex parte order against them in E.P. No. 158 of 1960 set aside and its dismissal by the executing Court.

The order which the plaintiff sought to get set aside has not been exhibited. It is not clear whether the order in question related to procedure or necessarily involved an adjudication of title in respect of the disputed properties. It was said that it is merely an order setting the plaintiffs ex parte in which case the plaintiffs may, at any time, intervene. It is not every order in execution that would constitute res judicata Even this feature is only in execution proceedings in S.C. No. 504 of 1959 and does not affect S.C. No. 266 of 1956.

5. While the doctrine of constructive res judicata is applicable to execution proceedings, it should be very cautiously applied. The Court, before it bars a party by the principle of constructive res judicata, must satisfy itself that the party had notice of the point which was likely to be decided against him on the hearing and the order pleaded in bar necessarily implied, when not express, a determination of the issue in question. It is one thing to say that, if the property is attached and brought to sale as that of the deceased judgment debtor in the hands of his legal representatives, the latter not only could but also should set up their personal title to the property in the execution proceedings and an order in execution proceedings which is prejudicial to them, even if they were ex parte, would be res judicata. But the Court has to be wary in the application of the rule--it must see that the party that would be affected had an opportunity to present his case as provided in the Code. True it is incumbent on the legal representatives to set up in the execution proceedings their personal title to the property. It is not a case of their being merely competent to do so. They have no option in the matter to stand by and allow the property to be proceeded against as the property of the judgment debtor and then question the sale. But in the present case the parties have come up with their objections, when they find their properties are being proceeded against in execution, and there is nothing shown on record that would amount to a prior adjudication against them. Not only the plaintiffs but their brothers had been brought on record as representatives. Guruswami Nadar had properties of his own. Under the Hindu Succession Act, the daughters also are heirs to his properties along with the sons. Was it brought to the plaintiffs' notice before they were set ex parte that the disputed properties were also being proceeded against? This case, on its facts, bears resemblance to the Full Bench decision of this Court in Chidambara

Chettiar v. Theivanaiammal ILR (1923) Mad. 768 : (1923) 45 M.L.J. 634, where, while confining the decision to the facts of the case the Full

Bench held that mere non-attendance at the hearing of an application to settle the terms of a sale proclamation did not estop the legal

representative of the deceased judgment debtor from disputing thereafter the liability of the property to attachment. The Full Bench case was

followed by Kuppuswami Aiyar, J., in Soorianarayana Chetti v. Shenbagathammal, the learned Judge remarking (1944) 2 M.L.J. 114.

Can it be said in this case that when the appellant received notice under Order 21, Rule 66 he had any information as to what the properties were

that were brought to sale?

6. Having regard to the particular facts of this case, following the above two decisions, I find that the appellants are not barred by the principle of

constructive res judicata from raising the plea that the suit properties are not liable to be attached and sold in execution of the decree in question as

assets of the debtor Guruswami Nadar.

7. As regards the objection that the suit is not competent, this is a case where this Court can treat the suit as a proceeding u/s 47, Civil Procedure

Code. No question of limitation or jurisdiction is involved. As I pointed out, at the outset before the trial Court even a plea was not taken that

Section 47 is a bar to the suit as such. The suit is, therefore, treated as a proceeding u/s 47. As I agree with the conclusion of the learned

Subordinate Judge on the merits, no further enquiry is called for.

8. Before closing I feel it necessary to make certain remarks. Often I have found little thought is bestowed in the executing Court as to the nature

and character of interlocutory proceedings initiated or objections raised in execution. Orders are passed mechanically and the parties appear to

have developed a feeling that their cause may not receive in the executing Court, when serious questions of title are involved, the same care and

attention as the matter would receive at a regular trial in a suit. This results in the parties often filing suits when the matter must be considered u/s 47.

Quite readily the parties accept a situation demanding enquiry into title as warranting a regular suit and the Court gives the matter a summary

disposal. It cannot be said that the apprehension of parties is groundless or unjustified. The law, however, does not contemplate that it should be

so. The very scheme of the Code is to prevent wasteful and prolonged litigation, and Section 47 enables parties to obtain adjudication of questions relating to execution without unnecessary expense or delay which a fresh trial might entail. A determination u/s 47 is a decree under the Code and subject to appeal and second appeal as a decree. Proceedings in execution u/s 47 quite often involve a determination of Valuable rights of properties. When proceedings are against legal representatives of a deceased judgment debtor, as much care and attention must be bestowed to the proceedings as in suits. Grave consequences which may follow by absence of a proper determination in execution proceedings are quite often not perceived. In the present case, while refusing to set aside the ex parte order, the learned District Munsif remarked that the petition had been filed only to drag on the proceedings and to prevent the decree-holder from reaping the fruits of the decree. It looks as if everybody went with the impression that this is not a matter to be dealt with in the executing Court as important question of title were involved. I take this opportunity to emphasise over again the need for due care and attention by the Courts in execution proceedings. That would avoid any contribution by the executing Court to the prevalence of the rather unwelcome saying that the woes of a decree-holder in India begin after the decree.

9. The second appeal is, therefore, allowed. There will be a decree as prayed for, setting aside attachment of the suit properties, in execution of the decree in S.C. 504 of 1959 on the file of the District Munsif of Tirumangalam and S.C. No. 266 of 1956 on the file of the Sub-Court, Madurai.

Having regard to all the circumstances of the case, the parties will bear their respective costs throughout. No leave.