

(1931) 10 MAD CK 0001
In the Madras High Court

Kambhan Chenchayya

APPELLANT

Vs

Bandarupalli Bapayya and Others

RESPONDENT

Date of Decision : 27-10-1931

Acts Referred:

Citation : AIR 1932 Mad 233 : (1932) 35 LW 66

Hon'ble Judges : Jackson, J

Bench : Division Bench

Judgement

Jackson, J.—The plaintiff sues for a declaration that a mortgage deed is valid. He is transferee of the mortgagee, defendant 10.

2. The mortgagors defendants 1 to 3, were declared insolvent on a creditor's petition. The alleged act of insolvency was the fraudulent execution

of this very mortgage and it was prayed that the alienation be declared void: I.P. No. 53 of 1918, p. 2 of documents.

3. Defendant 10 got notice of this petition and remained ex parte (para. 6 of order, p. 5 of documents). The Judge in his "order" found that there

was no opposition to the petition to adjudicate the debtors insolvent, declared the alienation void and vested the assets in the Official Receiver:

para. 7. It will be noted that this "order" does not in terms adjudicate the debtor an insolvent. But on the same date an order of adjudication was

also issued: p. 3 of documents. More than that a Court is not required to do u/s 27, Act 5 of 1920 and it is difficult to say if the "order" is more

than obiter.

4. A similar order by the same Judge was under consideration in Appireddi v. Appireddi AIR 1922 Mad. 246, where it is held, following Hemraj

Champa Lal v. Ram Kishen Ram [1917] 2 Pat. L.J.101, that the Judge should not

avoid such alienations until moved by the Official Receiver u/s

53, or by an aggrieved party. "No one else can do so.

5. So much is undisputed. The present question is whether defendant 10, and through him the plaintiff, are bound by res judicata because

defendant 10 allowed the proceeding to go ex parte, and suffered this decision that the alienation was void.

6. The learned Judge in the lower appellate Court has ingeniously argued that the bankruptcy Court had inherent jurisdiction to avoid the alienation,

and the fact that it was exercised erroneously will not help the plaintiff. But to build up a constructive res judicata it must be found in the first place

that the matter was directly and substantially in issue. Can a matter be said to be thus in issue at a stage when the Court cannot go into it? The

answer is that it cannot--to hold otherwise would be to treat substantially"" as meaningless. If the Court, from an erroneous view of its powers,

proceeds to deal with something not substantially in issue, the absentee party cannot be held bound by that decision. There does not seem to be a

case exactly in point, because this sort of error by the Court itself is happily rare. An ex parte decree can only be res judicata in respect of a matter

in which relief has been claimed in the plaint. But the case has not previously arisen where the relief is claimed, but claimed prematurely in the

plaint, and the Court has nevertheless passed a decree. I think that a party is justified in holding that such a relief would never be substantially in

issue, because the Court could be trusted to know its powers and to perform its duty, and if, on the strength of that belief the party remained

absent, an erroneous exercise of the Court's power cannot constitute res judicata.

7. It may also be argued that the adjudication on the insolvency petition is entirely contained in what is called the order of adjudication and the

order of the same date is an informal superfluity which in no case can amount to a res judicata. *Sardorbhai v. Sabhapathy* [1897] 21 Bom. 205,

cited by the lower appellate Court does not clarify the matter. There the insolvency Court in the ordinary exercise of its jurisdiction had adjudicated

a debtor insolvent, and it was pointed out that its adjudication could not afterwards be treated as a nullity on the mere plea that an act of insolvency

had not been proved. The appeal is allowed with costs up to date throughout.

The original Court must proceed with plaintiff's suit. The court fees in appellate Courts may be refunded.