

(1934) 09 MAD CK 0032
In the Madras High Court

Lakshmanan Chettiar and Another		APPELLANT
	Vs	
Chidambaram Chettiar and Others		RESPONDENT

Date of Decision : 27-09-1934

Acts Referred:

Citation : AIR 1935 Mad 236

Hon'ble Judges : Curgenven, J

Bench : Division Bench

Judgement

Curgenven, J.—The appeal arises out of execution proceedings taken in a suit filed to recover some property from a number of defendants.

We are here-concerned with defendant 9. With the others he contested the suit and it was dismissed with costs. The plaintiff appealed to the High

Court, defendant 9 being impleaded as respondent 8. On 2nd May 1926, he was served with notice of the appeal but he failed to comply with the

terms of the notice by entering an appearance within the 30 days allowed. The appeal was disposed of in December 1930, and sometime in June,

1927, while it was pending, respondent died. After his death three petitions were filed by the appellant in the appeal: (1) to excuse the delay which

had occurred, (2) to set aside the abatement of the appeal, and bring on the legal representatives of respondent 8, namely the present appellant 1,

as respondents 10, and (3) to appoint his mother as his guardian, he being a minor. In disposing of these petitions, the learned Judges, Phillips and

Devadoss, JJ. passed an order in these terms:

Under Order 22, Rule 4, Civil P.C., no legal representatives need be impleaded. The petitions-are dismissed.

2. The appeal was heard in due course and the decree of the lower Court

reversed, the appellate decree directing the respondents to put the legal representatives of the plaintiff in possession. For the purpose of executing this decree petition (E.P. No. 105 of 1932) was then filed praying that the present appellants might be added as legal representatives of the deceased defendant 9, and that has been ordered by the lower Court. That order is contested on the grounds that Rule 4(4) of Order 22, Civil P.C., has no application to appeals, that the learned Judges who passed their order under this Rule has therefore no jurisdiction to exempt the appellant from the necessity to substitute the legal representatives of the deceased respondent and accordingly that the appellate judgment, having been pronounced against the dead respondent 8, is not binding on his legal representatives.

3. Rule 11, of Order 22 provides for the application of the order to appeals, so far as may be. Unless therefore there is something in the terms of

Rule 4(4) which precludes its application to appeals there can be no doubt that, equally with a number of other provisions of the Code which are in

language adapted to suits, the intention is to apply a similar rule to both forms of proceeding. It is worth notice that a provision of somewhat

analogous character, embodied in the proviso to Rule 14, Order 41, and enabling the appellate Court to dispense with the service of notice on

respondents against whom the suit has proceeded ex-parte was introduced into the Code at the same time as Rule 4(4), Order 22. Mr. T.M.

Krishnaswami Ayyar argued that it is not possible to apply this latter rule to appellate procedure. He contends that no such omission or default can

be made by a respondent in an appeal as will correspond to that of a defendant

who has been declared ex parte or who has failed to file his written statement or who, having filed it, has failed to appear and contest at the hearing

4. Such a respondent cannot be declared ex parte. He has nothing to do and cannot therefore commit default in doing anything until the actual

hearing of the appeal. Even if he has failed to enter an appearance, yet, if he appears in person or by pleader on the day of the hearing he must be

heard. This does not, we think, give quite a correct view of the position of a respondent, at least in relation to proceedings before this Court. The

procedure is specified in Order 41, (A), which modifies Order 41, Civil P.C., Rule 2 (2) of this order prescribes a period of 30 days from service

of notice for entry of appearance by the respondent and filing by him of a memorandum of Cross-objections if any. Under Rule 3 if the respondent

intends to appear and defend the appeal he shall, within the period specified, enter an appearance by filing in Court a memorandum of appearance.

If he fails to enter an appearance within the time allowed and in the manner provide he shall not be allowed to translate or print any part of the

record. Failure therefore to appear may involve the exclusion of part of the record from consideration in appeal, so that even though a respondent

who has not complied with these rules may be heard, he must do without such portions of the record as the appellant has not been interested to

print. He cannot have something done for him the time for doing which is over. It appears to us that this is just the nature of the penalty attached to

default by a defendant in a suit. If a defendant is ex parte, Order 9, Rule 7 provides that he can only be heard in answer to the suit as if he had

appeared on the day fixed for his appearance if he assigns good cause for his previous non-appearance. If he has failed to file a written statement

or, having filed it, has failed to appear and contest at the hearing, he cannot claim to go back to the stage reached before the default occurred.

5. On the other hand, it is always open to him at any time after such default to appear and contest the suit in its remaining stages. No more than in

an appeal therefore does any finality attach to a default of appearance in a suit. We think that the rule, alike for suits and appeals, is grounded not

upon some irrevocable default committed by the respondent before his death but upon the creation, by his conduct, of a reasonable expectation

that, had he survived the later stages of the suit or the hearing of the appeal, he would have remained ex parte. That expectation seems to us to be

at least as strong in the case of a respondent who has failed to put in an appearance within the time allowed as in the case of a defendant who for

instance has filed a written statement but has not appeared and contested at the hearing and has then died. The power which the rule gives to the

Court to grant exemption is of course only discretionary and probably it rarely will be exercised in the case of a single respondent. Where, as in the

present case, there are several respondents whose interests are common, and some contest and others do not enter appearance, it is fairly safe to

assume that the defence of the decree has been left in the hands of some on behalf of all. We think therefore that the learned Judges who passed

the order under reference had jurisdiction to pass it, that the appellate decree has the same force and effect as if it had been pronounced before

respondent 8 died and that the order of the lower Court bringing on his legal representatives must be confirmed.

6. We have heard some further argument upon the question whether, assuming the order to have been without jurisdiction, so that the appellate

decree would not bind respondent 8's heirs, the matter can be raised in execution. Since anything which we may now say on this point will be

merely obiter, we do not propose to discuss the question at length. We have been referred to two Privy Council cases in which it is said objection

has been allowed in execution to the validity of the decree. In *Khiarajmol v. Daim* (1905) 32 Cal 296 the question was whether the right of a

mortgagor to redeem was affected by certain sales in execution under decrees in which he as a minor was not properly represented, and it was

held that he could proceed to redeem without taking any proceedings to get the sales and decrees set aside. The principle accepted was therefore

that in a separate suit such a decree could be treated as a nullity, and nothing was said as to the power of an executing Court to go behind the

terms of the decree. In *Wajid Ali Khan v. Purana Singh* 1929 PC 58 the trial Court passed a decree for pre-emption. There was an appeal, and

while it was pending one of the respondents (plain-tiffa1) died and the legal representative was not brought on. The suit was dismissed in appeal

and the defendant obtained restitution of possession. The plaintiffs then contended that by reason of the death of one of their number the whole

appeal had abated and that the appellate decree was a nullity, so that the defendant was not entitled to possession.

7. It was held that the abatement was limited to the appeal against the deceased respondent's interest and that the appellate decree did not bind his

legal representatives, so that they were entitled to redelivery of possession. The point was not raised or decided whether the validity of such a

decree could be questioned in execution proceedings. Moreover the proceedings were by way of restitution and it is at least doubtful whether the

same principle would apply to them. So far as this Court is concerned we have been shown three decisions of single Judges, *Subramania Iyer v.*

Vythinatha Iyer 1916 Mad 656, *Arunachalam Chetty v. Abdul Suban Sahib and Govinda Nadar v. Natesa Pillai* 1932 Mad 7. In the first of these

Oldfield, J., and in the second Madhavan Nair, J., have accepted the principle that an executing Court can satisfy itself whether or not a decree is a nullity for some such reason as improper representation. Jackson, J., has come to a contrary decision in the third case and in our judgment the opinions which he expressed are supported by the greater weight of authority, especially the two Calcutta cases, Kalipada Sarkar v. Hari Mohan Dalal 1917 Cal 844 and Gorachand Haldar v. Pafulla Kumar 1925 Cal 907, and appear to us in other respects to be more acceptable. We should therefore hold, if it were necessary, that the executing Court was not entitled to inquire into the validity of the appellate decree passed against the deceased respondent 8. We dismiss the appeal with costs.