

(1934) 09 MAD CK 0036
In the Madras High Court

Lakshmanan Chettiar represented by mother and guardian
Lakshmi Achi and Another

APPELLANT

Vs

Chidambaram Chettiar by his mother and next friend
Unnamalai Achi and Others

RESPONDENT

Date of Decision : 27-09-1934

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4

Citation : (1935) ILR (Mad) 752 : (1935) 41 LW 249 : (1935) 68 MLJ 318

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 ninth defendant. With the others he contested the suit and it was dismissed with costs. The plaintiff appealed to the

High Court, ninth defendant being impleaded as eighth respondent. 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, the eighth 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 representative of the eighth

respondent, namely the present first appellant, as tenth respondent 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 Procedure Code, no legal representative 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

representative of the plaintiff in possession. For the purpose of executing this decree a petition (E.P. No. 105 of 1932) was then filed praying that

the present appellants might be added as legal representatives of the deceased ninth defendant, and that has been ordered by the lower Court.

3. That order is contested on the grounds that Rule 4(4) of Order 22, Civil Procedure Code, has no application to appeals, that the learned Judges

who passed their order under this rule had therefore no jurisdiction to exempt the appellant from the necessity to substitute the legal representatives

of the deceased respondent find accordingly that the appellate judgment, having been pronounced against the dead eighth respondent, is not

binding on his legal representatives.

4. 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 adopted 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 provisos to Rule 14, of Order 41, and enabling the appellate Court to dispense with 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) of Order 22. Mr. T.M.

Krishnaswami Aiyar 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, Q~ having filed it, has failed to appear and contest at the hearing." 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.

5. 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 of the Civil Procedure Code. 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 R. 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 provided 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. 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 the eighth respondent 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 the eighth respondent'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 *Khierajmal v. Daim* (1904) L.R. 32 IndAp 23 : ILR 32 : ILR 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 (1929) ILR 51 267 (Privy Council) the trial Court passed a decree for pre-emption.

There was an appeal, and while it was pending one of the respondents (plaintiffs) 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. 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 re-delivery 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 Aiyar v. Vaithi-

natha Aiyar ILR (1913) 38 Mad. 682, Arunachalam Chetty v. Abdul Subhan Sahib (1925) 50 M.L.J. 232 and Govindan Nadar Vs. Natesa Pillai

(Lunatic) represented by his wife and guardian Annathachi, . 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. Hart Mohan Dalal ILR (1916) 44 Cal. 627 and Gora Chand Haldar v.

Prafulla Kumar Roy ILR (1925) 53 Cal. 166 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 enquire into the validity of the appellate decree passed against the deceased 8th respondent.

7. We dismiss the appeal with costs.