
(1988) 07 MAD CK 0005
In the Madras High Court

Mangalammal and Another

APPELLANT

Vs

T. Lalitha and Others

RESPONDENT

Date of Decision : 13-07-1988

Acts Referred:

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

Citation : (1989) 2 MLJ 454

Hon'ble Judges : Srinivasan, J

Bench : Division Bench

Judgement

Srinivasan, J.—These two revisions petitions are directed against orders dismissing cheque applications filed by the petitioners in order to

withdraw the amounts in deposit in Court brought to the executing Court pursuant to orders of attachment made earlier. The respondents in both

the revisions are the same while the petitioners are different.

2. The petitioner in C.R.P.No.4199 of 1987 filed a suit O.S.No.60 of 1983 on the file of the Sub-Court, Tiuvannamalai and obtained a decree

against the respondents. The decree directed the respondents to pay the amount from out of the assets of the deceased A.V.K.V.S.Thirugnanam,

the husband of the first respondent and father of other respondents. In execution of the decree the petitioner claimed a sum of Rs. 33,573-75 as

due on 27-12-1987 and prayed for attachment of the amount in deposit in O.S.No.671 of 1983 on the file of the District Munsif, Thiruvannamalai.

It Was expressly stated in the execution petition that the amount in the Court of the District Munsif belonged to the deceased

A.V.K.V.S.Thirugnanam, and was pay able to the respondents, and therefore, liable to attachment. The executing Court ordered notice and

attachment by prohibitory order on 27.2.1987 and posted the matter to 17-3-1987. On 17-3-1987 the executing Court ordered fresh notice to the respondents through Court and adjourned the matter to 20-4-1987. On 20-4-1987 the executing Court recorded that the first respondent was served and notice to the second respondent was affixed as he was absent. The executing Court proceeded to set the respondents ex parte and made the attachment absolute.

3. The petitioner in C.R.P.No.4767 of 1987 obtained a decree against the respondents in O.S.No.114 of 1981 on the file of Sub-Court, Thiruvannamalai. It is seen that A.V.K.V.S. Thirugnanam was the first defendant in that suit and the respondents herein were defendants 2 to 6.

After giving credit to the amounts received from the respondents, the petitioner filed execution proceedings for recovery of Rs. 44,884-75 and

prayed for attachment of the amount in deposit in O.S.No.671 of 1983 on the file of the District Munsif, Thiruvannamalai. In this execution petition

also it was expressly stated that the amount in deposit in the District munsifs Court belonged to the first defendant in the suit viz., the deceased

Thirugnanam and was payable to the respondents herein and was, therefore, liable to attachment. The said execution petition was filed on 1-2-

1987 and the Court ordered notice and attachment by prohibitory order on 12-2-1987. The notice returned with an endorsement of refusal on the

part of the first respondent and the Court ordered fresh notice on 4-3-1987. The first respondent was served and on 6-4-1987 the executing

Court set the respondents ex parte and made the attachment absolute.

4. Pursuant to the orders of attachment, a sum of Rs. 34,000 was transferred to the credit of O.S.No.69 of 1983, Sub-Court, Thiruvannamalai

and a sum of Rs. 45,000 was transferred to the credit of O.S.No.114 of 1981, Sub Court, Thiruvannamalai. Thereafter, the petitioners filed

applications for issue of cheques for the respective amounts. At that stage, the first respondent filed counter statements in both the cases

contending that the amount in deposit in O.S.No.671 of 1983 on the file of District Munsif, Thiruvannamalai did not belong to the respondents and

that the deposit was made in that Court on behalf of Sri Manonmani Amman Bus Service, which was a partnership firm. It was therefore

contended that the amount was not liable to attachment in execution of the

decrees obtained by the petitioners. A reference was also made in the counter statements to A.S.No.34 of 1987 on the file of Sub-Court, Thiruvannamalai filed by the defendant in O.S.No.671 of 1983 against the decree passed in favour of the first respondent herein.

5. The learned Subordinate Judge, Thiruvanna malai, after hearing arguments on the cheque applications, looked into the records in A.S.No.34 of

1987 and held that the amount in deposit in O.S.No.671 of 1983 did not belong to the first respondent and was, therefore, not liable to at

tachment. Consequently, he dismissed the applications for issue of cheques and also directed the amounts to be sent back to the Court of District

Munsif, Thiruvannamalai. It is against the said orders, the present revisions have been filed by the aggrieved decree-holders.

6. The common argument advanced by learned Counsel for the petitioners is that the respondents are precluded by the principle of constructive res

judicata from raising the question of attach ability of the amount in deposit in O.S.No.671 of 1983 at the stage of cheque applications as they had

failed to contest the application for attachment and allowed the orders of attachment to become final. In answer to the said contention it was urged

on behalf of the respondents that the principle of constructive res judicata would not apply to the facts of the case as the executing Court had not

declared expressly that the service of notice in the execution proceedings to the respondents was sufficient and that the respondents were, there

fore, entitled to question the right of the decree-holders to attach the amount in deposit in the District Munsifs Court. It was further argued that the

learned Subordinate Judge had found from the records in A.S.No.34 of 1987, which was on his file, that the amount did not belong to the first

respondent exclusively and hence the orders passed by him rejecting the applications filed by the petitioners were just and proper, and this Court

should not interfere with the same in exercising its revisional jurisdiction. Learned Counsel for the respondents cited number of decisions in support

of the contentions urged by him. I will refer to the them in the appropriate place.

7. Even before the CPC was amended in 1976, it was held by the Supreme Court as well as this Court that the principle of constructive res

judicata would apply to execu tion proceedings. It is not necessary for me to refer to the various decisions on the subject ex cepting that of a

Division Bench of this Court in C. Abdul Afeez Sahib Vs. Official Receiver, Sub Court, . It was held in that case that when a judgment-debtor to

whom notice is ordered in the execution proceedings fails to contest the application, and an order ex parte is made for sale, the effect of the order

for sale is that the Court must be deemed to have decided (1) that the petitioner has a right to execute, (2) that the judgment-debtor is liable to

satisfy the decree, (3) that the decree is executable, and (4) that it is not barred by limitation. It was held further that the order in an execution

petition in favour of the decree holder bars investigation of any plea of limitation raised at any subsequent stage.

8. The amendment of the Code in 1976 was only a statutory approval of the judicial decisions rendered earlier. Explanation VII to Section 11 of

the CPC introduced by the Amendment Act 104 of 1976 expressly made the provisions of the section applicable to a proceeding in execution of a

decree. Thus, Section 11 of the CPC can be invoked in execution proceedings on its own terms.

9. The present case stands on a much stronger ground and it does not depend merely on the doctrine of res judicata. It rests on a higher pedestal

than that. After orders of attachment were made by the executing Court, there was no attempt by the respondents to have it set aside by moving

the same Court or by approaching a higher forum by way of revision or appeal. Thus, the orders of attachment became final and the amounts,

attached were also transferred to the credit of the suits, the decree passed in which were being executed. The applications for payment of amounts

made by the decree-holders were only consequential proceedings depending on the orders of attachment which had already become final. It is not

open to a party to contest the correctness of the orders passed by the court in the proceedings which flow consequent to such orders. It will be

like questioning the correctness of a preliminary decree in a proceeding for the passing of final decree. It is needless to refer to Section 97, Code

of Civil Procedure, which preclude a party from disputing the correctness of a preliminary decree in an appeal preferred from the final decree,

when he had failed to prefer an appeal as against the preliminary decree. In this case, the learned Sub ordinate Judge by rejecting the cheque

applications and directing the return of the amounts to the District Munsifs Court, has in effect set aside the order of attachments which had already

be come final without even an application for review. There is no doubt whatever that the learned Subordinate Judge had no jurisdiction to pass

such an order. On that ground, these two revision petitions deserve to be allowed.

10. However, learned Counsel for the petitioners having invoked the aid of "res judicata", learned Counsel for the respondents contended that the

doctrine would not apply to the present case. He placed reliance on the judgments of this Court in *Alagappa Chetti v. Ramanathan Chettiar*, 64

M.L.J.629 and in *Ramandhan Chettiar v. Veerappa Chettiar and Ors.* A.I.R.1937 Mad.64. Both the judgments were rendered by Division

Benches. It was held in both the cases that when a notice in an execution application was served only by affixture and if the executing Court had

not declared expressly that service was sufficient, it would be a case of failure to comply with the provisions of Order 5, Rule 19, CPC and

consequently, the principle of constructive res judicata would not apply. Both the judgments relied on the fact that Section 11, Code of Civil

Procedure, was not applicable as such to execution proceedings. The ratio in those cases will not apply to the present case as the first respondent

herein had been personally served through Court and the executing Court had made a record of the same. The correctness of the endorsements

made by the executing Court on the execution proceedings as regards service of notice was not challenged before me. In fact, as pointed out by

learned Counsel for the petitioners, the alleged insufficiency of service in the execution proceedings and the alleged non-compliance with the

provisions of Order 5, Rule 19, CPC by the executing Court were not mentioned in the counter statements filed by the respondents in the Court

below. There was not even a whisper about the same in the counter statements. For the first time, arguments were advanced in this Court by

learned Counsel for the respondents on these aspects of the matter. As the first respondent has been served personally through Court, the two

decisions relied on by learned Counsel for the respondents referred to above will not apply to the present case.

11. Learned Counsel for the respondents drew my attention to the decision of the Andhra Pradesh High Court in *Chagnati Raghava Reddi Vs.*

Kondapaneni Krishnayya, wherein it was observed that the principle of res judicata would not apply if the judgment-debtor had no notice with

regard to the point to be decided against him and notice under Order 21, Rule 66, CPC would not put the judgment-debtor on notice that the

question of sale ability of the property would be decided by the Court. That decision cannot in any way help the respondents in the present case.

Once the notice in the application for attachment is served on the judgment-debtor, he should be aware that the point to be decided by the

executing Court is whether the property is liable to be attached or not and that he is duty bound to contest the application if the property is not

liable to attachment. Having failed to raise that question by appearing before Court after receipt of notice, it is not open to the respondents to raise

the dispute at a later stage.

12. Another decision of the Andhra Pradesh High Court in Nadikatla Anjanna and Others Vs. Bandi Ramakrishna and Others, was next cited by

learned Counsel for the respondents. It was held in that case that an attachment could be made of a debt due to a judgment-debtor alone and

where the debt is due to the judgment-debtor along with someone else, it could not be attached. That decision will not apply to the facts of this

case as the respondents are precluded from raising the question of attach-ability.

13. Considerable reliance is placed upon the decision of the Supreme Court in Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B.

Jeejeebhoy, , learned Counsel read the following passage in that Judgment:

But the doctrine of resjudicata belongs to the domain of procedure, it cannot be exalted to the status of a legislative direction between the parties

so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a Court finally between them, even though no

question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. A decision

of a competent Court on a matter in issue may be res judicata in another proceeding between the same parties; the "matter in issue" may be an

issue of fact, an issue of law, or one of mixed law and fact. An issue of fact or an issue of mixed law and fact decided by a competent Court is

finally determined between the parties and cannot be reopened between them in another proceeding. The previous decision on a matter in issue

alone is res judicata the reasons for the decision are not res judicata. A matter in issue between the parties is the right claimed by one party and

denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure

question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is

res judicata, it is meant (sic) the right claimed has been adjudicated upon and cannot again be placed in contest between the " same parties. A

previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the

transaction which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision the decision on law

cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be as res judicata in a subsequent

proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when

the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates

to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law.

14. Learned Counsel submitted that it is clear from the above passage that an illegal decision will not be res judicata in a subsequent proceeding. In

my view, the passage extracted above does not help the respondents in any way in this case. The Supreme Court has clearly laid down that the

question relating to jurisdiction of a Court cannot be deemed to have been finally decided by an erroneous decision of that Court. But, when the

question turns on an issue of fact and if that issue is decided by the Court, that will be res judicata in a subsequent proceeding. A bare perusal of

the above passage clearly shows that the contention urged by learned Counsel for the respondents cannot be accepted. In the present case, when

the orders of attachment were made by the executing Court, they were based on the fact that the amounts belonged to the deceased Thirugnanam

and payable to the respondents. The decision of the Court on the issue of fact is certainly res judicata at a subsequent stage. When the

respondents are prevented by the principle of res judicata from raising that question of fact, it is not open to them to contest the legality of the

orders of attachment.

15. Learned Counsel placed reliance on a later decision of the Supreme Court in Raghunath Pradhani Vs. Damodra Mahapatra and Others, . In

that case, a decree-holder himself had apprised the Court that the judgment-debtor belonged to Schedule Tribe, but yet the property of the

judgment-debtor was attached by order of Court. When the Court auction sale was held, the judgment-debtor attacked its validity on the ground

that he belonged to Scheduled Tribe and that the attachment was itself invalid, The Court held that his failure to raise that plea when the order of

attachment was made did not debar him from raising the objection at the time of sale on principles of actual or constructive res judicata. That was

because the decree-holder himself admitted the fact that the Judgment-debtor belonged to Scheduled Tribe even at the stage of attachment. In

spite of that admitted fact, the Court made an order of attachment. Therefore, the Supreme Court held that the order of attachment was illegal on

the admitted facts and the judgment-debtor was not precluded by the principle of res judicata. The facts of that case have no resemblance

whatever to the facts of the present case.

16. The last decision relied on by learned Counsel for the respondents is that of Mohan, J., in Dr.S.Mahadevan v. Commissioner and Secretary to

Government, Agricultural Department (1986) 2 M.L.J.209. The learned Judge, has observed in that case that on general principles where a glaring

instance of injustice is brought to the notice of the Court, the rights of persons cannot be defeated on such rules of constructive res judicata, which

are intended to attain finality of litigation. On the facts of that case, it was admitted that the petitioner therein was a Ph.D. Degree-holder on the

relevant date and, therefore, the rejection of his claim was totally unjust. Under those circumstances, it was held that the principle of res judicata

could not be applied. That decision cannot find the respondents in this case as the facts are entirely different.

17. It has also been urged that the learned Subordinate Judge himself called for the records in A.S.No.34 of 1987 on his file and after perusing the

same proceeded to pass the orders, which are challenged in these revision petitions. The learned Judge did not choose to mark the records in that

appeal as Exhibits in this case. It does not appear from the available records before me that the petitioners in the revision petitions were given any

opportunity to make their submissions with reference to the records in A.S.No.34 of 1987 which the learned Subordinate Judge has used against

them. The learned Judge ought to have granted an opportunity to the petitioners to make use of those records.

18. It is contended by learned Counsel for the respondents that they were prevented from withdrawing the amount in O.S.No.671 of 1983 even

though the suit ended in favour of the first respondent. It is stated that when they applied for payment out, the appellant in A.S.No.34 of 1987

opposed the application and got it dismissed on the ground that the appeal was pending. It is, therefore, argued that the amount in deposit in

O.S.No.671 of 1983 could not be treated as one payable to the respondents. There is no substance in this contention. Once the suit O.S.No.671

of 1983 is dismissed, the amount is undoubtedly payable to the respondents. The mere fact that an appeal has been filed against the decree does

not alter the position. Admittedly, there has been no order of stay passed by the appellate Court. In this circumstances, it cannot be contended by

the respondents that the amount in O.S.No.671 of 1983 was not payable to them.

19. In the result, all the contentions urged by learned Counsel for the respondents are rejected and the case of the petitioners is accepted. The civil

revision petitions are allowed and the applications for payment made by them in the Court below are ordered as prayed for. However, there will

be no order as to costs.