

(1942) 04 MAD CK 0023
In the Madras High Court

Matte Atchutarama Rao

APPELLANT

Vs

Solasa Bapanayya, Trustee Vijjapu Kamakshamma Charities
and Others

RESPONDENT

Date of Decision : 02-04-1942

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 73, 92

Citation : AIR 1942 Mad 748 : (1942) 55 LW 627

Hon'ble Judges : Abdur Rahaman, J

Bench : Division Bench

Judgement

Abdur Rahaman, J.—This appeal arises out of a suit u/s 73 (2), Civil P.C., for refund of certain assets paid to defendant 1 on his application

for rateable distribution. The facts which led to the present suit are that one Vijjappu Kamakshamma executed a will on 16th September 1918

bequeathing her stridhanam properties of the value of Rs. 20,000 for the establishment of a public watershed and a public choultry for feeding

people and appointed her brother Nalam Subramanyam as an executor and a trustee for carrying out her directions contained in the will. On the

allegation that Nalam Subramaniam had failed to carry out the directions in his sister's will after her death, a suit O.S. No. 8 of 1932 u/s 92, Civil

P.C., was instituted in the Court of the District Judge of East Godavari at Rajahmundry for Nalam Subramaniam's removal from the trusteeship

and for a settlement of a scheme. Nalam Subramaniam died before filing a written statement and his son and widow were brought on record as his

legal representatives. A decree (Ex. B) was eventually passed against these representatives on 11th February under which a scheme was framed

by the Court and the present defendant 1 (who had applied for and succeeded in

getting rateable distribution) was appointed as a sole trustee for

the management of the trust. The following provisions of the decree are important:

(1) that the suit trust be managed by a single trustee as per terms of the scheme hereto appended;

(3) that the trust property do consist of Rupees 29,886-6-9 as on this date and that it do carry further interest at six per cent, per annum.

(4) that the trustee do realise the trust properties and administer the same as per the scheme hereto appended;

(5) that defendants 2 and 3 do pay the plaintiffs Rs. 604 as and for their costs in the suit and do bear their costs in the suit being Rs. 201; and

(6) that defendants 2 and 3 do deliver the utensils and articles as per list below to the trustee within two months from, this date and in default do

pay Rs. 157-14-3 their value to the trustee.

The only clause which is of any consequence in the scheme framed by the Court and attached to the decree reads as follows:

4. All the trust properties either cash or moveables shall vest in the trustee for the time being and he shall take possession of the same through

Court if necessary in execution of this decree and manage the same on behalf of the public.

2. Not being satisfied with the decree, Ex. B, that was passed on 11th February 1933, the trustee appointed under that decree brought a suit O.S.

No. 57 of 1934 in the same Court for a declaration that he had a right to recover the money decreed in O.S. No. 8 of 1932 from out of the assets

of the late Nalam Subranianiam in the hands of defendant 1 and that the trust had a charge over the properties of the deceased Subramaniam

generally and over the properties A to E mentioned in the schedule attached to the plaint in particular. The important clauses of the decree (Ex. A)

passed in that suit on 15th September 1936 are:

(1) That the plaintiff be and hereby is entitled to recover from the assets of the late Nalam Subramaniam in the hands of defendant 1 the money

decreed in O.S. No. 8 of 1932 on the file of this Court.

(2) That a charge for the recovery of the money decreed in Clause (1) supra be and the same hereby is, created over all the properties proved to

have been acquired by the late Nalam Subramaniam after 11th June 1924.

(3) That the question which of the properties have been acquired by the late Nalam Subramaniam after 11th June 1924 be determined by the executing Court in execution proceedings.

3. The other clauses in the decree only provided for costs and need not be reproduced. In the meantime, three decrees were obtained against the estate of Nalam Subramaniam. The appellant obtained a a decree for Rs. 70,000 and odd in O.S. No. 79 of 1931. A decree in O.S. No. 19 of

1933 was obtained by defendant 3 and defendants 7 to 10 had secured a decree in O.S. No. 23 of 1933. The decrees in these two suits were

being executed in the Court of the District Judge of East Godavari and Subramaniam's assets were expected to be received by the executing

Court in these executions. This led a number of creditors including defendant 1 and the appellant to make applications for rateable distribution.

They were allowed although the executing Court was of opinion that in view of the decision in Bava C. Vaithilinga Mudaliar v. Sri

Thyagarajaswami Devasthanam, Tiruvarur AIR 1936 Mad. 581 the decree passed in O.S. No. 8 of 1932 on the basis of which defendant 1 had

made his application was inexecutable. But holding that it was riot possible for the Court to go behind the decree and in view of an order passed

by his predenessor which had held the decree to be executable, the learned District Judge allowed defendant 1's application for the grant of

rateable distribution. The plaintiff, i. e., the decree-holder in O.S. No. 79 of 1981, not being satisfied with the order, brought the suit out of which

the present appeal arises, for a sum of Rs. 2886-9-10 to which he alleged he was entitled in excess of what he had already got by way of rateable

distribution. To this suit, the other decree-holders who had received their shares in the rateable distribution (defendants 3 to 16) were also

rapleaded. It was contended on behalf of the plaintiff that defendant 1 was not entitled to rateable distribution, (a) as the decree in O.S. No. 8 of

1932 was not a decree for money and was not executable; and (b) that even if that decree could be regarded to be one for the payment of money,

it ceased to bear that character after defendant 1 had succeeded in getting a charge declared in O.S. No. 57 of 1934. These allegations were

controverted on behalf of defendant 1. The lower Courts came to the decision that the decree in O.S. No. 8 of 1932 was a decree for the

payment of money and defendant 1 was entitled to rateable distribution. The suit having been thus dismissed by both the Courts, the plaintiff has

preferred this second appeal.

4. From what has been stated, it would be obvious that two main questions have to be determined in this appeal. They are, (a) whether the decree

passed in O.S. No. 8 of 1932 was one for payment of money and executable and (b) if so, what was the effect of the decree passed in O.S. No.

57 of 1934. it has been held in a number of decisions, Ranganatha Thathachariar v. Krishanaswami Thathachariar AIR 1924 Mad. 369 Abdul

Hakim Baig and Others Vs. Mahomed Burramudin and Others, Vedantam Ramacharyulu v. Kasturi Narasimha Suryanarayana (1933) 1933

M.W.N. 183, Bava C. Vaithilinga Mudaliar v. Sri Thyagarajaswami Devasthanam, Tiruvarur AIR 1936 Mad. 581 Trustee of Temple of Sree

Venugopalaswamivaru Vs. Vedantam Seetharamanujacharyulu and Others, Ramanathan Chettiar v. The Madura Sri Meenakshi Sundareswar

Devasthanam AIR 1938 Mad. 256 most of which Venkatasubba Rao J. was a party, that the provisions of a decree in a scheme suit would be

inexecutable if they formed a part and parcel of the permanent scheme of administration and were not ""intended to be given effect to independent

of the constitution framed by and embodied in the decree"" even if they happened to be directory in their nature. At the same time it was pointed out

that they would be executable even if they happened ""to stray into the wording of the scheme if they were intended to be immediately executable

for the purpose of introducing the scheme or otherwise."" The distinction has been very clearly brought out in Bava C. Vaithilinga Mudaliar v. Sri

Thyagarajaswami Devasthanam, Tiruvarur AIR 1936 Mad. 581 where Venkatasubba Rao J. observed as follows:

The true distinction is, not whether a provision in a scheme decree is directory or declaratory, but whether the provision sought to be executed, is

or is not in what is really the scheme part of the decree.

5. I have therefore to see whether the provision in the decree which has been held by the lower Courts to be executable does or does not form

the scheme part of the decree."" I cannot get rid of the decisions which have been cited before me in the way in which the learned District Judge

seems to have got over the decision in Bava C. Vaithilinga Mudaliar v. Sri

Thyagarajaswami Devasthanam, Tiruvarur AIR 1936 Mad. 581 in

execution proceedings. The present plaintiff was no party to the order passed by his predecessor and there was no question of the Court being

called upon to go "behind a specific recital in the decree" when the contention advanced before him, as admitted by the learned District Judge in his

order of 26th January 1937, was that the recital embodied in the decree was not enough to make it executable. The very first thing that strikes the

eye in reading Ex. B is that although there is a definite direction in clause 4, "that the trustee do realize the trust properties" there is nothing in that

provision which entitles the trustee to realize the properties from the defendants. Clause 4 of the decree may be, in that respect, compared with

clauses 5 and 6 where defendants 2 and 3 were ordered to pay the coats or to deliver the utensils to the plaintiffs or to the trustee. As observed by

Venkatasubba Rao J. in Ranganatha Thathachariar v. Krishanaswami Thathachariar AIR 1924 Mad. 369 :

In a suit for money the decree directs payment of it by the defendant to the plaintiff.

6. But there is nothing in this decree which empowers the decree-holder to realize the money from Nalam Subramaniam's heirs. The omission

appears to have been deliberate and not accidental. Nalam Subramaniam died during the pendency of that suit and even if defendants 2 and 3 (his

minor son and widow) were added as legal representatives of the deceased trustee, they could not be held to be trustees themselves and were

really strangers to the trust. One must not, in considering these cases, fail to notice the distinction (which Odgers J. failed to draw in Balakrishna

Chettiar v. Krishnamurthi Iyerv AIR 1927 Mad. 416 between a trustee who was ordered to render an account in the Allahabad case and any

other defendant who was not a trustee) whether the direction in the decree was being given against a trustee or against a stranger to the trust, who

had to be impleaded because his presence was necessary for a final adjudication of the question relating to the existence of the trust or to the

nature of the property. Learned counsel for the respondents complained to me that the contention as to the omission of any reference to the

defendants from clause 4 of the decree was a new one and should not be allowed to be raised at this stage. I do not agree as the point that the

decree was not for the payment of money and was inexecutable has been specifically raised throughout. The pleadings could not have been

argumentative and it was not necessary for the plaintiff to state the grounds or reasons in support of that contention in his plaint. When I expressed

my opinion on that objection, he suggested that I might look through the judgment on which the decree (Ex. B) was based and requested me not to

pronounce my judgment until he had been able to get a copy of the same from his clients. As no objection was raised to this course by the other

side, I agreed to do so. A copy of the judgment was produced in Court on Friday last and I have looked into it. But on going through the same, I

do not find that the judgment in any way helps the respondents. The portion of the judgment on which clause 4 of the decree is based is identical in

terms with what is found in the decree. No decree was passed against defendant 2 and 3 in spite of the fact that they were found to be in

possession of the assets and accounts belonging to Subramaniam.

7. I have thus to see whether in view of the legal position that has been stated in the various orders to which reference has already been made, this

direction in regard to the realisation of the trust properties was one forming part of the scheme of management or was independent of the same.

That it does form part of the actual scheme (vide para. 4 of the same) admits of no doubt. But it may be that that direction has, in the words of

Reilly J. erroneously strayed into the scheme and this is what is being contended by Mr. Ramchandra Rao. He would want me to take out the

words "he shall take possession of the same through Court if necessary in execution of this decree" from para. 4 of the scheme and attach them to

clause 4 of the decree. This cannot be done as in my opinion the realisation of the trust properties on which the whole scheme depended was an

essential part of the same and could not be taken out of it. The words in clause 4 of the decree (Ex. B) are words vesting the property of the trust

in the trustee appointed under clause 2 of the decree and cannot be construed so as to be directory. The vesting of the trust property in the trustee

cannot but be regarded to form "a part and parcel of the permanent scheme of administration" and cannot be found to have strayed into the

wordings of the scheme erroneously. It is only in pursuance of the scheme and in accordance with the vesting order passed by the Court and

embodied in the decree that the trustee can be said to have been entitled to recover it for and with the object of carrying out the object of the trust.

To say that the realisation of the trust property, on which the foundation of the scheme rests was outside its pale and could not be said to relate to

the permanent arrangements or permanent scheme of administration as remarked by the learned District Judge is incorrect in my opinion.

Moreover, the decree was not really for the payment of money by the defendants. I must therefore hold that the decree Ex. B was not for the

payment of money and was not executable. The application therefore for rateable distribution u/s 73(2) was not competent.

8. As to the second question. Defendant 1 was not content with the decree passed by the District Judge in the scheme suit. It was in all probability

realised that the decree was not passed against the defendants and could not therefore be executed against them, that is how clause 1 in the

decree, Ex. A, can be explained. If the decree amount was realisable from the assets of the late Nalam Subramaniam in the hands of defendant 1,

the first provision in the decree, Ex. A, would have been useless. It was also realised that in view of Nalam Subramaniam having died with a large

number of debts, the trust may not be able to satisfy itself, at any rate fully, from out of his property if it did not get a charge declared in its favour.

That is why a separate suit was brought for that purpose. The second provision in the decree creates ""a charge for the recovery of the money

decreed in clause 1 supra"" ""over all the properties proved to have been acquired by the late Nalam Subramaniam after 11th June 1924."" But, in

view of my decision on the first question that the decree in O.S. No. 8 of 1932 was not for money and was inexecutable, it is unnecessary for me

to decide as to the effect of the decree in O.S. No. 57 of 1934. That question would have arisen for consideration if the first contention advanced

on behalf of the plaintiff would have been decided against him. For the above reasons, the appeal must be accepted, the order of dismissal of the

suit by both the Courts set aside and a decree for Rs. 2886-9-10 and interest at 6 per cent, per annum from the date of the suit upto the date of its

realisation passed in favour of the plaintiff against defendant 1. The plaintiff will have his costs throughout from out of the estate vesting in defendant

1.

9. A verbal application was made at the hearing on behalf of the other creditors who were impleaded in this case as parties and who did not choose to bring a suit u/s 73, Civil P.C., praying for a decree to be passed in their favour also if I came to the conclusion that the judgments of the lower Courts were incorrect and could not be sustained. Reference was made in this connexion to the very wide powers conferred on a Court of appeal under Order 41, Rule 33, Civil P.C. But they cannot possibly help the other defendants in this case. If they were dissatisfied with the decision of the executing Court passed in January 1937, they should have instituted a suit against defendant 1 within the period of limitation prescribed for such suits. They failed so to do. It is impossible to grant a relief to them in this case as it would affect a vested right which has come into existence by virtue of the law of limitation. They should have brought suits themselves if they felt aggrieved by the order of the executing Court.

I am dealing in this case with a suit for a specific sum of money brought by a person who had felt aggrieved by that order. And in dealing with an appeal from a decree passed in that suit, it is impossible for me to grant decrees in favour of all the defendants who were hit by the order of the execution Court simply because they were parties to this action and in supporting the plaintiff's claim had asked for decrees for their rateable shares passed in their favour. No court-fee was paid by them in respect of their demands and no appeal or even cross-objections were preferred or filed by them in the lower appellate Court when the plaintiff's suit was dismissed. The fact is that these defendants were merely formal parties to the present action and have continuously regarded themselves to be so. I cannot therefore accede to their prayer. Leave refused.