
(1937) 02 MAD CK 0036
In the Madras High Court

N. Adinarayana Chetty and Another

APPELLANT

Vs

A. Chengiah Chetty and Others

RESPONDENT

Date of Decision : 05-02-1937

Acts Referred:

Citation : AIR 1937 Mad 918 : 173 Ind. Cas. 659 : (1937) 46 LW 544

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—The question raised in this civil revision petition is whether it is open to a party who has been impleaded as the legal representative of the deceased mortgagor defendant to resist the passing of a final decree on the ground that the mortgaged property being an Acharyapurusha service inam is inalienable and the sale of such property would be illegal on grounds of public policy. The lower Court took the view that it can and raised an issue for determination as to whether the property mortgaged is Acharyapurusha service inam and adjourned the matter for the taking of necessary evidence. Mr. Sampath Aiyangar for the mortgagee petitioner contends that the lower Court had no jurisdiction to go into the said question. He urged two points in support of his contention: (i) The lower Court is bound to pass a final decree in accordance with Order 34, Rule 5, Civil P.C., if it is found that payment as directed was not made; and (ii) assuming it can go behind the preliminary decree, it has no jurisdiction to take evidence to find out the nature of the property.

2. Reliance is placed on the recent decision of Burn and Lakshmana Rao, JJ. in Annamalai Chettiar v. Srirangachariar AIR 1937 Mad 134, which reversed the decision of Pandrang Row, J. in T.T.K.K. Kumare Appan Srirangachariar Vs. T.V.A.K.T. Annamalai Chettiar, . The argument of Mr. Sampath Ayyangar can be outlined thus: An executing Court has no jurisdiction to go behind the decree and must execute it as it stands; assuming it can, in cases where public policy is involved, it must ex facie appear from the decree or there must be an admission by the parties that the property is inalienable. This principle is applicable with

greater force to mortgage decrees as the Court has no option but to pass a final decree in accordance with the directions of the preliminary decree which settles finally the rights of parties. It is no doubt a well established principle of law that a Court executing the decree cannot go behind it, but the Courts are not agreed as to the exact limits of this rule. The above rule was given effect to in a Full Bench decision of this Court reported in *Zamindar of Ettiyapuram v. Chidambaram Chetty* AIR 1920 Mad 1019, even in cases of want of territorial jurisdiction. Wallis, C.J. explained the basis of the decision at pages 686 and 687 thus:

The ordinary way of questioning a decree passed without jurisdiction is an appeal or in revision, and if this is forbidden, a Court of first instance cannot in execution do that which the Appellate or Revisional Court is precluded from doing . . . An objection to the jurisdiction is a ground for setting aside the decree and is not one of those questions relating to the "execution, discharge or satisfaction of the decree " which are required by Section 47 to be dealt with in execution.

3. The Full Bench decision purports to follow the ruling of the Calcutta High Court in *Kalipada Sirkar v. Hari Mohan Dalai* AIR 1917 Cal 844, but the Calcutta High Court has since relaxed the rule. In *Gora Chand Haldar and Another Vs. Prafulla Kumar Roy and Others*, the question arose in execution with reference to some of the mortgaged properties being outside the territorial jurisdiction of the Court which passed the decree. There was a reference to the Full Bench in the following terms:

Where a decree having been passed by a Court having no jurisdiction to pass it is void and a nullity, is the executing Court competent to question its validity and refuse to execute it?

4. The answer to the reference was in these terms:

Where the decree presented for execution was made by a Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction.

5. This view has been since followed in the Calcutta High Court. In *Rabindra Nath Chakravarthi Vs. Jnanendra, Mohan Bhaduri and Others*, a decree was passed on an award made under the Indian Arbitration Act and it was sought to be executed. Objection was taken that no such decree could be passed and therefore it was a nullity. It was held that the executing Court was competent to treat the decree as a nullity. This was confirmed by the Privy Council in AIR 1933 61 (Privy Council), where their Lordships of the Judicial Committee make the following observations at page 674:

The Act (the Indian Arbitration Act) does not contain any provision for making a decree on an award such as is contained in Schedule 2, Para. 21, Civil P.C. Such

a decree, if made, is one without jurisdiction and therefore a nullity. Their Lordships agree with the view taken by the Courts in India that the decree of 14th February 1919 was passed without jurisdiction, and was therefore incapable of execution as such.

6. This is a definite pronouncement by the Privy Council that if the decree is a nullity it is competent to the executing Court to entertain the objection relating thereto and refuse to execute it. In view of this pronouncement, some of the decisions of our High Court which have taken a contrary view in regard to the objections based on the score of nullity will require re-consideration and with due respect I dissent from the observations of Venkatasubba Rao, J., as to the scope of the Privy Council decision in AIR 1933 61 (Privy Council) , in Krishnamurthi v. Imperial Bank of India AIR 1936 Mad 618 at pp. 653 and 654. There is another exception which the Courts have recognized to the application of the general rule as to jurisdiction of the executing Court to go behind the decree. It has been held where alienation of certain property is prohibited on grounds of public policy, either under the general law or by statute, the executing Court can refuse to execute a decree which directs such a sale. For a case under the general law, reference may be made to Lakshmanaswami Naidu v. Rangamma (1903) 26 Mad 31. In that case there was a decree by consent on a mortgage of certain property. The property mortgaged was the office known as golla mirasi" and the emoluments attached to the said office. Objection was taken in execution as to the incompetency of the Court to sell the said property. The objection was upheld. The learned Judges observed:

There is no contention but that the sale of such an office as that now in question is opposed to public policy and ought not to be recognized or enforced by the Courts.

7. For a case of prohibition under the statute, reference may be made to Rajah of Vizianagaram v. Dantivada Chelliah (1905) 28 Mad 84. In that case there was an ex parte decree directing the sale of certain village carpenter's service inam as a public service inam inalienable u/s 5 of Act 3 of 1895. It was held that the order for sale therein cannot be carried out. Their Lordships Subramania Ayyar and Sankaran Nair, JJ. observed that:

The decree in so far as the direction for sale goes was altogether ultra vires and incompetent to confer the right intended and Courts are bound on the matter coming to their notice to abstain from enforcing the direction.

8. The same principle was applied in R.D.K. Venkatalingama Nayanam Bahadur Varu, Rajah of Kalahasti Vs. Rao Muni Venkatadri Rao Garu, . Thus the extreme contention of Mr. Sampath Ayyangar that an executing Court cannot go behind the decree is untenable. In none of the above cases, it will be seen, was any distinction drawn between the cases where prohibition appeared on the face of the decree and cases where evidence will have to be taken to ascertain it. In Gora Chand Halder and Another Vs. Prafulla Kumar Roy and Others, , no doubt

Walmsley, J. who delivered the leading judgment used the word "apparently" and the learned Judges in *Amalabala Dasi Vs. Sarat Kumari Dasi and Another*, , explained it as meaning "on the face of, but it is not possible to understand why such a distinction should be drawn. As Page, C.J. remarks in *S.A. Nathan v. S.R. Samson* AIR 1931 Rang 252

If the fact is that the decretal Court had no jurisdiction to pass the decree , I ask with all due respect to the learned Judges who decided *Gora Chand Haldar and Another Vs. Prafulla Kumar Roy and Others*, , what difference does it make in principle or as a matter of common sense whether the executing Court ascertains that fact by perusing the decree or after hearing evidence or holding an enquiry? In my opinion, none whatever. If there was a want of jurisdiction in the decretal Court, the fact exists and remains whether the absence of jurisdiction is apparent or not.

9. The learned Judges in *Annamalai Chettiar v. Srirangachariar* AIR 1937 Mad 134 seems to have taken the same view as the Calcutta High Court and distinguished the cases in *Rajah of Vizianagaram v. Dantivada Chelliah* (1905) 28 Mad 84 and *R.D.K. Venkatalingama Nayanim Bahadur Varu, Rajah of Kalahasti Vs. Rao Muni Venkatadri Rao Garu*, as cases in which the objection to jurisdiction was apparent on the face of the decree. In coming to the said conclusion, the attention of the learned Judges was not directed to the decision of a Bench of our High Court reported in *Ramachandra Suru v. Venkatalakshminarayana* AIR 1919 Mad 429. That was a suit on a mortgage and there was razinama decree. The property mortgaged comprised an impartible estate which can only be alienated subject to the restrictions imposed by the Impartible Estates Act, Madras Act 2 of 1904. u/s 4 of that Act, the proprietor of an estate is restricted from alienating that estate except in circumstances where alienation would be permissible by law if the estate was ancestral property and the proprietor occupied the position of a managing member. An application was made for the passing of a final decree Under Order 34, Rule 5, and for sale of the mortgaged property. Objection was taken that the property was an impartible estate, that there was no necessity to borrow the amount for which the mortgage was executed and therefore the property could not be sold. It will be seen that this fact could not be apparent from the face of the decree. The learned Judges held that the objection can be entertained and evidence can be taken in regard thereto. This case is a distinct authority for the position that where objection as to alienability is taken on the ground of public policy, it is the duty of the Court to entertain the objection and determine the same if necessary by taking evidence and refuse to pass a final decree or to execute the decree. It is this view which Pandrang Bow, J. gave expression to in *T.T.K.K. Kumare Appan Srirangachariar Vs. T.V.A.K.T. Annamalai Chettiar*, where he observed thus:

I fail to see why, if the Court can decide a question on the admission of parties, it should lose that power to decide it simply because the parties do not choose to make any admissions and the Court has to take evidence for the purpose of

deciding it. The Court's jurisdiction can in no way be dependent on the point whether evidence has to be recorded or not (Pages 487 and 488).

10. With these observations I agree and respectfully dissent from the view taken in *Annamalai Chettiar v. Srirangachariar* AIR 1937 Mad 134. If the facts of the present case were the same as in *Annamalai Chettiar v. Srirangachariar* AIR 1937 Mad 134, being a decision of the Bench, I am bound to follow it. But the facts of this case are distinguishable. In *Annamalai Chettiar v. Srirangachariar* AIR 1937 Mad 134 objection was taken after the final decree for sale and at the stage of execution; but in this case the final decree has not been passed and objection was taken to the passing of the final decree. In my opinion the decision in *Ramachandra Suru v. Venkatalakshminarayana* AIR 1919 Mad 429 would directly apply to the case, but even on principle the doctrine that an executing Court cannot go behind the decree would not be applicable to a case where objection is taken at the stage of passing the final decree. Until the final decree is passed in a mortgage suit, there is no executable decree and the suit must be deemed to be still pending. An application for a final decree is not an application in execution and it cannot be said that the objection that the Court cannot pass a decree for sale is one relating to execution, discharge or satisfaction of the decree and thus the reasons advanced by Wallis, C.J. in *Zamindar of Ettiyapuram v. Chidambaram Chetty* AIR 1920 Mad 1019 would not apply. Order 34, Rule 5, Civil P.C., no doubt says that if payment is not made as directed by the preliminary decree, the Court shall pass a final decree for sale, but that does not mean that the Court is bound to pass a final decree for sale. It is only in cases where there is no prohibition imposed by substantive law that the Court can direct a sale. Therefore the question whether in default of payment the Court can direct a sale can be gone into, because it is the duty of the Court to see whether the appropriate relief by way of sale could be given to the parties or not and once the prohibition on grounds of public policy is brought to the notice of the Court, it is incumbent on the Court to give effect to that prohibition and decline to pass an order for sale: *Lakshmi Bibi Kujrani v. Atal Bihari Halder* (1913) 40 Cal 534 and *Ramachandra Suru v. Venkatalakshminarayana* AIR 1919 Mad 429.

11. Mr. Sampath Ayyangar also contends that it is not open to the present defendant as the legal representative of the mortgagor to raise the objection. There is not much substance in this contention. Objection can be taken even by the original mortgagor and in cases where objection was entertained, it was done at the instance of defendants who were parties to the decrees, the principle being that estoppel cannot be relied upon to defeat the prohibition of law on the ground of public policy: *Soora Ramakrishnamma Vs. Pasumarthi Venkata Subbiah and Others*, .

12. The lower Court is therefore competent to go into the question whether the property is inalienable. If it finds it is, it can refuse to pass a final decree; otherwise, the execution must be allowed and it is not open to it to go into any other question in execution. The decision of the lower Court to go into the

question of inalienability of the property is therefore right. In the result this civil revision petition fails and is dismissed with costs.