
(1950) 02 MAD CK 0023

In the Madras High Court

Case No : Letters Patent Appeal No. 43 of 1947

Natesa Sastrigal and Another

APPELLANT

Vs

Alamelu Achi by power agent, K.S. Sundaram Chettiar

RESPONDENT

Date of Decision : 07-02-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3, 105, 2(11), 97

Citation : AIR 1950 Mad 541 : (1942) 55 LW 388

Hon'ble Judges : Horwill, J; Balakrishna Ayyar, J

Bench : Division Bench

Advocate : G.R. Jagadisa Iyer, for the Appellant; T.R. Srinivasan, for the Respondent

Final Decision : Allowed

Judgement

1. On 3rd March 1933, one Sivakami Achi obtained an order for restitution against another, Sivaramakrishna Aiyar, in respect of a sum of Rs.

5280 odd. On 29th August 1933, Sivaramakrishna Aiyar died leaving a will dated 1st December 1918 by which he disposed of his properties in

various ways. One of the properties dealt with under the will is a house in Kumbakonam. He gave a life estate in this house to his widow

Dharmambal and the remainder to Kuppalu Ammal and her heirs. This Kuppalu Ammal, it may be mentioned, was a daughter of Dharmambal's

sister. In November 1933 Dharmambal orally surrendered her life estate in the house in favour of Kuppalu Ammal. In 1940 Kuppalu died and

thereafter her sons--they are the appellants before us--obtained possession of the house. Sivakami Achi died in September 1938 and her interests

devolved on her daughter Alamelu Achi. On 7th February 1942 Alamelu Achi filed E. A. No. 196 of 1942 in the Court of the District Munsif of

Mayavaram praying that the decree be transmitted for execution to the Court of the District Munsif, Kumbakonam. In that E. A., Dharmambal was

shown as respondent 2 in place of her deceased husband, Sivaramakrishna Aiyar. She took the objection that the decree was barred by limitation,

While this E. A. was pending, Alamelu Achi filed another application, which was numbered as E. A. No. 372 of 1942 in which she prayed that

four other persons might be added as respondents 3 to 6. Of these four persons, two shown as respondents 3 and 4--are the brother's sons of

Sivaramakrishna Aiyar and the other two--shown as respondents 5 and 6--are the sons of Kuppalu. By an order made on 18th September 1942,

E. A. No. 372 of 1942 was allowed and the four persons named therein were added as legal representatives of Sivaramakrishna Aiyar. On the

same day E. A. No. 196 of 1942 was dismissed as barred by limitation. Against this order Alamelu Achi filed an appeal in A. 3. No. 159 of 1942

on the file of the Sub-Court of Mayavaram. But that appeal was unsuccessful. She then came to this Court in C. M. S. A. No. 226 of 1943. That

appeal was heard by Byers J. who reversed the decision of the Courts below on the question of limitation and remanded the E. A. to the executing

Court for further disposal according to law. Before Byers J. an attempt was made to canvass the correctness of the finding given in E. A. No. 372

of 1942 to the effect that the appellants before us are the legal representatives of Sivaramakrishna Aiyar. On this matter, the learned Judge stated

as follows :

The character of respondents 4 and 5 as legal representatives has been raised but this is not a question which arises in this appeal which is solely

concerned with limitation. That question will have to be decided at the proper time in the lower Court." When the matter went back, the learned

District Munsif at Mayavaram held that the appellants before us were not the legal representatives of Sivaramakrishna Aiyar. It was argued before

him that by reason of the order in E. A. No. 372 of 1942, which had not been appealed from, it was not open to the appellants before us to

canvass the correctness of the decision therein, The District Munsif overruled that objection on two grounds: One was that E. A. No. 372 of 1942

is in the nature of an interlocutory application in the main execution petition and the other was that the observations of Byers J., left the question at

large and that, therefore, it was open to him to go into the matter. That decision was pronounced on 29th December 1944. On appeal from the

District Munsif of Mayavaram, the learned Subordinate Judge took the same view, the result of which was that the efforts of Alamelu Achi to levy

execution against the house in the possession of the appellants have failed. Alamelu Achi then came to this Court in C. M. S. A. No. 309 of 1945.

Govindarajachari J. who heard this second appeal concurred in the view of the Courts below that the decision in E. A. no. 372 of 1942 was not

final, but he differed from them on the question whether the appellants before us are the legal representatives of Sivaramakrishna Aiyar and,

reversed their decision. The present appeal has been filed with the leave of the learned Judge.

2. The main point, which Mr. Jagadisa Aiyar for the appellants tried to make may be thus stated: The appellants are persons who have got the

property as the heirs of a legatee of a portion of the estate of Sivaramakrishna Aiyar. Such persons have never been held to be legal

representatives of the testator and the learned Judge erred in taking the view he did. In reply Mr. Srinivasan stated: (i) the decision in E. A. No.

372 of 1942 was final and the view of Govindarajachari J. and the Courts below on that point is not correct; (2) the appellants are persons who

have intermeddled with the estate of Sivaramakrishna Ayyar and therefore the legal representatives of his estate ; and (3) legatees, even heirs of

legatees, can be properly regarded as the legal representatives of the testator.

3. The first objection raised by Mr. Srinivasan need not detain us long. As held both by the District Munsif and the Subordinate Judge, E. A. No.

372 of 1942 was really in the nature of an interlocutory application in E. A. No. 196 of 1942. A reference to the B diary in E. A. No. 196 of 1942

shows that E, A. No. 372 was filed during the pendency of E. A. No. 196 and that the latter application was to add new parties in E. A. No. 196.

Both were disposed of the same day. As E. A. no. 196 of 1942 was dismissed, an appeal against the order recorded in E. A. No. 372 of 1942

would have been wholly purposeless. In this connection Mr. Jagadisa Aiyar read to us the following passage from the decision of the Privy Council

in Maharajah Moheshur Singh v. Bengal Government, 7 M. I. A. 283 : 3 W. R. 45 :

We are not aware of any law or Regulation prevailing in India which renders it

imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting for ever the benefit of the consideration of the appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditions administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities.

Mr. Srinivasan replied that since the decision in the above case, the CPC has been amended by the insertion of Section 97 which precludes a party who has not appealed from a preliminary decree from disputing its correctness in any appeal which may be preferred from the final decree; that by virtue of the definition of the word "decree" in Section 2(2) of the Code, the determination of any question within Section 47 would also be a decree ; that the order made in E. A. No. 372 of 1942 must be considered to be in the nature of a preliminary decree and, no appeal having been preferred therefrom, its correctness cannot now be disputed. We are not satisfied that this reply disposes of the matter. The consideration set out in Maharajah Mohesur Singh v. Bengal Government, 7 M. I. A. 283 : 3 W. R. 45 P.C. are of general application and must be given effect to, except in so far as statutory enactments, or other equivalent legal process make them inapplicable. One would have thought that if the Legislature intended to preclude a party, who has not appealed from an interlocutory order, from questioning its correctness, when appealing from the final order, it would have made suitable amendments in the other portions of the Code at the time Section 97 was inserted. But it did not do so. Nor are we satisfied that there is any analogy between a preliminary decree in a suit and an interlocutory order of the kind passed in E. A. No. 372 of 1942. 3a. On this part of the case, Mr. Srinivasan also argued that it is not correct to read the order of Byers J. as though it re-opened the decision which had been given in E. A. no. 372 of 1942 and left the matter free for further consideration. But we find that the District Munsif, the Subordinate Judge and Govindarajachari J. -- all of them--took the view that the

order of Byers J. left the question whether the appellants before us are the legal representatives of Sivaramakrishna Aiyar at large and we do not see sufficient reasons to dissent from that view. Moreover, when we have regard to the substance of the matter we notice that though in form and appearance there were two separate orders, one in E. A. No 196 of 1942 and another in E. A. No. 379 of 1942 there was virtually only one composite order and that in effect it was in favour of the appellant before us 3-b. The second objection of Mr. Srinivasan was that the appellants before us must be regarded as intermeddlers with the estate of Sivaramakrishna Aiyar and therefore as his legal representatives within the meaning of Section 2(11), Civil P. C. That definition reads as follows:

Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased.

It is true that the appellants are in possession of a part of the estate of Sivaramakrishna Aiyar, but to say that for that reason they are his legal representatives appears to us to involve a misconception. It is not every person in possession of part of the testator's estate, who is an intermeddler. It was conceded before us that a mere trespasser cannot be regarded as an intermeddler, or as a legal representative. Nor do we think that a person who receives payment of a legacy can be properly described as an intermeddler. To take a common instance when a sum of money is left by a will and that money is remitted to the legatee, it would be difficult to say that by merely accepting the remittance he becomes an intermeddler with the effect or a legal representative of the testator. In order to make an intermeddler a legal representative, the intermeddling must bear a particular stamp. It involves the doing of something which appertains to the character of an executor. An intermeddler is the person who is spoken of as an executor de son tort, or an executor of his own wrong. In Stroud it is stated : ""Executor" is when a man makes his testament and last will and therein nameth the person that shall execute his testament, then he that is so named is his executor." and an ""Executor de son tort"" is he that takes upon him the office of an executor by intrusion, not being so constituted by the testator.

This idea has been brought over into Indian law in Section 303, Succession Act,

A person who intermeddles with the estate of the deceased, or does any other act which belongs to the office of executor while there is no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong.

We would emphasise the words "other act which belongs to the office of executor", which occur in the section, words which make it plain that the intermeddling referred to in the earlier part of the section must be intermeddling by doing an act which belongs to the office of executor.

4. The decisions are also clear on the point. One of the earliest of the cases read before us is that of *Hill v. Curtis*, (1866) 1 Eq. 90 : 35 L. J. Ch.

133. The learned Vice Chancellor who delivered the judgment stated:

I have recently examined all the cases upon this old branch of the law and there are one or two points which, I think, may be treated as clear... It

has been settled by that decision in the Queen's Bench, that if one person possesses himself of the property of a testator and hands over that

property to a second person, the latter is not an executor de son tort." The next decision on this part of the case that Mr. Jagadisa Aiyar cited is

that of *Petres v. Leeder* and *Saime v. Borguest*, (1878) 47 L. J. Q. B. 573 (common judgment). In that case the widow of the testator being

required to vacate the premises found it necessary to remove the furniture which belonged to the deceased. She took part of it to a smaller house

and afterwards purchased it. The residue was removed to an auctioneer's premises and afterwards sold by auction. The proceeds of the auction

as well as the price of the goods retained by the widow were duly handed over to the administrator. Actions having been laid both against the

widow and the auctioneer, charging them as executors de son tort, the Court held that they were not, because they had no intention to usurp the

functions of an executor, The Court quoted the definition of the executor de son tort, which we have reproduced from Stroud and went on to say:

The definition implies a wrongful intermeddling with the assets, a dealing with them in such a way as denotes an usurpation of the functions of an

executor, an assumption of authority, which none but an executor or administrator can lawfully exercise. It is obvious that it is not every

intermeddling with the goods of the deceased which is wrongful." The decision in *Hursell v. Bird*, (1892) 65 L. T. 709 also lays down the same

rule. In that case a widow had made herself an executrix de son tort of her husband. A creditor of the deceased had obtained payment of part of

her debt from the widow. The plaintiff sought to make the creditor liable as an executrix de son tort. The Court ruled that he could not do so.

The law is that a creditor who obtains payment of his debt from an executor de son tort does not by reason of so doing become an executor de

son tort himself"" and again, ""The law upon the subject is clear. It is that a creditor getting hit debt, whether in money or in kind, does not thereby

become an executor de son tort."" In Section 296, Vol. XIV, 2nd Edition of Halsbury, the law on this point is summarised in these words: ""A

person who receives payment from the executor de son tort of a debt due from the deceased, or who takes over property of a deceased person

from an executor de son tort, does not thereby himself become an executor de son tort, though, if he has taken the property with notice of a trust, it

may be followed into his hands as trust property.

The law in India is also the same (vide *Satyanarayan Roy v. Sarat Chandra*, 30 C. W. N. 565 : A. I. R. 1926 Cal. 825. The headnote to the report

reads as follows:

The mere taking away of a portion of a deceased defendant's property does not make the person who takes away the same his executor de son

tort in the absence of proof of an intention that he intended to act as a legal representative of the deceased; and to represent his estate by

intermeddling with it.

4a. In the present case it is impossible to say that when the appellants before us took possession of this house in Kumbakonam, they intended to

represent the estate of Sivaramakrishna Aiyar or usurp the functions of an executor or do any act which belongs to the office of executor. They

cannot, therefore, be treated as inter-meddlers within the meaning of Section 2(11), Civil P. C.

5. The last objection of Mr. Srinivasan brings us to the only point that remains. It is whether the appellants can be treated as persons who in law

represent the estate of Sivaramakrishna Aiyar within the meaning of the former part of the definition of legal representative in Section 2(11), Civil

P. C. Stroud quotes Knight Bruce, Vice-Chancellor as suggesting that the term legal representatives ""might be void for uncertainty"". This remark

derives point from the fact that the meaning of this expression has greatly varied with the situation. It has meant different things at different times and

in different context. There is a clear exposition of the subject in the judgment of Woodroffe J. in *Dinamoni Chowdrani v. Elahadut Khan*, 8

C.W.N. 843, where he has analysed the meaning of the expression "legal representative" occurring in Section 234 of the old Code.

In their strictest and most ordinary sense the words "legal representatives" are understood to mean executors and administrators only *Price v.*

Strange, (1820) 6 Mad. 159 : 56 E. R. 1052.. . . The term is yet one which is naturally capable of a more extended sense than that in which it is

ordinarily and strictly employed

"Where there is an executor or administrator they alone are the legal representatives of a deceased judgment-debtor. But the section is also

commonly applied both in the case of heirs as well as in that of executors and administrators and the term "legal representative" has been defined

to ordinarily mean all these classes of persons."

When there is no executor or administrator but succession by heirship as in cases governed by the Bengal School of Hindu law or in cases of

separate and self-acquired property under Mitakshara law the decree must be executed against the heir as the legal representative within the

meaning of this section.

The section has, however, been applied to cases where the succession is otherwise than by heirship to the last holder of an estate as also to cases

where the estate accrues to the present holder by survivorship. In those cases where a decree is passed against a judgment-debtor not in his or her

personal capacity but in a representative capacity the decree may be executed against the person who, though not an heir of the judgment-debtor

the last holder of the estate, is entitled thereto after her death whether as reversioner or surviving coparcener. So inasmuch as a decree properly

obtained against a Hindu widow in her representative capacity is binding upon her husband's reversioners, where a suit has been instituted or

defended by a Hindu widow in her representative capacity, the reversioners though they do not claim through her but as heirs of her husband have

yet been held to be her legal representatives in respect of the estate held by her as such Hindu widow....

Where, however, the interest of the father has been attached during his lifetime, or a decree directing a sale of hypothecated property has been

passed in the lifetime of the judgment debtor or the judgment-debtor has been expressly sued as representing the undivided family or the decree

charges the family property; in all these cases the decree, it has been held, may be executed against those who in succession in time take by the

legal title of survivorship and not by that of heirship.

The principle under consideration has been still further extended to the case of a person who without title as administrator, executor, heir,

reversioner or surviving coparcener is the de facto possessor of the estate of the deceased Hindu it having been held that he must be treated for

some purposes as his representative and that a judgment obtained against such a representative is not a mere nullity The Madras High Court

has more recently held that there is no authority for holding that the words "legal representative" include any person who has taken possession of

the property of a deceased judgment-debtor, that a stranger in possession of property who was not a party to the decree ought not to be

proceeded against in execution or otherwise than by a regular suit and that the words "legal representatives" cannot be taken to include any person

who does not in law represent the estate of the deceased.

From this review of the authorities it will appear that judicial decisions have extended the sense of the term "legal representative" beyond that of its

ordinary meaning of "administrator, executor and heir" and though such extension has been attended with doubt and has in some cases been the

subject of conflicting decision it appears to me to be too late now to endeavour, however convenient it might be, to secure for the term that which

is perhaps its strict and legitimate sense. I agree, therefore, in holding that the term is not limited to administrators, executors and heirs and am of

opinion that it must now be held to include any person who in law represents the estate of a deceased judgment-debtor.

In his commentary on the Civil Procedure Code, Mulla states that the definition in Section 2(11) settles the meaning of the term as explained in the

case from which we have just quoted so extensively.

6. In support of his contention that a legatee is a legal representative, Mr. Srinivasan referred to four decisions, Subbarayudu v. Ramadasu, 45

Mad. 872 : AIR 1923 Mad. 237; Abdul Aziz v. Dharmasay Jetha & Co., A. I. R. 1940 Lah. 348 : 190 I. C. 506; Dwarak Singh v. Harihar

Baksh Singh, 12 Luck 1 : A. I. R. 1936 Oudh 7 and AIR 1943 24 (Oudh) . In Subbarayudu v. Ramadasu, 45 Mad. 872: A. I. R. 1923 Mad.

237, a decision given in this Court, the facts were that a mortgagee, who had obtained a preliminary decree for sale died leaving a will bequeathing

the mortgage decree to A. The legatee A applied to be brought on record only after the expiration of the 90 days, which Article 176, Limitation

Act, prescribes, ""to have the legal representative of a deceased plaintiff made a party"". It was contended in this Court that the appellant was not

in the position of a legal representative of the deceased plaintiff within the meaning of Order 22, Rule 3, Civil P. C., but that contention was

overruled. This decision, according to Mr. Srinivasan, is a direct authority for the position that a legatee is a legal representative of a deceased

testator. In respect of this decision, we would first of all state that it does not appear that any executor had been appointed under the will of the

deceased mortgagee with the result that apparently there was no one else competent to continue the proceedings. We also find that this decision

has been overruled in Perumal Pillai v. Perumal Chetti, 51 Mad. 701 : A. I. R. 1928 Mad. 914. Mr. Srinivasan attempted to argue that

Subbarayudu v. Ramadasu, 45 Mad. 872 : A. I. R. 1923 Mad. 237 has not been overruled in respect of the principle he seeks to extract from it.

Even if that be so, there can be no doubt that its authority stands considerably impaired. The decision in Abdul Aziz v. Dharmasay Jetha & Co., A.

I. R. 1940 Lah. 348 : 190 I. C. 506 merely laid down, what nobody seriously disputes, that a decree-holder can proceed against a legatee

irrespective of whether the other properties of the deceased are, or are not sufficient to pay the debts of the decree-holder. The question for which

it was cited as an authority, namely, whether a legatee is the legal representative of the deceased was not really decided there. In Dwark Singh v.

Harihar Baksh Singh, 12 Luck. 1 : A. I. R. 1936 Oudh 7 it was decided that the universal legatee of a person is his legal representative within the

meaning of Section 2(11), Civil P. C. It may be remarked that this decision does not lay down that a legatee of a part of the estate is the legal

representative of the testator. Nevertheless, argued Mr. Srinivasan, if a single universal legatee can be the legal representative, why not all the

legatees put together collectively and as a body be treated as legal representatives of the testator. If one who takes the whole can be a legal

representative, why not all who together take the whole ? As a matter of pure logic this argument has some force; but there is a material difference

between a universal legatee and the legatee of a part only of the estate, because he who takes the whole cannot but be its representative. A

universal legatee is more than the arithmetical aggregate of a number of part legatees.

7. The decision in AIR 1943 24 (Oudh) does no doubt explicitly state that a legatee is a legal representative of the testator. But, on an examination

of that decision, we find that this statement was really not necessary for the decision in that case. The position/therefore, is that the view which Mr.

Srinivasan urged, namely, that a legatee is the legal representative of a testator, has not thus far found acceptance.

8. It remains for us to refer to some of the decisions cited by Mr. Jagadisa Aiyar on the opposite side. The first of these is (Pulikku Madathil

Nelliari) Kolaremathu Amma Vs. (Thappalli Koonattat) Madhavi Amma and Others, where it is said,

The mere fact that there are certain dispositions of property and legacies in the will has not the effect of making the legatees the legal

representatives.

The second case is Rathnammal Vs. Sundaram Achari and Others, . In that case, a decree was passed against defendants 1 and 2. The deceased

had by his will granted a life-interest in the property sought to be proceeded against to his widow, defendant 2, with vested remainder to defendant

4. After the decree, defendant 2 died and the plaintiff sought to proceed in execution against the property, which had come into the possession of

defendant 4 on her death. It was held that defendant 4 was neither the judgment-debtor, nor a legal representative of the judgment-debtor. There

is also an observation in that judgment to the effect that a part legatee is only a part legatee and does not become a legal representative, because he

is in actual possession of part of the property. The third case is Joy Chandra Roy and Others Vs. Satis Chandra Roy, . There it was ruled that

where there are administrators with the will annexed to the estate of the deceased, a creditor cannot follow the assets in the hands of a legatee in

execution. It is true that in that case it was not decided whether a legatee is the legal representative of the testator or not. But if they had taken the view that a legatee is a legal representative, the learned Judges could not have given the decision they did.

9. The result of this discussion may be shortly put. The persons or class of persons indicated by the expression ""legal representative"" would depend on the context. Subject to that qualification it includes properly appointed executors and administrators; it includes persons who have taken on themselves duties and responsibilities, which belong to the office of executor or administrator even though only in respect of part of the estate; it includes heirs-at-law, whether they take by succession or by survivorship: it includes reversioners where the action has been brought by or against the widow as representing her husband's estate; it includes a universal legatee, it may perhaps in some cases and for some purposes include persons in de facto possession of the entire estate of the deceased, though this Court has so far not endorsed this view; but it does not include trespassers; it does not include creditors who have received payments of the debts due from the estate of the deceased; it does not include persons dealing in the ordinary course of business with goods of the deceased received from another; it does not include persons who intervene merely for purposes of preserving the goods of the deceased or providing for his funeral or for the immediate necessities of his family; it does not include legatees of a part of the estate and it does not include those taking possession of the property of the deceased from the legatees of a part of the estate.

10. It follows that the appellants cannot be regarded as the legal representatives of Sivaramakrishna Aiyar. It also follows, therefore, that they cannot be proceeded against in execution.

11. In the result the appeal is allowed with costs here and before Govindarajaohari J. The revised decree of the District Munsif dated 20th December 1942 will be restored.