

(1948) 08 MAD CK 0057
In the Madras High Court

P. Sundaresan and Others

APPELLANT

Vs

P. Venkatesiah and Others

RESPONDENT

Date of Decision : 13-08-1948

Acts Referred:

Citation : (1948) 61 LW 795 : (1948) 2 MLJ 421

Hon'ble Judges : Horwill, J

Bench : Division Bench

Judgement

Horwill, J.—The matter arising in this civil miscellaneous appeal is whether in view of the provisions of Section 7 of Madras Act XV of 1946 the defendants are able to resist the execution of the decree for eviction passed in O.S. No. 169 of 1940.

2. An agreement was entered into between the plaintiffs and the defendants, who belong to one family, whereby the plaintiffs were to own the whole of the family house—which is the subject-matter of the dispute—and in return for which they executed a promissory note in favour of the defendants. The defendants were however allowed to remain in possession of two rooms as tenants of the plaintiffs, the further arrangement being that the interest due on the promissory note executed by the plaintiffs in favour of the defendants should be set off against the rent due for the two rooms. The plaintiffs alleged that not only did the tenants fail to pay the rent and that the tenancy was therefore at an end; but that they had trespassed into a third room. It was finally held in Letters Patent Appeal that although the plaintiffs and the defendants had not become divided and that the family house still remained technically an asset of the joint family, so that the plaintiffs and the defendants were tenants-in-common, yet in view of the fact that the defendants had agreed to hold the two rooms as tenants of the plaintiff and to pay a rent therefor, it was not open to them u/s 116 of the Evidence Act to deny the right of the plaintiffs as long as they were in possession. The Court therefore confirmed the decree of the Courts below evicting the defendants from these two rooms.

3. The plaintiffs attempted to execute their decree and were met with obstructive tactics at every stage. On 15th July, 1947, in the absence of the judgment-debtor, E.P. No. 252 of 1947 was ordered to be executed. The defendants then filed various applications which dragged on the proceedings until Madras Act XV of 1946 had become law. E.A. No. 1402 of 1947, the order on which is now under consideration, was filed for a short stay of execution pending an application for review to the High Court. During the course of that application the defendants drew the attention, of the Court to the provisions of Section 7 in Madras Act XV of 1946 and said that the Court had no jurisdiction to evict them. That application was in due course-dismissed. Hence this appeal.

4. Section 7 of Madras Act XV of 1946 makes provision for the remaining in possession of a tenant, unless he has done something which would disentitle him to do so. The various acts which would disentitle him are set out in Sub-section, (2). Section 7(1) shows that the Act applies to tenants against whom a decree for eviction has been passed as well as to other tenants. There can be no doubt that the fact that the plaintiffs obtained a decree long before the Act came into force would not entitle them to dispossess the defendants. Strictly speaking, the appellants were not tenants; but were estopped from contending so because of the provisions of Section 116 of the Evidence Act. The definition of "tenant" in this Act would however make the defendants tenants within the meaning of the Act; because a tenant according to Section 2(4) "" means any person by whom...rent is payable." Because of the estoppel, the defendants are bound to pay rent to the plaintiffs as long as they remain in possession.

5. Ordinarily, the earlier order in the same execution proceedings passed on 15th July, 1947, would operate as constructive res judicata with regard to the same matters; raised at subsequent stages of the execution application; but where an order is. passed by a Court without jurisdiction, that would not necessitate the Court's, again acting without jurisdiction. In other words, an order passed without jurisdiction in an earlier proceeding or at an earlier stage in the same proceeding would not operate as res judicata in a subsequent proceeding or at a later stage of the same proceeding. This principle has been well accepted, and it is unnecessary to quote a large number of decisions to that effect. Reference may however be made to Sri Rajah Kotagiri Madhavarao Bahadur, Zamindar and Others Vs. Vutukuru Papayya Rao, in which this principle was laid down with regard to a decree passed in a suit which was alleged in a subsequent suit to operate as res judicata Similarly, in Gajadhar Prasad v. Firm Manulal Jagarnath Prasad ILR (1925) Pat. 440 it was held that an order which was ultra vires would not operate in subsequent proceedings as res judicata.

6. The only other question remaining is whether an appeal lies against the order of the lower Court refusing to stay execution. That question was fully considered in Nalluru Veera Raghavayya and Another Vs. Nalluru Koti Rattamma and Others, . It is argued that that decision of a single Judge is not correct, and various decisions of other High Courts have been quoted in support of that

contention. There was a difference of opinion in the High Courts of Allahabad and Calcutta on the one hand and that of Lahore and this High Court in *Subramania Pillai v. Kumaravelu Ambalam* (1915) ILR 39 Mad. 541 on the other. The judgment in *Nalluru Veera Raghavayya and Another Vs. Nalluru Koti Rattamma and Others*, does not refer to the Full Bench decision in *Chidambaram Chettiar v. Krishna Vathiar* (1916) 32 M.L.J. 13 : ILR 40 Mad. 233 where the learned Judges had to consider the scope of the present Section 47 as compared with that of Section 244 of the old Code. They discussed various decisions of other High Courts and came to the conclusion that,

the scheme of the corresponding Section 47 of the present Code is not to specify any particular questions at all, but to include all questions relating to the execution, discharge or satisfaction of a decree as being within its scope.

Phillips, J., who delivered a dissenting judgment, referred to *Subramania Pillai v. Kumaravelu Ambalam* (1915) ILR 39 Mad. 541 relied on by the learned Judge in *Nalluru Veera Raghavayya and Another Vs. Nalluru Koti Rattamma and Others*, and dissented from it. The majority however followed *Subramania Pillai v. Kumaravelu Ambalam* ILR (1915) Mad. 541. There can therefore be no doubt as regards the law in this High Court. The learned advocate for the respondents has cited *Malamal Vittil Krishnan Nair Vs. Kavalappara Moopil Nair*, in which it was held that there was no appeal against an order by the appellate Court refusing to stay execution under Order 41, Rule 5; but the learned Judges came to that conclusion because the application under consideration was not one filed in the Court executing the decree. They held that Section 47 applied only to orders passed by the Court executing the decree.

7. In the view taken by the lower Court, it was unnecessary to consider whether on any of the grounds set out in Section 7(2) of the Madras Act XV of 1946 the landlords were entitled to evict the tenants. That question will now however have to be considered in view of the above findings.

8. The appeal is therefore allowed and E.A. No. 1402 of 1947 remanded for disposal in the light of the provisions of Section 7 of Madras Act XV of 1946. The costs will abide the result.