

(1937) 10 MAD CK 0031
In the Madras High Court

Pandivi Satyanandam and Others

APPELLANT

Vs

Paramkusam Nammayya and Another

RESPONDENT

Date of Decision : 06-10-1937

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1938 Mad 307 : (1938) 47 LW 51

Hon'ble Judges : Burn, J

Bench : Division Bench

Judgement

Burn, J.—These appeals and O.R.P. No. 331 of 1935 arise out of orders passed by the learned District Judge of East Godavari and the Principal Subordinate Judge, Ellore, in the course of proceedings taken in execution of the decree in O.S. No. 18 of 1928 on the file of the Sub-Court Ellore. The suit was for partition of joint family property, but besides the members of the joint family, many persons were impleaded as defendants on the allegation that they were in possession of joint family properties, moveable and immovable. On 16th September 1930, the Subordinate Judge passed a "preliminary decree", and this was transferred for execution to the District Court of East Godavari. In that Court, three applications for execution were put in by the plaintiff and defendant 5, against defendants 40-43. The first was E.P. No. 151 of 1931 by the plaintiff, presented on 6th October 1931, in which he prayed for arrest of defendants 40-43, and for attachment and sale of their moveable and immovable properties to realize the balance due to the plaintiff under the decree of 16th September 1930. It is clear, though the papers are not before us, that in pursuance of this petition certain moveable and immovable properties were brought to sale, for, on 16th November 1931, defendant 5, (a brother of the plaintiff and defendant 1) presented E.P. No. 167 of 1931 against the same judgment-debtors, praying for attachment and sale of immovable properties, for his rateable share in the proceeds of the sale of the moveable properties attached by the plaintiff in E.P. No. 151, and for the appointment of a Commissioner to collect the entire income from the properties of the judgment-debtors. The third execution petition was E.P. No. 76 of 1934, by

defendant 5 against the same judgment, debtors praying for the attachment of a sum of about Rs. 12,000, said to be in deposit in O.S. No. 62 of 1926 on the file of the Sub-Court, Rajahmundry.

2. The principal question for decision in these appeals is whether the decree of 16th September 1930 was executable, or whether it was a mere decree on paper, which could not be executed because it had not been engrossed on a non-judicial stamp paper. This question was not raised by defendants 40-43 till 14th March 1934, more than two years after the filing of E. Ps. 151 and 167 of 1931. It was then raised in E.A. No. 77 of 1934, an application u/s 47, Civil P.C., in which defendants 40-43 prayed for the dismissal of E.P. No. 151 of 1931 on the ground that there was not in existence a valid and legal decree engrossed on a proper non-judicial stamp paper. The learned District Judge, Mr. P.T. Jagannadhachariar, dismissed this application on 17th March 1934 in a short order:

This application was apparently put in Under a misapprehension. What was transmitted to this Court to execution was the preliminary decree dated September 1930 and not the final decree. Execution has been going on from 1931. Petition dismissed.

3. A.A.O. No. 304 of 1934 is filed by defendants 40, 42 and 43 from this order. Having dismissed E.A. No. 77 of 1934, the District Judge ordered execution to proceed, and certain properties of defendants 40-43 were sold at Court-auction on 17th March 1934. On 6th April 1934, defendants 40-43 presented two petitions to the District Judge, E.A. Nos. 107 and E.A. No. 108 of 1934. In the first, they prayed for restoration to the file of E.A. No. 77 of 1934, and for review of the order passed thereon. In the second they applied Under Order 21, Rule 90, Civil P.C. for the getting aside of the sale. By the time these came on for hearing, Mr. P.T. Jagannadhachariar had been succeeded in the office of District Judge by Mr. P. Rajagopalan, I.C.S., who took a very different view. He allowed E.A. No. 107 of 1934 reviewed his predecessor's order and on 6th September 1934 passed an order accepting the contentions of the judgment, debtors. He held that the decree of 16th September 1930 was a final order for partition within the meaning of Section 2(15) of the Stamp Act. It followed that it could not be acted upon, i.e. executed by any Civil Court (Section 35 of the Stamp Act). A.A.O. No. 9 of 1935 is filed by the plaintiff from this order. There are thus two appeals by opposing parties from two contradictory orders passed by two District Judges on the same petition.

4. Without delay the plaintiff went to the Court which had passed the decree, and on 17th September 1934, he applied in E.A. No. 279 of 1934 to the Subordinate Judge, Ellore, for orders on the question whether any and if so what non-judicial stamp was to be paid for by the plaintiff, and for orders to receive from the plaintiff whatever stamp was necessary, and to have the decree engrossed thereon. The Principal Subordinate Judge allowed the plaintiff's request, and directed his office to determine the value of the stamp in a weak, allowing the

parties in whose favour a decree had been given 15 days time to produce the required non-judicial stamps. A.A.O. No. 81 of 1935 is preferred by defendants 40-43 from this order. The Subordinate Judge's order was obeyed without delay but the learned District Judge of East Godavari held that the engrossing of the decree on the proper stamp paper after 17th September 1934, could not validate any proceedings taken in execution theretofore. Acting on this view, he dismissed E.P. No. 151 of 1931 on 15th November 1934, and A.A.O. No. 291 of 1935 is the plaintiff's appeal from that order of dismissal. For the same reasons the learned District Judge on 30th November 1934 dismissed the two execution petitions of defendant 5, E.P. No 167 of 1931 and E.P. No. 76 of 1934. A.A.O. No. 94 of 1935 and A.A.O. No. 409 of 1935 are defendant 5's appeals from those orders. The last petition with which we have to do is E.A. No. 293 of 1934 presented on 19th November 1934, by a purchaser at the auction held on 17th March 1934 of some of the properties of the judgment, debtors. He brought to the notice of the Court that the decree had by that time been engrossed on a non-judicial stamp. He requested the District Judge to hold that the decree had thereby been validated with retrospective effect, and accordingly to confirm the sale in his favour. The District Judge disposed of this petition and I.A. No. 108 of 1934, (the judgment-debtor's application Under Order 21, Rule 90), in one order on 27th November 1934. He directed that both should be "struck off the file" on the ground that E.P. No. 151 of 1931 had been dismissed. This dismissal, the learned District Judge held, rendered E.A. No. 108 of 1934, superfluous, and made it impossible to comply with E.A. No. 293 of 1934, From the order striking off E.A. No. 293 of 1934, the auction-purchaser has preferred A.A.O. No. 82 of 1935; he has also, in C.E.P. No. 331 of 1935, prayed that the order of the District Judge may be revised u/s 115, Civil P.C.

5. Several interesting questions arise for decision, of which the most important, as already observed, is what is the nature of the decree passed in O.S. No. 18 of 1928 on 16th September 1930. Mr. Jagannadhachariar, without apparently giving the matter much consideration, remarked that it was the preliminary decree and not the final decree. How a mere preliminary decree in a suit for partition could be executable, he did not explain; he seems to have been satisfied that it could, because execution had been going on for over two years. Mr. Rajagopalan, on the other hand, held that the decree, though it styles itself as a preliminary decree, was a final order for effecting a partition within the meaning of Section 2(15), Stamp Act. Mr. Suryanarayana, who appeals in these appeals for the plaintiff, and Mr. Kameswara Rao, who appears for defendant 5, also for the auction-purchaser, contend that in so far as it is a decree for partition, it is only a preliminary decree. They would say that it is only a final decree in so far as it decides the liabilities of the debtors of the joint family to the joint family. According to this view, the executing Court was not asked to act upon the decree in its character of a decree for partition, but merely in its character of a decree for payment of money to the family. Mr. Somayya, who appears for defendants 40-43, supports the decision of Mr. Rajagopalan. It is necessary at this point to examine the

decree, and in particular those portions of it which the plaintiff and defendant 5 have attempted to execute. The decree begins with an order that certain immovable properties be divided into four equal shares, and that that plaintiff, defendant 1, defendant 10, Mid defendant 11, do each get possession of one such share. It goes on to give directions regarding the manner in which the partition of those properties shall be made and the various members of the family to whom certain items shall be allotted. It then declares that certain questions between the members of the family and Home defendants who were occupying lands belonging to the family, and certain questions between the members of the family inter se, shall be reserved for decision in separate suits. Next, the decree directs certain payments to be made to the plaintiff by other members of the family, defendants 1-5. Then we come to the terms with which these appeals are concerned, viz. the clauses directing defendants 40-43 to pay certain sums to the plaintiff, defendant 1 and defendant 5, after deducting certain sums due to them from the plaintiff and defendant 1. It will be convenient to set out these clauses of the decree in full. They are as follows:

(13) That the plaintiff and defendant 1 do each get from defendants 40-43 half of Rs. 1,30,496, being the sum shown as balance in the three names katha, and interest thereon from 14th February 1926, and that the plaintiff and defendant 1 do each get from defendants 40-43 half of Rs. 31,895-11-7, being the balance Under No. 2 Venkayya katha and interest there, on from 6th October 1925.

(14) That plaintiff, defendant 1 and defendant 5 do each get from defendants 40-43 one-third of Rs. 43,145-4-9, being the sum shown as balance in Sesha Rao's katha and interest thereon from 31st March 1925.

(15) That defendants 40-43 do deliver to each of plaintiff and defendant 1 half of the timber shown as balance under No. 2 Venkayya katha or their value, Rs. 6730, and interest thereon from 25th February 1925.

(19) That defendants 40-43 do recover from plaintiff Rs. 87,910-7-10, being the amount of debt payable by him under No. 1 Venkayya katha, and interest there, on from 14th March 1926.

(20) That defendants 40-43 do recover from defendant 1 personally and from the family properties of defendants 2 to 4, the sum of Rs. 98,777-2-10, being the balance of debts still payable under No. 1 Vankayya katha, after deduction of the sum payable by plaintiff as per para. 19 supra, and interest on the said sum of Rupees 98,777-2-10 from 14th March 1926.

(21) (This clause provides for interest on the sums due to the plaintiff, defendants 1, 5, and 40-43.)

(22) That defendants 40-43, do deposit into Court or pay plaintiff and defendant 1 and defendant 5 the sums due to each of them Under the three names katha, No. 2 Venkayya katha and Sesha Rao's katha, after deducting what is due be them from plaintiff and defendant 1 respectively with reference to No. 1

Yankayya katha.

6. The remaining clauses are concerned with the appointment of a Commissioner to determine the amounts due to the several parties Under Clauses 9(a) to 9(d), 10(a) to 10(d), 12(a) to 12(c) and 16 to 18, with directions to the Commissioner, the remuneration of the Receivers and the Commissioner, and the court-fees payable to Government. It is clear that the clauses of the decree extracted above are on the face of them executable provisions. It is also clear that they are not directions for payments to be made by strangers to the joint family as a whole. They are directions for the payment of the specific sums to individual members of the joint family. And there is no gainsaying the statement of defendants 40-43 that these payments are to be made out of moneys that were before the suit joint family property, or out of the proceeds of the sale of joint family property. The effect of these provisions in the decree therefore is that properties which were joint properties are divided amongst the members of the family who were the co-owners. There is nothing more that the Court which tried the suit can do to divide these joint properties. The learned District Judge (Mr. Rajagopalan) was undoubtedly Justified in relying on the decision of Bakewell J. in *Thiruvengadathan Alya v. Mangayya* (1912) 35 Mad 26 where the distinction between a preliminary and a final order for partition is explained. The learned advocates for the plaintiff, defendant 5 and the auction, purchaser have not been able to adduce any arguments or authorities to show that the learned District Judge was wrong. We agree with his conclusion that the decree in this case is a final order of a Civil Court for effecting a partition, and that it falls strictly within the terms of Section 2(15), Stamp Act. That the decree does not finally divide the whole of the joint family property is quite immaterial, As the learned District Judge has observed, the Explanation to the definition of "decree" in Section 2(2), Civil P.C., shows that a decree may be partly; preliminary and partly final. It is not necessary to cite authority for this, or to refer to cases in which this distinction has been acted upon.

7. The next question discussed by Mr. Suryanarayana for the plaintiff has reference to Section 36, Stamp Act. He contends and Mr. Kameswara Rao supports him on behalf of defendant 5 and the auction, purchaser, that it is now too late for defendants 40-43 to object to the execution of the decree. Even if it be held, as we do hold, that the decree of 16th September 1930 was an instrument of partition and as such not executable unless engrossed on a non-judicial stamp of the proper value, the decree was in fact acted upon and executed for over two years, and Section 36, Stamp Act, it is contended, precludes any subsequent objection to its execution on the ground that it has not been properly stamped. This contention, we are satisfied, is baseless. Section 36 deals only with the admission of instruments in evidence. There is no question here of admitting the decree of 16th September 1930 in evidence; the question is one of executing the decree. The provision applicable is Section 35, Stamp Act, which provides that:

No instrument chargeable with duty shall be? acted upon? by any public officer, unless such instrument is duly stamped.

8. For our present purpose, the important words in the section are "acted upon." The only way in which a decree of this kind can be acted upon is by execution. The District Court of East Godavari did not admit the decree in evidence is was never asked to admit it in evidence. What the plaintiff and defendant 5 wanted was that it should be put in execution, i.e. of acted upon, and that was what the District Court did until Mr. Rajagopalan pointed out that it could not be done.

9. Another contention put forward on behalf of the plaintiff, defendant 5 and the auction-purchaser is that when the Principal Subordinate Judge of Ellore on 5th October 1934 directed the proper non-judicial stamp to be produced, and had the decree engrossed thereon, the decree became validated with retrospective effect from the date on which it had been passed. Consequently, it is urged, all the proceedings taken in execution of the decree also became validated. This contention also is devoid of substance. Section 37, Stamp Act, is invoked, but it obviously has no application; this is not a case in which an instrument has been written on a stamp of sufficient amount but of improper description. There is no provision of law which could validate this decree with retrospective effect. As Mr. Somayya points out, Section 42(2), Stamp Act, merely provides that when the duty leviable upon an unstamped or insufficiently stamped instrument has been paid, and the instrument has been endorsed, the instrument shall thereupon be admissible in evidence, and may be acted upon. In terms this provision is not retrospective. It is well settled that a final decree for partition has no existence as a decree until it is engrossed on the proper non-judicial stamp paper; till that is done the suit is pending: vide *Jotindra Mohan Tagore v. Bejoy Chand* (1905) 32 Cal 483.

10. A subsidiary point taken in A.A.O. No. 9 of 1935 is that the District Judge, Mr. Rajagopalan, had no jurisdiction to review his predecessor's order dated 17th March 1934 on E.A. No. 77 of 1934; or, if he had jurisdiction, his order granting review was contrary to law. The first contention is apparently based on Rule 2, Order 47, Civil P.C. but it can not be upheld; the application of review was made to Mr. Jagannadhachariar and notice of it was given by him. There has been no appeal from Mr. Rajagopalan's order granting a review. That does not by itself preclude Mr. Suryanarayana from showing that it is wrong in his appeal from the final order passed after the review was granted: vide Rule 7, Order 47. But Mr. Suryanarayana has not attempted in argument to show exactly why he contends that Mr. Rajagopalan had so jurisdiction, nor why his order was illegal. From the unofficial typewritten copies produced by Mr. Suryanarayana at the time of hearing, it would seem that Mr. Rajagopalan granted the review because his predecessor had not decided the only point of importance put forward by the petitioners in E.A. No. 77 of 1934. The point raised was that the decree was not executable for want of engrossment on a non-judicial stamp. Mr. Jagannadhachariar did not say a word about this in his order of 17th March

1934. This omission would clearly amount to "other sufficient reason" Under Rule 1, Order 47, even if it did not constitute a "mistake or error apparent on the face of the record." It is therefore impossible for us to hold either that Mr. Rajagopalan had no jurisdiction, or that his order granting a review was wrong in law.

11. Mr. Somayya, for the 40-43 judgment-debtors, contended that it was a matter of little or no importance, whether Mr. Rajagopalan had or had not jurisdiction to review his predecessor's order in view of the fact that his clients had preferred an appeal (A.A.O. No. 304 of 1934) from the order which was reviewed. The application for review of Mr. Jagannadhachariar's order of 17th March 1934 was filed on 6th April 1934; the appeal from the same order was presented in this Court on 16th July 1934. Now it is well settled that when an application for review has been made, the subsequent filing of an appeal will not render the application for review incompetent: see *Chenna Reddi v. Peddaobi Reddi* (1909) 32 Mad 416. But, if the application for review is granted during the pendency of the appeal, the appeal cannot be heard and must be dismissed. The reason is obvious; the order appealed from has been superseded by the order passed after review: *Kanhaiya Lai v. Baldeo Prasad* (1906) 28 All 240. It remains to be disposed of the contentions of the auction-purchaser (appellant in A.A.O. No. 82 of 1935). Mr. Kameswara Rao argues that the auction, purchaser, having bought at the sale held by the Court, with no reason to suppose that there was anything lacking in the Court's power to sell, and having paid value, must be protected. He relies on the Privy Council cases reported in *Rewa Mahton v. Ram Kishan Singh* (1887) Cal 18 and *Malkarjun v. Narhari* (1901) 26 Bom 337. Those cases have no application to this. In both, it is clear that the executing Court had jurisdiction to sell. Here the whole point is that there was no decree in existence at the time of sale, and that consequently the whole of the sale proceedings was a mere nullity. There is therefore on the merits nothing in A.A.O. No. 82 of 1935 and C.E.P. No. 331 of 1935. Technically also the appeal and the C.E.P. are incompetent. There is no provision in the CPC for an application by the auction-purchaser for confirmation of the sale; confirmation follows automatically Under Rule 92(1) and the setting aside of the sale follows automatically, Under Rule 92(2) of Order 21. An order rejecting an auction, purchaser's application for confirmation of the sale is not an appealable matter, nor can it be revised. It is very unfortunate for the purchaser that he should have been misled by the action of the Court into paying down his money, and leaving it lying idle for such a long period, but it is quite impossible to confirm the sale in his favour.

12. A.A.O. No. 18 of 1935 is clearly incompetent. The application E.A. No 279 of 1934, to the Subordinate Judge of Ellore, was a mere reminder to the Court to do a duty incumbent on the Court, viz. to see that the decree was engrossed on a proper non-judicial stamp. This has nothing to do with the execution, discharge or satisfaction of the decree, and the Subordinate Judge's order is not one u/s 47, Civil P.C. The learned Subordinate Judge has made a somewhat obscure reference to the doctrine of "nunc pro tunc" which we do not altogether

Understand. If he meant to imply that the decree after engrossment on the proper stamp could or would become validated with effect from the date, 16th September 1930, he was clearly wrong. We have already indicated that the decree only came into existence as a decree on the date on which it was engrossed. The learned District Judge (Mr. Rajagopalan) was wrong in holding that E.P. No. 151 of 1931 "must be deemed to have been dismissed on 6th September 1934." The E.P. was not before the learned District Judge on 6th September 1934 when he disposed of E.A. No. 77 of 1934. Actually, the learned District Judge dismissed E.P. No. 151 of 1931 on 15th November 1934 as appears from the concluding sentence of his judgment, and from the decretal order passed in pursuance of it. This order is correct, if based upon the view that the decree which was to be executed was the decree engrossed on a non-judicial stamp, no copy whereof had been produced before, or transmitted to the District Judge, East Godavari. It would be incorrect if based on the ground that E.P. No. 151 of 1931 must be deemed to have been dismissed on 6th September 1934, but we must decline to interfere with it, since it is quite possible to read the learned District Judge's judgment as basing it on the proper ground, viz. that a certified copy of the decree had not been produced (vide Order 21, Rule 11(3), Civil P.C.).

13. We proceed to pass orders on the matters before us in the light of these conclusions. A.A.O. No. 304 of 1934 is dismissed with the costs of respondent 1 (plaintiff.) A.A.O. No. 9 of 1935 is dismissed; we make no order as to costs, because the respondents were unduly dilatory in raising the contention that the decree could not be executed. A.A.O. No. 81 of 1935 is dismissed with costs. C.E.P. 328 of 1935 also is dismissed. A.A.O. No. 291, 94 and 409 of 1935 are dismissed; as in A.A.O. No. 9 of 1935 we make no order as to costs. A.A.O. No. 82 of 1935 and C.E.P. No. 331 of 1935 are dismissed. The parties will pay their own costs in these.