

(1962) 09 MAD CK 0023

In the Madras High Court

Case No : Civil Revision Petition No's. 162 and 455 of 1960

Periyakarupa Thevar and Others

APPELLANT

Vs

Vellai alias Ocha Thevar and Others

RESPONDENT

Date of Decision : 14-09-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Criminal Procedure Code, 1898 (CrPC) — Section 141, 146

Citation : AIR 1963 Mad 338 : (1963) CriLJ 381 : (1964) ILR (Mad) 494 :
(1963) 1 MLJ 376

Hon'ble Judges : Ramakrishnan, J; Jagadisan, J

Bench : Division Bench

Advocate : P.R. Gopalkrishnan and S. Jayakumar, for the Appellant; A.G., T. Changalvarayan and T.N. Ananthanayaki, for the Respondent

Final Decision : Dismissed

Judgement

Jagadisan, J.—These civil revision petitions have been directed to be heard by a Division Bench by order of the learned Chief Justice in view

of the importance of the question that is raised and, because, the decision of a single Judge of this court in Kondammal and Others Vs. Duraiswami

Naicker and Others, is challenged as not having been correctly decided.

2. The undisputed facts are as follows. A dispute in respect of possession of certain lands gave rise to a proceeding u/s 145 CrI. P. C. before the

Revenue Divisional Officer, Usilampatti who is the Executive I Class Magistrate, Usilam-patti. Before, the learned Magistrate one Periya Karuppa

Thevar and 9 others were the B party and one Vellia alias Ocha Thevar constituted the A party. The learned magistrate, being apparently of the

opinion that the question which party was in possession on the crucial date, namely, the date of the preliminary order could not be satisfactorily

determined by him, referred the matter to the District Munsif, Tirumangalam. This procedure was adopted u/s 146 Crl. P. C. When the

proceedings came on for hearing before the learned District Munsif on 18-9-1959 the A party appeared through his counsel, but the B party were

absent and remained ex parte. A witness was examined on the side of the A party who swore to the possession of that party on the date of the

preliminary order and there was no evidence contra. On this evidence an ex parte order was passed by the learned District Munsif holding

adversely against the B party by declaring the possession of the A party.

3. The B party therefore filed an interlocutory application, I. No. 1144 of 1959 before the District Munsif praying to set aside the ex parte order,

invoking the aid of Section 151 and Order IX, Rule 13, C. P. C. During the pendency of this application Vellai alias Ocha Thevar, the A party,

died on 27-10-1959. The B party thereupon filed I. A. No. 1416 of 1959 to bring on record the widow , and the daughter of the deceased A

party as legal representatives in order to enable them to prosecute further the application to set aside the ex parte order. The learned District

Munsif held that the provisions of the CPC were not applicable to the reference proceedings u/s 146, Crl. P. C. and dismissed both the

applications. It is against these orders that the present civil revision petitions have been preferred.

4. It is necessary to refer even at the outset to the decision in Kondammal and Others Vs. Duraiswami Naicker and Others, , as the correctness of

this decision has been called in question by the learned Advocate General appearing for the respondent in these petitions. That was also a case

where a reference in the Civil Court u/s 146, Crl. P. C. was made by the magistrate in a proceeding u/s 145, Crl. P. C. The A party failed to be

present in the civil Court when the matter was posted for hearing and was treated as ex parte. The reference was disposed of by the civil Court in

their absence. There does not appear to have been any application in that case under Order IX, Rule 13, C. P. C. for setting aside the ex parte

order. Apparently after the ex parte order of the civil Court was transmitted to the magistrate and after the Magistrate implemented the finding of

the civil Court a petition to quash those proceedings was filed in this Court. One of the grounds urged for quashing the magisterial proceedings was

that the petitioners who were absent before the civil Court had no opportunity to participate in the enquiry held by the civil Court.

Anantanarayanan, J. held that the interests of equity and justice required that they should be heard. At p. 284 (of Mad LJ): (at p. 385 of AIR) the

learned Judge observes thus: ""In any event, it is now clear upon the"" authority Kochadai Naidu and Another Vs. Nagayasami Naidu and Others,

that all pro-Visions of the CPC are applicable to such matters as a reference to a civil Court u/s 146, CrI. P. C. This would necessarily involve the

further proposition that a party, treated as ex parte in such proceedings, could seek to have that order set aside, and could request the Civil Court

to afford him an opportunity to be heard, in accordance with Order 9, Rule 13, C. P. C. or. any other relevant rule of Order 9, C. P. C. Hence, all

that is necessary at the present stage is to direct that in these proceedings u/s 145, CrI. P. C.. the criminal Court must wait for the Civil Court to

transmit the orders that it may ultimately pass in the matter, and then act in accordance with those findings.

5. We must observe that what we are concerned with in the present case is not the correctness of the actual decision in Kondammal and Others

Vs. Duraiswami Naicker and Others, , but only the tenability of the observations of the learned Judge expressing the view that the provisions of

Order IX, Rule 13, C. P. Code would be applicable to a reference proceeding in a Civil Court u/s 146, CrI. P. C. The learned Judge has referred

to the decision in Kochadai Naidu and Another Vs. Nagayasami Naidu and Others, in support of his observation.

6. It will be now convenient to refer to the decision in Kochadai Naidu and Another Vs. Nagayasami Naidu and Others, . That is a decision of

Ramachandra Iyer, J as he then was. The question that was raised in that case was whether a reference in a civil Court arising out of a proceeding

u/s 145. CrI- P. C is a ""proceeding"" within Section 24, C. P. C. susceptible. of transfer. A reference had been made to the District Munsif,

Periakulam, and one of the parties applied for transfer of the proceedings from that-Court to the sub-Court, Dindigul, to be tried along with

another suit between the same parties raising the question of title in respect of the very properties over which there was the land dispute.

The view taken by the learned Judge was that a pending proceeding in a civil Court u/s 146, CrI P. C. is a ""proceeding"" within the meaning of

Section 24, C. P. C. and that it can be transferred to any other Court. It was contended before the learned Judge that the jurisdiction of the civil

Court acting u/s 146, Crl. P. C. was merely consultative or advisory on the strength of the observation of Ramaswami, J. in Rengammal Vs. Rama

Subbarayalu Reddiar, . This contention was however repelled by Ramachandra Iyer, J. in the following words:

That however is not correct. The jurisdiction conferred on the civil Court, is by the statute and not one under the magistrate's own authority;

assuming that such a reference or delegation could be legal the civil Court will have a duty to decide the question referred by virtue of the statute.

The magistrate on his part would be bound by the finding given by the civil Court on the question of possession.

The conclusion of the learned Judge upholding the applicability of Section 24, C. P. Code is thus expressed at page 816:

In my opinion, the true principle is that, where the Legislature confers a special jurisdiction on recognised Court and is silent as to the manner in

which that jurisdiction is to be exercised, it will only be an addition to the existing jurisdiction of that Court, and all rules of procedure that apply to

its ordinary jurisdiction will be attracted in regard to the special jurisdiction as well. That rule would apply to a civil Court determining an issue as to

possession on a reference u/s 146. Crl. P. C. To such a proceeding all provisions of the CPC except those relating to costs, appeals, reference,

review etc., would apply-so far as they are not inconsistent with the nature of those proceedings.

It is the latter part of this observation which has been mainly relied upon by Anantanarayanan, J. in Kondammal and Others Vs. Duraiswami

Naicker and Others, , for the proposition that Order IX, Rule 13, C. P. C. would be applicable to a reference application under "" Section 146,

CrI. P. C.

7. Before discussing the relevant statutory pro-visions and the question whether the provisions of the Civil Procedure Code, particularly the

Chapter under Order IX, are applicable to the proceeding before a civil Court, u/s 146, CrI. P. C. we would like to refer to the following order of

the learned Chief Justice by which he directed the hearing of these petitions by a Division Bench:

The learned Advocate General contends that the decision in Kondammal and Others Vs. Duraiswami Naicker and Others, requires

reconsideration. I am also of the same view having regard to the fact that the proceedings referred u/s 146; Crl. P. C. cannot be said to be a suit.

Section 146, Crl. P. C. is silent about the procedure to be followed by the civil Court while disposing of the matter referred in it, but it is possible

to infer that the provisions of the CPC are attracted to those proceedings as the reference is to the civil Court and not to any officer presiding over

a Court as a persona designata. Section 146, Crl. P. C. in so far as it is material for the present purpose, reads,

(1) If the magistrate is of opinion that none of the parties was then in such possession, or is unable to decide as to which of them was then in such

possession, of the subject of dispute, he may attach it, and draw up a statement of the Facts of the case and forward the record of the proceeding,

to a civil Court of competent jurisdiction to decide the question whether any and which of the parties was in possession of the subject of dispute at

the date of the order as explained in Sub-section (4) of Section 145; and he shall direct the parties to appear before the civil Court on a date to be

fixed by him;

(1-A) On receipt of any such reference, the civil Court shall peruse the evidence on record and take such further evidence as may be produced by

the parties respectively, consider the effect of all such evidence, and after hearing the parties, decide the question of, possession so referred to it.

(1-B) The Civil Court shall, as far as may be practicable, within a period of three months from the date of the appearance of the parties before it,

conclude the inquiry and transmit its findings together with the record of the proceeding to the magistrate by whom the reference was made; and

the magistrate shall, on receipt thereof, proceed to dispose of the proceeding u/s 145 in conformity with the decision of the civil Court.

(1-D) No appeal shall lie from any finding of the civil Court given on a reference under this section nor shall any review or revision of any such

finding is allowed.....

There is enough indication in the terms of Section 146 quoted above to show that though the matter is dealt with by the "civil Court" as such its

powers in dealing with the matter are narrow and circumscribed. The Court has

merely to record the evidence in the matter, hear the parties and submit its finding to the referring magistrate. The section is so designed as to enable the civil Court to function speedily in view of the fact that proceedings u/s 145, Crl. p. C. involves an imminent threat of breach of the peace. On the frame of the section it is rather difficult to hold that the provisions of the CPC operate and govern the proceedings which, it must be remembered, do not fall within the general jurisdiction of that Court. The pendency of the proceeding in the civil Court after a reference by a magistrate is only a sojourn of the main proceeding which is of course governed only by the provisions of the Criminal Procedure Code. But we have also to take note of the fact that there is nothing in Section 146, Crl. P. C. to prohibit the application of the provisions of the CPC in respect of these proceedings during their subsistence in the civil Court.

8. There cannot be any doubt that Order IX, Rule 13, C. P. C. would not in terms apply to the reference proceedings. As pointed out by the

learned Chief Justice Order IX, Rule 13 governs only suits. It reads.

In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to

set it aside, and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing

when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment

into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.....

In Kochadai Naidu and Another Vs. Nagayasami Naidu and Others, , the learned Chief Justice held that the matter before the civil Court arising

u/s 146, Crl. P. C. is only a proceeding and not, a suit. Now the question is whether Order IX, Rule 13, C. P. C. can be invoked because of

Section 141. C. P. C. Section 141 provides:

The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable in all proceedings in any Court, of

civil jurisdiction.

In order to determine the scope of the application of Section 141, C. P. C. it is necessary to refer to the previous history of this provision. In the

Code of 1877 Section 647 ran as follows

The procedure herein prescribed shall be followed so far as it can be made applicable in all proceedings in any Court of civil jurisdiction other than suits and appeals.

There was a conflict of judicial pronouncements on the question whether execution proceedings were "proceedings other than suits or appeals

within the meaning of Section 647. By Act VI of 1892, the Legislature therefore added the following explanation:

This section does not apply to applications for the execution of decrees which are proceedings in suits.

Deciding a case which arose before the Explanation, the Judicial Committee observed in *Thakur Prasad v. Fakirullah*, ILR 17 All 106 (PC). "Their

Lordships think that the proceedings spoken of in Section 647 include original matters in the nature of suits such as proceedings in probate,

guardianship, and so forth, and do not include executions..... Their Lordships' attention has been called to the recent Act VI of 1892 which would

appear to have been passed in order to avoid the disturbance of practice caused by the Allahabad rulings.....their Lordships have thought it right

to state their opinion that the Act of 1892 does nothing more than express the true meaning of the Civil Procedure Code." In the present section

the words "other than suits and appeal" and the Explanation have been omitted, apparently in the view that they are unnecessary and superfluous.

9. It is now well settled that Section 141, C. P. C. does not apply to execution proceedings. There is also ample authority interpreting the word

proceeding" as relating to original matters in the nature of suits. *Sarat Krishna Bose Vs. Bisweswar Mitra and Others*, *Sarat Krishna Bose v.*

Bisweswar Mitra; K. and J. Cooper Vs. Macmillan and Co., ; ILR (1941) AH 807 : AIR 1942 All 85 *Ram Gopal v. Shantilal; K.*

Venkatanarasimha Rao Vs. Hemadri Suryanarayana, Salar Beg Saheb Vs. Karumanchi Kotayya, . The nature of a proceeding whether it is of a

kind of original action bearing the characteristics of a suit, is not always easy to determine. Probate, Guardianship and Matrimonial proceedings,

initiated by applications provided for under special enactments, can readily be treated as being of the nature of original actions or suits.

Interlocutory applications in a pending suit would not fall within the class of original proceedings. We do not think that the proceedings in a civil

Court u/s 146, CrI. P. C. can with any propriety be called ""original"" in character. They are not initiated in that Court and they do not terminate their

affecting the rights of parties. The proceedings transit through the civil Court and are merely a phase of a criminal proceeding in a civil jurisdiction,

though, for the nonce they may assume the garb of civil proceedings. Section 141, C. P. C. cannot therefore apply to such proceedings.

10. There is another reason for the inapplicability of Section 141. It is only the procedure provided for in the Code that is attracted by that section.

Substantive rights like right of appeal, revision, or review, which are not part of procedural law cannot be availed of by relying on Section 141, C.

P. C. This has been laid down by a Division Bench of this Court in *Anantharaju Shetty v. Appu Hegade*, 37 MLJ 162 : AIR 1919 Mad 244.

Seshagiri Aiyar, J. expressed his opinion in these terms:

It was next argued that Section 141, C. P. Code is indicative of a general enunciation of principle by the legislature that to all the judicial

proceedings, the CPC is applicable. The section only empowers the Judge to regulate judicial trials by rules as to summoning of witnesses, etc.

which are to be found in the Code and not that the Code is to be applied in its entirety to such proceedings, including power of appeal and of review.

Following the ruling cited above it has been decided in *Pitchika Somanna and Others Vs. Putchala Chinnayya*, that the remedy under Order IX, C.

P. C. is not a matter of procedure and that a petition u/s 73 of the Madras Village Courts Act which is dismissed for default cannot be restored

invoking Order IX, Rule 9. In our opinion an application under Order IX, Rule 13 stands on the same footing as one under Order IX Rule 9. A

right to have an ex parte order set aside is not procedural but substantive in character." Further Section 141, C. P. C. must be read subject to

special procedure prescribed for a proceeding under a particular enactment. The maxim *generalia specialibus non derogant* (general provisions will

not abrogate special provisions) or *generalibus specialia derogant* (special things derogate from general) applies even to matters of procedural law.

This principle was upheld by a Single Judge of this Court in *S.J.S. Fernandes Vs. V. Ranganayakulu Chetty*, . The question that was raised in that

case was whether the order of this Court in a revision petition, disposing of a

matter arising out of the Madras Buildings (Lease and Rent Control)

Act, 1949 can be the subject-matter of a review under Order XLVII, Rule 1, C. P. C. At page 446 Ramaswami, J. observes thus:

So we have got to see whether in the present proceedings where the High Court is reached that Court is appealed to as one of the ordinary

Courts of the country with regard to whose procedure, orders and decrees the rules of the CPC are applicable. The Act itself does not contain any

provision regarding the application of the CPC and in fact the provisions of the Act seem to be self-contained in regard to procedure.....

In the face of these clear decisions, holding that the provisions of the CPC do not apply, and if the Act itself is a self contained one, there is no

point in contending that by reason of Section 141, C. P. C. the provision for review is attracted.

The proceedings u/s 145, Crl. P. C. are undoubtedly governed by the terms of that Code. The procedure to be followed by the civil Court u/s

146, Crl. P. C. when the matter is referred to that Court is just what is contained in that provision itself. It is not possible to enlarge the scope of

that procedure by resorting generally to the provisions of the Civil Procedure Code. We have already pointed out that in terms the provisions of

Order IX, Rule 13 apply only to suits. The provisions relating to the impleading of legal representatives of a deceased party also govern only suits

and appeals. Section 141, C. P. C. cannot be called into play for the reasons already stated by us.

11. We are therefore of opinion that the observations in Kondammal and Others Vs. Duraiswami Naicker and Others, that the provisions of Order

IX would be applicable to a reference proceeding u/s 146 Crl. P. C. are not with respect, well founded and cannot be supported.

12. In the result the civil revision petitions fail and are dismissed. In the circumstances, there will be no order as to costs.