

(1933) 02 MAD CK 0030
In the Madras High Court

Pidikiti Kotayya and Others

APPELLANT

Vs

Anne Radhakrishnamurthi and Others

RESPONDENT

Date of Decision : 01-02-1933

Acts Referred:

Citation : AIR 1933 Mad 833 : (1933) 38 LW 588

Hon'ble Judges : Madhavan Nair, J

Bench : Division Bench

Judgement

Madhavan Nair, J.—Defendants 2, 3, 4 and 5 are the appellants. The plaintiff is the son of one Gopayya. Gopayya's brother is Rathayya, defendant 1. The wife of Gopayya is Seetaramamma. The suit out of which this appeal arises was instituted by the plaintiff for recovery of one half share of the suit properties. The circumstances in which the suit was instituted are these: In O.S. No. 50 of 1911 defendant 5 obtained a decree against the plaintiff's father and defendant 1 for recovery of possession of the suit property and other properties together with mesne profits and costs. The ground of his claim was that he was entitled to the properties as the reversioner to the last male owner and that the plaintiff's father and defendant 1 were in possession as trespassers. The decree was dated 24th February 1914. After the decree defendant 5 applied for possession of the properties, on 26th September 1914, but did not ask for mesne profits and costs. But immediately after delivery of possession on 27th September 1914, the property contained in Sch. A was gifted by defendant 5 to Gopayya and defendant 1. Gopayya died on 6th December 1915. The plaintiff was not born at that time. Later on defendant 5 took steps to execute the decree in O.S. No. 50 of 1911 for the mesne profits and costs. It is the case of the plaintiff (respondent 1) that there was an adjustment between the parties at that time, that the decree for mesne profits and costs should not be executed and that the proceedings in, execution were taken to deprive Gopayya's widow and subsequently the plaintiff of possession of these properties. The decree for mesne profits was transferred from Masulipatam to Bezwada for execution on 12th January 1916. On 22nd February 1916, the defendant applied for

attachment of Schs. A and B properties and on 9th April 1916 the properties were attached. Before the sale of the attached properties, the plaintiff was born on 5th August 1916, and he was not specifically brought on the record as representative of his father. It is one of the disputed questions in the case, to which we shall have to refer later, whether the widow Seetaramamma continued on the record in the execution proceedings. On 4th November 1916 the properties were sold, and the sale was confirmed on 4th December 1916, and the sale certificate was issued on 2nd February 1917. Defendant 5 got possession of Schs. A and B properties on 26th February 1917, and later on portions of those properties were sold to the various appellants under different deeds.

2. The plaintiff's contention is that the sale of these properties is not binding on him because his interests were not represented by the widow and that he himself was not represented as a party. For these reasons he says that the sale is a nullity. He has also taken the ground that the adjustment pleaded is true and that the proceedings were carried on by defendant 5 with the knowledge that there was such an adjustment and that therefore the proceedings were fraudulent. In reply, the appellants contend that defendant 1 was admittedly on the record in the execution proceedings and was competent to represent the interests of the minor plaintiff, that even if he was not competent, the widow Seetaramamma continued to be on the record after receiving notice of the execution proceedings and was therefore competent to represent the interests of the minor; and that no case of fraud with regard to the adjustment has been made out. There are three points therefore for determination: 1. Whether defendant 1 sufficiently represented the interests of the minor; 2. Whether notice of execution proceedings had gone to Seetaramamma and if so, whether she could represent the interests of the minor; and 3. Whether the proceedings were vitiated by the fraud alleged by the plaintiff. We will deal with each of these questions separately.

3. On the first question we are of opinion that defendant 1 could not in law sufficiently represent the interests of the minor. The reason is this: The decree that was being executed was not one which was obtained against the joint family manager nor was it directed against the joint family property. That decree was obtained against the father of the plaintiff and defendant 1 as trespassers and not as persons representing properties of the joint family. In these circumstances the decisions relied on by the learned Counsel for the appellants in *M.L.M. Ramanathan Chettiar Vs. Ramanathan Chettiar and Others*, *Soorayya v. Chinna Anjaneyalu* AIR 1919 Mad 16 and the other allied decisions do not apply to the case.

4. The next question is whether the widow Seetaramamma, the mother of the plaintiff, had notice of the execution proceedings. The learned Judge holds that she had no notice and therefore the proceedings are not binding on the plaintiff. The evidence on this point consists of the proceedings taken by defendant 5 to

transfer the execution of the decree to the Bezwada Court and of the oral evidence of a few witnesses, viz., plaintiff's maternal uncle (P.W. 1), the widow (P.W. 3), defendant 1 (D.W. 1), and defendant 5 (D.W. 2). According to Rule 138 of the Civil Rules of Practice, when an application for transmission of a decree to another Court for execution is made, notice of the application shall be given in all cases in which under Order 21, Rule 22, Civil P.C., notice of an application for execution is required. Order 21, Rule 22 says that where an application for execution is made against the legal representative of the party to the decree, then notice shall be issued to the person against whom execution is applied for. Therefore we must in, considering the evidence in the case start with the presumption that when the transmission application was made, notice would have gone to the widow Seetaramamma, her husband having died prior to that application. Section 50, Civil P.C., says that when a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased. Such an application would in the ordinary course have been made in this case. Therefore we start with the presumption that Seetaramamma was brought on the record on the death of her husband and notice of the application was sent to her. (After examining the evidence both documentary and oral, his Lordship held that when the husband of Seetaramamma died, she was brought on the record as his legal representative and she continued to remain on the record throughout after receiving notice of execution proceedings and that the learned Judge's finding that Seetaramamma had not received notice cannot be upheld, and proceeded). Assuming that Seetaramamma had notice, can it be said that her representation of the plaintiff's interests was competent and that the sale therefore cannot be called into question even though the plaintiff himself was not brought on the record? If our finding with regard to notice is correct then it follows that she and defendant 1 had notice of the proceedings and that if there was anything to be done on behalf of the interests of the minor or of themselves, they would have taken steps to safeguard them. It is argued by Mr. Raghava Rao that strictly speaking a legal guardian should have been appointed for the minor. Now if a guardian had been appointed, in all likelihood that guardian would have been either the mother or defendant 1. It has been pointed out by their Lordships of the Privy Council in *Bissessur Lall Sahoo v. Luchmessur Singh* (1879) 6 IA 233(P C) that:

In execution proceedings the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find it is substantially right.

5. In this case we have no doubt that the execution proceedings were in substance correct, and if there was any re-presentation to be made on behalf of the minor, such representation would have been made by his mother or by defendant 1. As we have said, if the minor had been made a party to the execution proceedings, he would have appeared by his mother as guardian, and there is no reason to suppose that anything would have been done differently in

the execution proceedings if she had been described as his guardian instead of her being there as the representative of his estate. In this connexion our attention was drawn to the decision in *Devji v. Sambhu* (1900)24 Bom.135. No doubt that case is distinguishable from the present case, having regard to the fact that the widow herself was sued in that suit; but that distinction does not make any difference having regard to our opinion that the execution proceedings were substantially right. That being our finding we cannot give effect to the merely technical objection that is now urged to invalidate the execution proceedings. We therefore hold that the representation by the widow was sufficient in this case to make the proceedings binding on the plaintiff.

6. The last question is whether the proceedings were vitiated on account of the alleged fraud. The evidence with regard to fraud is not very full. It may be for this reason, viz., that fraud as a distinct ground of attack was not alleged in the plaint, nor was a specific issue raised about it. As already stated, the allegation of fraud was made with regard to the adjustment which was alleged to have taken place between defendant 5 and the plaintiff's father and defendant 1 that he would not execute the decree for mesne profits and costs. (After examining the evidence, his Lordship held that the fraud was not made out and concluded). These being our findings it follows that the plaintiff is not entitled to succeed in the suit for the recovery of a half share of the property. We therefore set aside the decision of the lower Court and dismiss the plaintiff's suit, but in the circumstances direct each party to bear his costs in this Court. The memorandum of objections is dismissed.