

(1942) 03 MAD CK 0017
In the Madras High Court

P.K. Subramania Ayyar

APPELLANT

Vs

K.T.S. Thandavamurthi Chetty

RESPONDENT

Date of Decision : 20-03-1942

Acts Referred:

Citation : AIR 1942 Mad 670 : (1942) ILR (Mad) 933 : (1942) 55 LW 433 : (1942) 2 MLJ 115

Hon'ble Judges : Alfred Henry Lionel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.—The question here is whether a decree passed by the City Civil Court declaring that the appellant is

entitled to a charge over the proceeds of the sale of property belonging to one Natesa is effective as against the respondent, who is Natesa's

brother. In 1931 Sabapathi Chetti, the father of Natesa and the respondent, died leaving a will dated the 15th October, 1931, by which he

bequeathed to Natesa a house known as 2|46, Erulappan Street, Madras and to the respondent a house known as 17,, Kuniarappa Mudali Street.

The respondent was then a boy of about ten years of age. On the 28th. October, 1936 the estate of the minor was vested in the Official Trustee of

Madras and as the guardian of the respondent's property he obtained probate of the father's will. Natesa had taken possession of both, the

properties and the Official Trustee was compelled to file a suit (No. 79 of 1937) on the Original Side of this Court to recover possession of the

minor's interest in his father's estate. The Official Trustee based his case on two grounds. In the first place he contended that the respondent was

entitled to the property representing No. 17, Kumarappa Mudali Street, by reason of the will. In the second place he said that even if the will were

invalid, the respondent was entitled to have the properties partitioned and his share delivered to him. The Court appointed the Official Trustee the receiver in the suit. It transpired that after his father's death, Natesa had created a mortgage on the property left to him. By an order of the Court this property was sold and the mortgage discharged out of the proceeds. There remained a balance of Rs. 1,927-5-3, which was paid into Court to the credit of the suit.

2. On the 17th February, 1938, the appellant instituted O.S. No. 244 of 1938, in the City Civil Court against Natesa for a decree for specific performance of an agreement to execute in his favour a mortgage of the Erulappan Street property. He averred that he had advanced moneys to Natesa in anticipation of the mortgage. In the alternative he asked for a charge on the property to the amount of Natesa's indebtedness to him. On the 8th August, 1938, the appellant applied for an attachment before judgment of the Rs. 1,927-5-3, lying to the credit of the Official Trustee's suit in this Court. The appellant had not received permission of this Court to apply for the attachment of these moneys, and as for the time being they were vested in the Official Trustee in his capacity of receiver in C. S. No. 79 of 1937, the appellant's action amounted to contempt of Court, but his action was not resented and the attachment remained effective until the 27th of July, 1939.

3. On the 9th January, 1939, the appellant was granted a decree in his suit against Natesa. The Erulappan Street property had by this time been sold and therefore it was not possible for the Court to give a decree for specific performance of the mortgage, but it gave a money decree for Rs. 760, with interest and costs, and a charge on the property to the extent of the decretal amount. The property having been converted into money and part of the money spent in discharging the mortgage over the property, the charge could only be effected, if at all, on the money lying to the credit of the Official Trustee's suit in this Court. In the meantime, namely on the 18th August, 1938, the Official Trustee as receiver applied for the payment out to him of the money in Court. On this application Venkataramana Rao, J., passed this order:

The balance of the amount, deducting the amount of the attachment may be paid to the Official Trustee. I leave it to the Official Trustee whether

he should contest the attachment.

4. The attachment referred to in this order was of course, the attachment obtained by the appellant in the City Civil Court and it meant that the

attachment was to remain effective to the extent of the appellant's claim against Natesa, unless the Official Trustee took steps to challenge it. The

Official Trustee took no steps to challenge, the attachment until the appellant applied to this Court for an order allowing him to withdraw sufficient

of the money in Court to satisfy his decree against Natesa. When this application was made, the Official Trustee objected, and as a result of his

objection the Master held that the attachment was invalid, because at the time it was made it had not been decided to whom the balance of the sale

proceeds of the Erulappan Street property belonged.

5. On the 26th January, 1940, Somayya, J., gave judgment in the Official Trustee's suit. The learned Judge found the will to be valid and

consequently held that the respondent was entitled to the Kumarappa Mudali Street property with mesne profits from the date on which Natesa

took possession. As the result of investigation it was found that the respondent was entitled to a sum of Rs. 3,150 by way of mesne profits. On the

4th March, 1941, the Official Trustee, as the decree-holder in C.S. No. 79 of 1937, applied for an order attaching the balance of the sale

proceeds of the Erulappan Street property lying to the credit of the suit. It was then the appellant's turn to object. Relying on the charge which the

City Civil Court had given him, he resisted the application of the Official Trustee and the Master held that his objection was well-founded. The

respondent appealed and Krishnaswami Ayyangar, J., reversed the decision of the Master. The learned Judge considered that the decree of the

City Civil Court was invalid as against the receiver in C.S. No. 79 of 1937, and on this ground he reversed the Master's order. This appeal is from

the order of the learned Judge.

6. Mr. Rajah Aiyar on behalf of the appellant admits that his client was guilty of contempt in applying for the attachment of the moneys which the

Official Trustee as receiver was entitled to hold in C.S. No. 79 of 1937, but he pertinently points out that no complaint was ever made on this

ground and that his client's action in applying for attachment does not affect his present case. He contends that his client was entitled, as against

Natesa, to ask for a charge on Natesa's property or the moneys realized by the sale without impleading the receiver, but even if he ought to have

made the receiver a party, the fact that he did not do so does not mean that the decree passed of the City Civil Court can be regarded as a nullity.

The receiver knew of the suit, but he did not seek to be made a party and at no time did he offer any objection to the reliefs which the appellant

was seeking. When the Official Trustee himself applied for the attachment of the moneys in Court after he had obtained a decree in his suit, he did

so not as receiver, but as the Official Trustee.

7. In *Kumar Suttia Ghosal v. Rani Golap Moni Debi* (1897) 5 C.W.N. 27, the Calcutta High Court held that a receiver is not a necessary party to

a. suit for possession of immovable property where the facts were these. The petitioners claimed to be the absolute owners and had been in

possession as howladars of certain land in the district of Khulna. A receiver had been appointed to take charge of these lands but persons claiming

adversely to the petitioners were in actual possession. The petitioners desired to bring a suit against those persons for possession and sought to join

the receiver as a party. The Court held that the receiver was not a necessary party. In *Administrator-General v. Dasai Goundan* (1910) 9 M.L.T.

300, Wallis, J., followed this decision and referred to the case of *Smith v. The Earl of Effingham* (1844) 49 E.R. 1103 : 7 Beavan 357. In the last

mentioned case a receiver had been appointed in a suit in which the priority of different incumbrances on an estate was to be determined. A person

who claimed to be the first incumbrancer had not been made a party to that suit and he filed a bill of his own to establish his right. It was held that

the receiver was not a necessary party to his suit.

8. The learned advocate for the respondent relies on the decisions in *Mrs. Levina Ashton v. Madhabmoni Desi* (1910) 14 C.W.N. 560 Fraser and

Ross Vs. Krishnaswami Iyer and Others, , and *Kalyanasundaram Ayyar v. Narasimha Ayyangar* (1922) 44 M.L.J. 427. In the first of these cases

the Calcutta High Court held that the sale of a foreclosure decree without the leave of the Court while the estate was in the possession of a receiver

was illegal and liable to be avoided. That case is no authority for the proposition that the decree of the City Civil Court passed in favour of the

appellant is a nullity. Whether it could be set aside at the instance of the Official

Trustee as such or as the receiver is, of course, another matter. In

Jotindranath Chowdhury v. Sarfaraj Mia (1910) 14 C.W.N. 653, the Calcutta High Court held that where property in the hands of a receiver is

intended to be affected by the result of the suit the receiver is a necessary party to the suit. Again we do not regard this as an authority for relieving

the Official Trustee of the necessity of getting rid of the decree obtained by the appellant, if he wishes to secure for the benefit of the younger

brother the moneys which are in Court. In Fraser and Ross Vs. Krishnaswami Iyer and Others, the question was whether the Court should have

made the receiver a party to certain execution proceedings and Kalyanasunram Ayyar v. Narasimha Ayyangar (1922) 44 M.L.J. 427, had

reference to an assignment taken in good faith. In our opinion these cases also have no bearing on the question under discussion.

9. It is not necessary for the Court to decide whether the Official Trustee as the receiver in his suit should have been made a party to the

appellant's suit or what steps are open to him to take. As far as this appeal is concerned the governing factor is that the appellant was granted a

charge in a decree passed by a Court of competent jurisdiction and that decree stands. In these circumstances, can it be said that the Official

Trustee as representing the respondent is entitled to priority? We think not. The appointment of the Official Trustee as receiver did not give the

respondent a charge. The receiver was an officer of the Court appointed to hold the property in suit for the benefit of the person who could show a

title to it. The respondent had no title to the moneys in Court. They belonged to his elder brother, and when the Official Trustee was granted a

decree the respondent had no greater rights than were conferred by the decree. The appellant was in a better position because a Court of

competent jurisdiction had given him a charge over the moneys. In these circumstances we consider that the decision of the Master should not have

been disturbed.

10. The appeal will be allowed with costs and the Official Trustee will be directed to redeposit the money into Court.