
(1936) 09 MAD CK 0014
In the Madras High Court

Radhakrishna Chettiar

APPELLANT

Vs

Narayanaswami Aiyar

RESPONDENT

Date of Decision : 23-09-1936

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12

Citation : AIR 1937 Mad 153 : 166 Ind. Cas. 727 : (1937) 45 LW 35 : (1936) 71 MLJ 823

Hon'ble Judges : Lakshmana Rao, J

Bench : Division Bench

Judgement

Lakshmana Rao, J.—The plaintiff is the appellant and the suit is for recovery of the plaint property from the respondent the purchaser in

execution of the decree in S.C. Suit No. 192 of 1920 obtained by one Subramania Aiyar against Kaliammal the mother of the appellant. The

appellant claims the property under the will of his father and the undisputed facts are that the father died in 1916 possessed of the plaint property

and other properties situate in the villages of Mangalavaram and Sourirajanpatnam. He left him surviving his widow Kaliammal and son the

appellant and after setting out the amount of his debts and charities to be conducted in perpetuity for the welfare of his soul the will directs,

Kaliammal to sell the properties in Sourirajanpatnam, discharge the debts, pay Rs. 200 to a temple and invest the balance of sale proceeds in the

purchase of properties. The will then provides that Kaliammal should as trustee enjoy the properties so purchased and the Mangalavaram property

and out of the income thereof pay the kist, spend Rs. 10 and Rs. 5 annually on two religious charities, give annually an allowance of paddy to the

appellant and his wife and another female relative and maintain herself. The will

directs her next to conduct an appeal which was pending and it finally provides that on her death the appellant and his heirs should from generation to generation enjoy the properties as trustees, pay the allowance to the female relative and maintain themselves. Kalliammal entered into possession on the death of her husband and she borrowed Rs. 100 on a promissory note in 1917 from Subramania Aiyar for conducting the appeal which was pending. The amount was not repaid and S.C. Suit No. 192 of 1920 was instituted by Subramania Aiyar against Kalliammal for recovery of the amount due under the promissory note. A personal decree was passed against her and the plaint property was attached in execution of that decree. An unsuccessful claim petition was filed by Kalliammal as trustee objecting to the attachment of the plaint property on the ground that it was trust property not liable to be attached or sold in execution of a personal decree against her and O.S. No. 12 of 1927 was instituted by her as trustee to set aside the order on the claim petition on the same ground. The suit was dismissed on the ground that the property was private property burdened with a trust and saleable in execution of a decree against the holder thereof, and the property was sold. It was purchased by the respondent and when he went for delivery the appellant obstructed him. The obstruction was removed on 13th October, 1927, and the property was delivered. Kalliammal died subsequently and the suit out of which this appeal arises was instituted by the appellant within a year of the dismissal of his application. It was resisted on the ground that under the will the property became the absolute property of Kalliammal and that even otherwise the decree in S.C. Suit No. 192 of 1920 & as binding on the estate, and accepting these contentions the District Munsif dismissed the suit. He held further that the decision in O.S. No. 12 of 1927 operates as res judicata and on appeal the decree was confirmed by the Subordinate Judge of Negapatam on the ground that under the will there was an absolute gift of the property to the widow. A second appeal was taken and while differing from the lower Courts regarding the construction of the will and holding that the will creates only a life interest to the extent of the surplus income in Kalliammal the executrix named therein, our learned brother Wadsworth, J., upheld the decree of the lower Court on the ground that the decision in O.S. No. 12 of 1927 operates

as res judicata.

2. Hence this Letters Patent Appeal and the initial question for determination is whether the decision in O.S. No. 12 of 1927 operates as res

judicata. That suit was instituted by Kaliammal as trustee of the charities and not as executrix, and the attachment was questioned on the ground

that the property is trusty property. It was decided that the property was not trust property and the extent or nature of the interest of the

beneficiaries did not arise for consideration. Further this would not be a ground of attack in respect of the claim made in the suit, viz., that the

property was trust property, nor could Kaliammal have resisted the sale of her beneficial interest in execution of the decree in question. She was

not litigating in respect of the beneficial interest of the remainderman nor was anything decided about it. The decision in O.S. No. 12 of 1927

cannot therefore operate as res judicata and bar the claim of the remainderman and the sale in execution of the decree in S.C. Suit No. 192 of

1920 could not pass anything more than the right, title and interest of Kaliammal. The suit promissory note was not executed by her as executrix

though the amount was borrowed for carrying out the provisions of the will and it is well settled that in a suit on such a promissory note the creditor

cannot have any direct claim against the estate of the testator. Further she was not sued as executrix nor was a decree claimed against the estate in

her hands. The sale in execution could therefore be only of her right, title and interest in the plaint property vide Lalit Mohan Pal Roy v. Dayamoyi

Roy Chowdhurani (1926) 52 M.L.J. 426 and on the unquestionable finding of our learned brother Wadsworth, J., that the will creates only life

interest in Kaliammal to the extent of the surplus income the sale would not be operative beyond her lifetime. The appellant the remainderman is

therefore entitled to a decree for possession and the decision of Wadsworth, J., cannot be upheld. It is therefore set aside and there will be a

decree for possession in favour of the appellant with mesne profits from the date of plaint to be ascertained by the trial Court. The trial Court will

make the necessary enquiry under Order 20, Rule 12, CPC and pass a final decree as to mesne profits. In the circumstances of the case there will

be no order as to costs throughout.