
(1925) 08 MAD CK 0025
In the Madras High Court

Rajagopala Pandarathar and Others

APPELLANT

Vs

Tirupathia Pillai and Another

RESPONDENT

Date of Decision : 28-08-1925

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90

Citation : AIR 1926 Mad 421 : (1926) ILR (Mad) 746 : 95 Ind. Cas. 12 : (1926) 50 MLJ 161

Hon'ble Judges : Venkatasubba Rao, J; Madhavan Nair, J

Bench : Full Bench

Judgement

Venkatasubba Rao, J.—The question argued in this case is one of jurisdiction, and it has been argued ably by Mr. Varadachariar for the appellants and the Advocate-General for the respondents.

2. The suit is upon a mortgage and the final decree was passed by the Sub-Court of Tanjore on 23rd March, 1917. The execution application with which we are concerned was filed in that Court on 2nd August, 1922. On 1st April, 1923, the taluk where the property is situate was by a

Government notification transferred as and from 1st July, 1923, from the local limits of the Sub-Court of Tanjore to the jurisdiction of the District

Court of West Tanjore. Notwithstanding this notification, the Sub-Court proceeded with the hearing of the execution application. On 6th July,

1923, objections were taken to the sale proclamation but no objection on the ground of want of jurisdiction was raised. On 14th July, 1923, the

Sub-Court made an order in regard to the objections raised. The decree-holder by this time having realised that the District Court of West Tanjore

was the proper Court applied to that Court to withdraw to its own file the execution application. The District Court in its turn formally withdrew the

application to its file and re-transferred it to the Sub-Court believing that by this process it conferred jurisdiction on the Sub-Court. After this order

of re-transfer, without any objection being taken to jurisdiction, the Sub-Court made an order directing the sale of the property. On 22nd October,

1923, the decree-holder himself purchased the property for Rs. 41,000, the amount due to him being over Rs. 52,000, and thereupon the

defendant, under Order 21, Rule 90, Code of Civil Procedure, applied to the Sub-Court for the setting"" aside of the sale and one of the main

objections taken was in regard to the jurisdiction of the Court to sell the property. The learned Subordinate Judge disallowed this application, and

in the present appeal the correctness of his order is attacked.

3. I may at the outset observe that though the sale is impeached before us on several grounds, the only point seriously urged is the one relating to jurisdiction.

4. On three grounds the order of the Lower Court may be supported.

5. First, the defendant did not object to the jurisdiction of the Court, and on the principle underlying Section 21, the objection must be deemed to

have been waived. It is a settled principle that where a Court has no inherent jurisdiction over the subject-matter of a suit, no waiver on the part of

the defendant can confer jurisdiction upon it. But where the Court has jurisdiction over the subject-matter but there are irregularities in the initial

procedure, the defendant who without objection goes to trial upon the merits cannot subsequently dispute the jurisdiction of the Court. See

Ledgard v. Bull (1886) L.R 13 Ind APP 134. Here then is the rule as well as the exception. Turning to the Indian Statute Law, Section 99, Civil

Procedure Code, embodies the rule. The exceptions to the rule are contained inter alia in Section 11 of the Suits Valuation Act and Section 21 of

the Civil Procedure Code. By virtue of these sections, certain defects of jurisdiction are put on a par with "" irregularities in the initial procedure "" . In

regard to the pecuniary jurisdiction of a Court, Section 11 of the Suits Valuation Act and in regard to its territorial jurisdiction, Section 21, Civil

Procedure Code; recognise that there may be a waiver on the part of the defendant and that the absence of jurisdiction does not render the decree

a nullity. As Mr. Varadachariar contends, Section 21 does not in terms apply; but the rule has been held to be of general application and the

principle underlying Section 21 has been applied to cases which do not strictly fall within its terms. *Zamindar of Ettiyapuram v. Chidambaram*

Chetty ILR (1920) Mad 675 is an authoritative ruling on the point. In that case the Court had jurisdiction to try the mortgage suit at the time it was

instituted. It had jurisdiction at the time the preliminary decree was passed but lost jurisdiction when it passed the final decree. Objection was taken

to the validity of the decree in execution, but it was overruled on the ground that the objection must be deemed to have been waived. Section 21

runs thus:

No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of First

instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement and unless there has been

consequent failure of justice.

6. No objection could have been taken to the place of suing, because the suit was instituted in the proper Court: nor was it the Appellate or

Revisional Court that disallowed the plea of want of jurisdiction. *Chokkalinga Pillay Vs. Velayudha Mudaliar and Others*, is, therefore, a clear

authority for the position that although Section 21 does not in terms apply, the principle underlying it holds good.

7. In *Chockalinga Pillai v. Velayudha Mudaliar (1919) L.R. 46 Ind App 151* a final decree was passed without objection in a mortgage suit by a

Court which had by then lost territorial jurisdiction by reason of a Government notification. In a subsequent suit brought to set aside the decree on

the ground that the decree was void for want of jurisdiction, it was held that the defendant having waived the plea of want of jurisdiction, it was no

longer open to him to raise it observed in my judgment in that case (page 459):

The section in terms no doubt does not apply, because it refers to the disallowing of the objection by an Appellate or Revisional Court But the

principle is of general application and if in appeal or revision the decree cannot be impeached it is equally reasonable that in a collateral proceeding

it should not be allowed to be attacked. I respectfully adopt the statement of the law contained in *Zamindar of Ettiyapuram v. Chidambaram*

Chetty ILR (1887) CAL 661 to the effect that the principle underlying Section 21 is that the objection to territorial jurisdiction is cured not merely

for the purpose of the Appellate or Revisional Court but cured entirely and for all purposes. In my opinion again, this section applies when there is want of jurisdiction not merely at the institution of the suit but at any stage during the progress of it. It is difficult to believe that a more stringent rule was intended to be applied to cases where there has occurred a cessation of jurisdiction than to those where there has been initial absence of jurisdiction.

8. In the Letters Patent Appeal from this decision, No. 57 of 1924, this view was confirmed.

9. Mr. Varadachariar strongly contends that although the rule has been extended to a certain extent in these cases, still they only deal with

objections that could have been taken prior to the passing of the decree, or compendiously put objections to the place of suing. In the present case

it is urged any plea of want of jurisdiction could have been taken for the first time only in execution proceedings and the learned vakil on this

ground asks us not to further extend the principle. I cannot accept the contention. If it is conceded that apart from Section 21 there is a principle of

general application, I fail to see why we must limit it in the manner suggested. I agree with Sir John Wallis observation in *Zamindar of Ettiyapuram*

v. Chidambaram Chetty ILR (1888) Cal 667 that the decision of the Privy Council in *Raniabhadra Ruju v. Maharajah of Jeypore* ILR (1891) cal

13 is not opposed to this view. The Judicial Committee were dealing with the case of a decree which ordered sale of land situate in a scheduled

district, and their Lordships held that as the sections of the Code did not apply to a scheduled district, the principle of Section 21 could not be

invoked. All that has been decided by the Privy Council is, that if the Code itself does not apply, the principle recognised by it does similarly not

apply. I am, therefore, clearly of the opinion that it is now no longer open to the defendant to object to jurisdiction.

10. The order may next be supported on the ground that the rule of territorial jurisdiction does not apply to execution of mortgage decrees. In

Maseyk v. Steel and Co. ILR (1894) cal 639 a mortgage suit was instituted u/s 19 of the CPC of 1882 which gives jurisdiction to a Court to

entertain, a suit in respect of properties partly situated within its jurisdiction and partly out of it. Some of the properties were situated in the district

of N and some in the district of Rule One property known as Mahal No. 20 was situated partly within the district of N and partly within the district

of Rule The suit was brought in the Court at R and the decree was also passed by that Court. In pursuance of that decree, the mortgage

properties, including Mahal No. 20, were sold by the R Court. The question that had to be decided was, was the sale of this Mahal not wholly

situated in the R district valid?

11. Petheram, C.J., observing that execution of a money decree stood on a different footing from execution of mortgage decrees, held that the

power of the Court in executing mortgage decrees was not limited by the territorial jurisdiction of that Court. In the case of a money decree, the

Court cannot attach property outside its jurisdiction, for, the decree merely awards a sum of money and does not prescribe the method by which

that sum shall be recovered. In the case of a mortgage decree, however, the decree itself directs the sale of the property by the Court and it is

practically in the nature of a decree for specific performance. On these grounds, the learned Chief justice held that the rule of territorial competency

does not apply to execution of mortgage decrees. The other learned Judge, Mr. justice Ghose, was also of the same opinion.

12. Section 19 referred to in the judgment, it will be seen, corresponds to Section 17 of the present Code. If Immovable property is situate within

the jurisdiction of different Courts, a suit in respect of it may be instituted in any Court within the local limits of whose jurisdiction any portion of

that property is situate.

13. With reference to *Maseyk v. Steel and Co.* ILR (1911) cal 104 I must make two observations. First, some passages in the judgment may give

the impression that the reason for the decision was that as Section 19 authorised the institution of the suit, the authority extended also to> execution

proceedings. But the decision is not based on this narrow ground, nor is there any warrant for the position that the section which in terms refers

only to the institution of the suit applies also to execution proceedings.

14. The second observation I have to make is, that the judgment deals only with the actual case that arose, that is to say, the sale of property partly

within the Court's jurisdiction and partly outside, and although there are some expressions of doubtful import, there is no definite pronouncement in

regard to the law if the property sold is wholly outside the jurisdiction.

15. In *Kartick Nath Pande'y v. Tilukdhari Lal* ILR (1915) M. 485 this principle was recognised and *Maseyk v. Steel and Co.* ILR (1897) 22

Bom.778 was cited with approval. I may incidentally say that this case is on all fours with the present. At the time of the passing of the mortgage

decree the property was wholly situate within the local limits of the Court, and after the decree the district within which the property was situate

was transferred to the local jurisdiction of another Court. It was held that the Court which passed the decree had authority to execute its decree

and bring the property to sale. I am not now concerned with the wider point whether the Court can in all cases execute its own decree. I am

referring to this case only for the more limited position that a Court can execute a mortgage decree passed by itself although the property to be

sold is wholly or partly outside its jurisdiction.

16. *Gopi Mohan Roy v. Doybaki Nundun Sen* ILR (1924) A 57 is an instructive case. It was decided by a Bench of which Ghose, J. who took

part in *Maseyh v. Steel and Co.* ILR (1887) cal 661 was a member. The suit was on a mortgage and related to two properties each within the

jurisdiction of a separate Court. The Court within whose jurisdiction one of the properties was situate passed the decree and it was held that it

could sell the other property also although it was outside its jurisdiction. Ghose, J., observed that he did not intend to lay down a contrary rule in

the earlier case, *Maseyk v. Steel and Co.* ILR 14 (1887) cal 661. The fact that one item was wholly outside the Court's jurisdiction was held not

to make any difference.

17. In *Tincourt Debya v. Shib Chandra Pal Chowdhury* ILR (1894) cal 639 Prinsep and Ameer Ali, JJ. affirmed *Gopi Mohan Roy v. Doybaki*

Nundun Sen ILR (1891) cal 13 on the broad ground that it would be impossible to give effect to the provisions of the Transfer of Property Act

relating to sales if it were held necessary to apply to different Courts to obtain realisation of the mortgage debt.

18. In *Begg, Dunlop and Co. v. Jagannath Marwari* ILR (1911) cal 104 it was held that a Court is not competent in execution of a decree for

money to attach a debt payable to the judgment-debtor outside the jurisdiction by a person not resident within the jurisdiction of the Court. Mr.

Justice Mukherjea in the course of his judgment observes that an exception is recognised in the case of mortgage decrees to the general rule that

no Court can in execution assume jurisdiction over property outside its territorial limits.

19. In some of the cases mentioned above see *Maseyk v. Steel and Co.* ILR (1857) cal 661 and *Gopi Mohan Roy v. Doybaki Nundun Sen*

(1891) cal 13 the learned Judges tried to overcome the difficulty presented by Section 223, corresponding to Section 39 of the present

Code. Under that section the Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court and

the section contains four Clauses (a), (b), (c) and (d) showing when this procedure is to be adopted. The view that found favour with the Judges

was that "" may "" in the section means "" may when necessary "". In the case of a mortgage decree, the Court which passes it directs the sale by itself

of the property mortgaged and in such a case sending of the decree to another Court is optional and not compulsory. In the case of attachment in

pursuance of a decree there is assumption of jurisdiction for the first time after the decree and the section then operates compulsorily.

20. The Calcutta High Court has thus uniformly held (and there is quite a string of decisions on. the point) that in the case of a mortgage decree, a

Court which passed it may notwithstanding the fact that the property is outside its jurisdiction, bring it to sale. We have not been referred to any

case of the Madras High Court which has refused to follow this rule. In matters of procedure it is more important that the law should be certain

than that it should be logical, and whatever my own view may be, if the question has to be decided on principle, I am content to follow the Calcutta

decisions not only for the reason that some very eminent Judges have taken part in them but also because, what with the defective provisions of the

Code relating to jurisdiction and what with the constantly occurring territorial re-distribution, there is scarcely a question free from doubt and the

view of the Calcutta High Court, in the circumstances, affords some measure of protection to decree-holders.

21. I shall now deal with the last of the three grounds I have mentioned. Section 24 gives the High Court or the District Court power to transfer

suits and other proceedings. The material part of the section reads thus:

The High Court or the District Court may transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court

subordinate to it and competent to try or dispose of the same.

22. Mr. Varadachariar's contention is that this does not apply to execution proceedings. He puts his argument thus: The test of competency in the

case of execution proceedings is territorial jurisdiction. How can then an execution petition be transferred from a Court to a Court which has no

such jurisdiction? It can be transferred only under the section to a Court competent to dispose of it. A Court without local jurisdiction is not

competent to dispose of the execution application. He thus contends that the words of the section by implication show that the section is not

intended to deal with execution applications. I am not prepared to accept this argument. Under the section a suit pending in any Court may be

transferred to any other Court competent to try it. To take a concrete instance, the High Court may transfer a suit pending in the District Court of

Tinnevely to the District Court of Rajahmundry. The District Court of Rajahmundry is not strictly competent to try the case as it is wanting in

territorial jurisdiction. Does it then mean that a suit cannot be transferred to a Court not having local jurisdiction? If this view be adopted, the very

object of the section will be defeated, and possibly very few suits, if any at all, can be transferred. This consideration makes it clear that in regard

to suits competency is not referred to in the section in the sense of territorial or local competency.

23. Now, coming to execution applications, the scheme of the Code seems to indicate that pecuniary competency in a Court need not exist. Mr.

Varadachariar asks, if in the case of execution application pecuniary competency is always out of the question and Section 24 is to be held as

authorising transfer to a Court not possessing territorial competency, what possible meaning can reasonably be given to the words "" competent to

dispose of the same ""? It seems to me that this objection does not take count of the fact that there may be other kinds of incompetency so far as an

executing Court is concerned. To take an instance, under Order 2, Rule 4, a decree directing delivery of possession of immovable property

cannot be transmitted to any Presidency Court of Small Causes for execution. I am therefore of opinion that Section 24 applies to execution

proceedings. *Sec Velliappa v. Subramaniam* (1915) 39 Mad 485 *Nassarvanji v. Kharsedji* (1897) 47 M.L.J. 448. and *Muhammad Habib-ullah v.*

Tikam Chand ILR (1924) A. 57.

24. Mr. Varadachariar next contends in the alternative that should Section 24 be held to apply to execution proceedings, they can be transferred

only to Courts competent u/s 39, Civil Procedure Code, to dispose of them. In other words, he urges that the only Courts to which decrees can be

transferred are those mentioned in Section 39, because they are the only Courts possessing jurisdiction. In effect, his contention is that Section 39

gives to the Court that passed the decree a power to transfer, whereas Section 24 gives a similar power, and no higher power to a superior Court.

This construction is far-fetched and if adopted will render Section 24 so far as execution proceedings are concerned almost useless.

25. A fourth point is raised by the learned Advocate-General who appears for the respondent that on a right construction of Sections 37, 38 and

39 the Court which passed the decree as well as the Court which has jurisdiction owing to territorial re-distribution, both these Courts have

jurisdiction to execute the decree. This argument extends to all decrees, money decrees" as well as mortgage decrees. It is very difficult to reconcile

the decisions that have been cited on the point and *Seeni Nadan v. Muthuswami Pillai* ILR (1919) M. 821 , a judgment of three Judges, illustrates

the range of conflict of opinion on this subject. As my decision on the previous points disposes of this appeal, I would prefer to express no opinion

on this question. I may repeat what I said on a cognate matter in *Chokkalinga Pillay Vs. Velayudha Mudaliar and Others*, that in view of the great

uncertainty that prevails on this subject, the Legislature should, in clear and unequivocal terms, lay down as to which Court possesses jurisdiction in

such cases. The appeal fails and I would dismiss it with costs.

Madhavan Nair. J.

I have had the advantage of reading the judgment of my learned brother. I agree with him in holding that this appeal should be dismissed with costs

but I prefer to rest my judgment on the short ground that since the appellant did not object to the jurisdiction of the Court at the earliest

opportunity, he is now precluded from raising that question on the principle underlying Section 21 of the Code of Civil Procedure. Under that

section, unless objection is taken to the place of suing at the earliest possible opportunity, no objection can be taken in appeal or in revision. As

contended for by Mr. Varadachariar in his able argument, the section in terms does not apply; but the decisions of this Court have on different

occasions applied the general principle underlying Section 21 to cases which do not fall strictly within its scope. The most recent decision on the

question is the one reported in Chokkalinga Pillay Vs. Velayudha Mudaliar and Others, by Phillips, J. and my learned brother. In that case a suit

upon a mortgage was instituted in the Kumbakonam Court when that Court had jurisdiction over the place where the mortgaged property was

situated. Owing to the transfer of jurisdiction from that Court to the Mayavaram Court, the former Court lost the jurisdiction over the place where

the mortgaged properties lay at the time of the passing of the final decree. No objection¹ was raised as to the competency of the Court to pass the

final decree. In a suit brought to set aside the decree on the ground that it was void for want of jurisdiction, it was held that since the objection was

not taken at the earliest possible opportunity, it must be deemed to have been waived. Both the learned Judges expressed the opinion that, though

the section in terms does not apply because it refers to the disallowing of the objections by an Appellate Court or Revisional Court, still the

principle is of general application and that the validity of the decree then under consideration could not be impeached in a suit brought to set aside

the decree. It is stated by Phillips, J. that "" the principle underlying the section is that waiver of territorial jurisdiction is recognised by law whereas it

has been consistently held that other forms of jurisdiction such as jurisdiction of the subject-matter or pecuniary jurisdiction cannot be waived by

consent of parties. "" For holding that the principle underlying the section is of general application, reliance was placed on, the Full Bench ruling

reported in Zamindar of Ettiyapuram v. Chidambaram Chetty ILR (1920) M. 675. In that case the Court which passed the final decree in a

mortgage suit had no jurisdiction to pass the decree and objection was taken in execution to the validity of the decree. In overruling the objection it

was pointed out by the Full Bench that "" the effect of the section is that objections which the Appellate or Revisional Court is thereby precluded

from allowing must be considered cured for all purposes unless taken before the passing of the decree in the original Court, that the ordinary way

of questioning a decree passed without jurisdiction is on appeal or in revision and that, if this is forbidden, a Court of first instance cannot in

execution do that which the Appellate or Revisional Court is precluded from doing.

Mr. Varadachariar's contention that since his plea as regards the want of jurisdiction could have been taken for the first time only in execution

proceedings in this case Section 21 of the CPC which deals only with the objection as to the place of suing should not be applied, cannot be

accepted. As pointed out by my learned brother, no reason is suggested for placing this limitation upon the general principle underlying Section 21.

The decision of the Privy Council in Ramabhadra Razu v. Maharaja of Jeypore (1919) L.R. 46 Ind App 151 does not support the contention of

the learned vakil for the appellant. In that case an order for sale of the mortgaged property situated in a scheduled district to which the CPC did

not apply was made by the Subordinate Judge's Court of Vizagapatam. It was held by their Lordships of the Privy Council that the order for sale

was bad as made under sections of the Code which did not apply to the scheduled district and that section 21 of the CPC did not apply to the

case. As pointed out by Wallis, C.J., they had not to consider the application of Section 21, where all the mortgaged properties were within the

jurisdiction of the Courts governed by the Code of Civil Procedure. I am, therefore, of opinion that the appellant in this case is not now entitled to

take the objection that the Court had no jurisdiction to sell the property.

I do not express any opinion on the other points dealt with by my learned brother in his judgment.