

(1916) 11 MAD CK 0005
In the Madras High Court

Saravana Pillai

APPELLANT

Vs

Arunachellam Chettiar minor by his next friend
Venkatachellam Chettiar through his agent Subramania
Chettiar

RESPONDENT

Date of Decision : 15-11-1916

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 73

Citation : (1917) ILR (Mad) 841 : (1917) 5 LW 538 : (1917) 32 MLJ 553

Judgement

1. The petitioner in this case applied for rateable distribution along with others to the District Munsif. Objection was taken that the decree of the

petitioner was a collusive one and that consequently he should not be allowed to share in the distribution of the assets. The District Munsif held that

it was open to him to enquire into the bona fides of the decree obtained by the petitioner. The question for consideration is whether the District

Munsif's view is right.

2. As the counter-petitioner was unrepresented, we requested Mr. K.V. Sesha Aiyangar to assist us in this case. We are indebted to him for the

care and energy he has displayed in arguing the case on behalf of the counter-petitioner.

3. We do not propose to consider the question whether under no circumstances can an executing court enquire into the validity of a decree. It is

fairly well settled that a judgment-debtor is not entitled in execution to impeach the soundness of a decree obtained against him. *Sudindra v. Budan*

ILR (1885) M. 80 and *Mahomed Isbu v. Basholappa* ILR (1903) B. 302. This principle applies only as between parties to the decree. As regards

strangers, it seems clear that collaterally they can attack the validity of a decree

to which they were not parties. The judgment of Lord Brougham in Earl of Bandon v. Becher (1835) 3 Cl. & F 479 established that proposition. See also Bigelow on Estoppel, 5th Edn. pp. 203 and 211. The larger proposition, however, that an executing court is disentitled from questioning the correctness of a decree does not directly arise in this case. In our opinion, whatever may be the rights of an executing court in this respect, a court charged with the distribution of assets u/s 73 of the CPC has no such power. It was held by the Judicial Committee in Shankur Sarup v. Mejo Mal ILR (1901) A. 313 that such a court is acting ministerially in apportioning the monies realised in execution. The question before their lordships related to limitation. It was argued that a suit brought to contest the validity of payments made to one of the decree holders should have been instituted within a year of the decision under article 13 of the Limitation Act. Their Lordships pointed out that in making a rateable distribution u/s 295 of the Code of Civil Procedure, 1882, the officer was acting departmentally and not as a court and that consequently the decision of such an officer was not one which should have been set aside within a year. A comparison of the provisions of the CPC relating to rateable distribution and to claim proceedings fully bears out this view. Order XXI, which relates to execution, makes provision in Rules 58 to 63 for investigating the claims of third parties. There are similar provisions beginning with Rule 97 where there is resistance to delivery of possession to the decree-holder. An enquiry is provided for in these rules, and the unsuccessful party is directed to establish his right in a court of law, failing which it is declared that the orders passed under the rules shall be final. No such provision is to be found with reference to Section 73. Clause 2 of that section says that a wrongful distribution may be questioned in a regular suit. No procedure is prescribed for ascertaining the legality or otherwise of the decrees under which rateable distribution is sought. The absence of such a provision indicates that the enquiry u/s 73 is non-judicial. It follows from this that an officer distributing the assets can have no power to enquire into the bona fides or otherwise of a decree brought to his notice. Section 73(c), Clause 4, does not contemplate any such enquiry. The only conditions to be satisfied are there must have been an application before the assets are realised and the decree should not have

been satisfied. Both these are matters of record which do not necessitate any lengthened investigation. We are therefore on the construction of the provisions relating to rateable distribution, of opinion that it is not competent to the District Munsif to enquire into the validity of a decree on the strength of which rateable distribution is claimed.

4. Before we examine the decisions which have been quoted before us, we may point out that Section 73 of the Code of Civil Procedure, 1908, is only an enabling section. It does not say that the orders passed under it are final unless set aside by a regular suit. It is clear that failure to participate does not prevent a decree holder from executing his decree against the person and other properties of the judgment debtor; Syed Nadur Hossein v. Baboo Pearoo Thovildarinee (1871) 19 W.R. 255 and Janoky Bullubh Sen v. Johiruddin Mahomed Abu Ali Coher Chowdhry ILR (1884) C. 567.

5. Now as regards the cases directly bearing on the question there is no doubt that in Calcutta there are a number of decisions which hold that the bona fides of a decree can be enquired into u/s 295 of the CPC of 1882, corresponding to Section 73 of the present Code of Civil Procedure. In re Sunder Doss ILR (1884) C. 42 enunciates that principle. That was followed in Chagan Lal v. Fazarali ILR (1888) B. 154. In Puran Chand v. Surendra Narain (1912) 16 C.L.J. 582 Mr. Justice Mookerjee says that the question is not free from difficulty, but, that having regard to the previous decisions of the Calcutta High Court, he was not prepared to dissent from the view that u/s 295 of the old Code the bona fides of a decree can be enquired into. In Raghu Nath Gujrati v. Rai Chatrapat Singh (1897) 1. C.W.N. 633 Maclean C.J. doubts the correctness of In re Sunder Doss ILR (1884) C. 42. In Peary Lal Das v. Peary Lal Doun Justice Mookerjee follows his previous decision in Puran Chand v. Surendra Narain (1912) 16 C.L.J. 582. The learned Judge in the earlier case already referred to says that as in re-enacting Section 73 of the present Code of Civil Procedure, the legislature, with knowledge of the decisions in In re Sunder Das ILR (1884) C. 42 and Chagan Lal v. Fazarali 6, has not made any departure from Section 295 of the Code of 1882, it may be taken that it accepted as correct the view taken in these cases. But it has to be remembered that Shanhar Sarup v. Mejo Mal ILR (1901) A. 313 was also

under the old Code and that notwithstanding the pronouncements of the Judicial Committee that the officer distributing the assets is only acting ministerially, the legislature has not thought fit to declare that he was performing judicial functions.

6. We are not prepared to attach any significance to the fact that Section 73 of the present Code is almost identical in language with Section 295 of

the old Code. On the whole, limiting our observations solely to the functions of an officer exercising his duties u/s 73, we are of opinion that it is not

open to him to enquire into the legality or validity of a decree brought to his notice in distributing the assets.

7. The order of the District Munsif must be set aside : and the petition restored to file, and disposed of according to law. Costs to abide.