

(1949) 03 MAD CK 0050
In the Madras High Court

Shanmugam alias Muthukaruppan

APPELLANT

Vs

N.S. Radhakrishna Sarma and Another

RESPONDENT

Date of Decision : 10-03-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 16, Order 34 Rule 6

Citation : (1949) 2 MLJ 741

Hon'ble Judges : Raghava Rao, J

Bench : Division Bench

Judgement

Raghava Rao, J.—The facts of the application under Order 21, Rule 16 and Order 34, Rule 6, Civil Procedure Code, out of which this

appeal arises, are as; follows:

2. The appellant here was the second respondent to the application in the Court below, while the 1st respondent here was the applicant there. The

application prayed that the assignment in favour of the applicant of rights under the final decree in a mortgage suit, O.S. No. 139 of 1926, Sub-

Court, Madura, by the decree-holder therein, may be recognised, and that a decree may be passed against the first judgment-debtor, the father of

the second personally and against the joint family assets of the two defendants for Rs. 34,538-14-11, being the unrealised balance still outstanding

after the sale in execution of the final decree in the suit. The assignment relied on as the basis of the application was one effected by the original

decree-holder after the confirmation of the execution sale under the final decree. The deed of assignment is filed as Exhibit P-1 and is dated 26th

January, 1943.-It provided that the profit and loss incidental to the assignment was to be the assignee's own concern and described the first item

of the B schedule attached to it, which is the item with which we are concerned in this appeal, as the right to obtain a personal decree against

defendants 1 and 2 in O.S. No. 139 of 1926, Sub-Court, Madura, as per the mortgage decree already passed therein, after giving credit to the

sum of Rs. 11,100 realised by the auction sale of the properties comprised in the mortgage decree. The respondents to the application resisted it--

the first respondent, the father of the appellant before us, contending that the assignment in favour of the petitioner was inoperative, being a benami

transaction unsupported by consideration, the second respondent, the appellant before us, contending that the decree was liable to be scaled down

under Madras Act IV of 1938 and that if that was done, no further amount would be found due. The Principal Subordinate Judge of Madura, who

tried the application, raised two points, for determination: (1) whether the assignment is true and valid; and (2) whether the second defendant is

entitled to have the decree scaled down. He found on both the points in favour of the petitioner and allowed the application. Against this order the-

second respondent in the Court below has preferred this appeal.

3. Both the points have been reiterated before us in appeal by Mr. K. S. Ramabhadra Ayyar, the learned advocate for the appellant, with the

emphasis and exhaustiveness characteristic of him. The learned advocate also raised a further point of the unmaintainability of the application out of

which this appeal arises, to which we shall in detail refer in the sequel.

4. On the first of the points, the learned Subordinate Judge in the Court below held that in spite of the inadequacy of the consideration for the

assignment as found by him which was apparently the only circumstance pressed before him in connection with this point--the assignment could

not be regarded as necessarily nominal and consequently inoperative. We accept his finding. On the second of the points the learned Subordinate

Judge observes that admittedly the first defendant is not an agriculturist within the meaning of Madras Act IV of 1938 and holds that u/s 6 of the

Act the second defendant, his son, must also be deemed a non-agriculturist. Against this view of the learned Subordinate Judge it is contended by

Mr. Ramabhadra Ayyar firstly that it is very material for the decision of this latter point to know whether the first respondent was assessed in his

individual capacity or as manager of the joint family of which his son is a

member, and that in the absence of proof that the assignment was in the latter capacity, the disqualification attaching to the father under proviso (a) to Section 3 of the Act would not extend to the son. In support of this contention he cited Rajoo alias Doraisami Goundar and Others Vs. Palaniyappa Chettiar and Others, . It is next contended by him that the burden of proving the facts required by the proviso to the section lay upon the creditor. In support of this submission he cited Periasami Pillai Vs. Sivathia Pillai, . We have come to the conclusion that both the contentions must be negated. The first was not a point raised in the lower Court, and the second bears no force in view of the admission made in the lower Court.

5. In addition to these points raised in the Court below, which, as we have held were rightly decided by the Court below, there is a new point taken in appeal before us by Mr. Ramabhadra Ayyar, namely, that the application itself was unmaintainable under Order 21, Rule 16, as well as under Order 34, Rule 6, Civil Procedure Code, under which it was presented. Under Order 21, Rule 16, Civil Procedure Code, it has, counsel urges, no legs to stand upon, because that provision of the Code presupposes an executable decree, whereas hereafter the execution of the final decree no personal decree has yet come into being. It is unnecessary for us to deal with the merits of this submission, as the learned advocate for the respondents accepts the position and urges" the maintainability of the application only under Order 34, Rule 6, Civil Procedure Code.

6. Mr. Ramabhadra Ayyar contends that under Order 34, Rule 6, Civil Procedure Code, it is equally unmaintainable, because, firstly, till proceedings in execution of the final decree are completed by actual delivery of the property sold in execution to the auction-purchaser the provision of Order 34, Rule 6, Civil Procedure Code, cannot be invoked; secondly, the right to apply under that provision is peculiar and personal to the original plaintiff in the mortgage action and does not avail an assignee from him; thirdly, the right sought to be transferred by Ex. P-1 is a mere right to litigate, rather, as counsel put it, a right to gamble in litigation, and is not validly transferable u/s 6(e) of the Transfer of Property Act; and fourthly, the application for a personal decree is contrary to the terms of the High Court's decree, dated 25th September, 1936, passed in the appeal preferred against the revised preliminary decree, dated 25th September,

1933.

7. As regards the first of these grounds, it is sufficient to say that there is no warrant for the importation into the Rule of the condition contended for

by the advocate for the appellant., That would be to re-write the enactment which is none of our Business and not to construe it, which is all our

function. All that Order 34, Rule 6, Civil Procedure Code, requires is that the net proceeds of any sale held under Rule 5 should be found

insufficient to pay the amount due to the plaintiff. It is not disputed that that condition is satisfied in the present case.

8. With reference to the second of these grounds, we are of opinion that although Rule 6 does only use the word "" the plaintiff"" that does not mean

that an assignee from the plaintiff cannot have the right to apply under that rule. There are no words of restriction or exclusion to be found in the

rule such as would justify the contention urged. Moreover, the mortgage suit is obviously pending at the stage contemplated by the rule, and Order

22, Rule 10, Civil Procedure Code, can well govern the case of a devolution of interest like the one involved in Ex. P-1.

9. The third of the grounds too is, in our judgment, devoid of substance. The case reported in M.T. Rajamanickam Chetty and Another Vs. T.R.

Abdul Halim Sahib, , which is relied upon. by the learned advocate for the appellant, enunciates no principle that can assist the appellant; nor does

it bear any parity or parallel to the facts of the case before us, except that there also the deed of assignment said that the assignee was to bear-the

profit and loss of the transaction--which is not a material point of analogy that attracts the decision. All that is ruled in and by that case is that there

cannot be an assignment of a suit which has been filed for the purpose of recovering damages either in contract or in tort, but that it is lawful for a

plaintiff in such a pending suit to assign the benefit which he may obtain under the decree to be passed in the suit, that that does not however give

the assignee the right to interfere in proceedings in the action. There is another case also cited by the learned advocate, V.P.R.V. Chockalingam

Chetty v. Seethai Ache and Ors. (1927) 54 M.L.J. 88 ILR 6 Rang. 29 which is, we think, likewise not in point. The observation in the judgment of

the Privy Council delivered by Sir John Wallis in that case which is relied upon is at page 34 and runs in these terms:

...Sales by an Official Assignee of lands in possession of alienees from an insolvent. are, in substance if not in form, nothing more than sales of the right to litigate, and, assuming that they do not come within the prohibition in the Transfer of Property Act, against the transfer of a mere right to sue--which has not been contended--they are open to the same objection and in their Lordships' opinion are strongly to be deprecated.

The irrelevancy of the citation is too obvious to need any elaboration.

10. The fourth of the grounds urged is, of course, a new point not raised in the lower Court, no question of the unmaintainability of the application

having been at all raised there. The record does not disclose any relevant facts proved to show how or where exactly the contravention of the High

Court's decree lay. Nor does it appear possible for us to hold that any irregularities in the matter of the execution sale already held, on a proper

holding of which only it is contended that the right to apply under Order 34, Rule 6, Civil Procedure Code, arises can be ripped open collaterally

without proper proceedings independently taken to set aside the sale--which apparently there have not been in the present case.

11. In the result the appeal fails and is dismissed with costs.

12. This appeal having been posted this day for being mentioned, the Court delivered the following

13. It is suggested by Mr. Ramabhadra Ayyar that the expression occurring in the decree ""from family properties"" may be replaced by "" from joint

family properties "" which is the expression used in the judgment. There can be no objection to this suggestion which is accordingly accepted. The

amendment will be therefore carried out by the decree of this Court.

14. The appellant will pay the court-fee due to Government.