

(1949) 03 MAD CK 0029
In the Madras High Court
Case No : Appeal No. 45 of 1946

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 22 Rule 10, Order 34 Rule 5, Order 34 Rule 6

Transfer of Property Act, 1882 — Section 6

Citation : AIR 1951 Mad 628 : (1942) 55 LW 54

Hon'ble Judges : Raghava Rao, J; Horwill, J

Bench : Division Bench

Advocate : K.S. Ramabhadra Iyer, for the Appellant; K.V. Srinivasa Iyer, for the Respondent

Final Decision : Dismissed

Judgement

Raghava Rao, J.—The facts of the application under Order 21, Rule 16 and Order 84, Rule 6, Civil P. C., out of which this appeal arises,

are as follows : The appellant here was respondent 2 to the application in the Court below, while respondent 1 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. 34538-14-11, 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 Ex. P-1 and is dated 26-1-1943. 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 Schedule B 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. Section No. 139 of 1926, Sub-Court, Madura, as per the mortgage decree already passed therein, after giving credit to the sum of Rs. 11000, realised by the auction sale of the properties comprised in the mortgage decree. The respondents to the application resisted it--respondent 1, 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, respondent 2, the appellant before us, contending that the decree was liable to be scaled down under Madras Act IV [4] 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 defendant 2 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 respondent 2 in the Court below has preferred this appeal.

2. Both the points have been reiterated before us in appeal by Mr. K. S. Ramabhadra Aiyar, 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.

3. 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 defendant 1 is not an agriculturist within the meaning of Madras Act IV [4] of 1938 and holds that u/s 6 of the Act defendant 2, his son, must also be deemed a non-agriculturist. Against this view of the learned Subordinate Judge it is contended by Mr.

Ramabhadra Aiyar firstly that it is very material for the decision of this latter point to know whether defendant 1 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 lower Court.

4. 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 Aiyar, namely, that the application itself was unmaintainable under Order 21, Rule 16 as well as

under Order 34, Rule 6, Civil P. C. under which it was presented. Under Order 21 Rule 16, Civil P. C., it has, counsel urges, no legs to stand

upon, because that provision of the Code presupposes an executable decree, whereas here after 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 P. C.

5. Mr. Ramabhadra Aiyar contends that under Order 34 Rule 6, Civil P. C., 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 P. C. 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), T. P. Act ; and fourthly, the application for a personal decree is

contrary to the terms of the High Court's decree dated 25-9-1936 passed in the appeal preferred against the revised preliminary decree dated 25-9-1933.

6. 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 rewrite 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 P. C. 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.

7. 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 P. C. can well govern the case of a devolution of interest like the one involved in Ex. P.-1.

8. The third of the grounds too is, in our judgment, devoid of substance. The case reported in *Rajamanickam Chetty v. Abdul Halim*, 53 M. L. W.

64 : A. I. R. 1941 Mad. 389, 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, AIR 1927

252 (Privy Council) 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 p. 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 objections and in their Lordships' opinion are strongly to be deprecated.

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

9. 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 P. C. 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.

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

(This appeal having been posted this day for being mentioned, the Court delivered the following :)

11. It is suggested by Mr. Ramabhadra Aiyar 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.

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