

(1932) 09 MAD CK 0018
In the Madras High Court

S.R.M.M. Seetharaman Chettiar

APPELLANT

Vs

A.R.M.N. Chidambaram Chettiar and Others

RESPONDENT

Date of Decision : 07-09-1932

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 55

Citation : AIR 1933 Mad 166 : (1933) ILR (Mad) 447 : (1932) 36 LW 844 :
(1932) 63 MLJ 941

Hon'ble Judges : Venkatasubba Rao, J;Reilly, J

Bench : Full Bench

Judgement

Venkatasubba Rao, J.—Before stating the point of law raised, it is necessary that I should set out briefly the facts which have given rise to

these appeals. The decree that is under execution is the one passed in O.S. No. 39 of 1924. The plaintiff in that suit (the appellant) attached before

judgment the Immovable property in question. Having obtained a decree in his suit, he has filed E.P. No. 39 of 1927 for the purpose pf bringing

the attached property to sale. In the meantime, but subsequent to the attachment before judgment, one Meyappan Ambalam filed O.S. No. 498 of

1924 against the same judgment-debtor and in execution of the decree he obtained, he brought the same property to sale, purchased it in court-

auction and conveyed it to the respondent. As such purchaser, he is interested in resisting E. P. No. 39 of 1927 filed by the appellant. He first

sought to assert his right by filing a claim petition under Order 21, Rule 55, Civil Procedure Code. But that petition was summarily rejected on the

ground that at the time of the attachment before judgment, the respondent had no right to the property and his claim petition therefore was

unsustainable. Having failed in this, he had recourse to another method for

asserting the same right, that is, he intervened in E.P. No. 39 of 1927 under 547, Civil Procedure Code, claiming that as the representative of the judgment-debtor, he could assert his right to the property and resist the execution of the decree in O.S. No. 39 of 1924. The application he filed for the purpose was E.A. No. 91 of 1928. The first point that has to be decided is, whether the respondent is the representative of the judgment-debtor and whether he can intervene u/s 47. There can be no doubt that as the purchaser of the property belonging to the defendant, he should be regarded as his representative and the question is undoubtedly one relating to the execution of the decree. See *Veyindramuthu Pillai v. Maya Nandan* ILR (1919) 43 M. 107 : 38 M.L.J. 32. His application therefore u/s 47 was properly made and this is also the view taken by the Lower Court. Mr. Panchapagesa Sastri, the appellant's learned Counsel, does not question the correctness of this part of the learned Judge's order. The question then arises : what was the proper procedure the Lower Court should have adopted, after it held that the respondent could rightly come in u/s 47? The appellant's contention was that the decree obtained by Meyappan Ambalam was collusive and fraudulent, that the respondent was a benamidar for the judgment-debtor and that in point of fact the property in question continues to be in the possession of the latter. The Lower Court without deciding this question which is the subject of issues 1 and 3 framed by it, has referred the appellant to a regular suit for the purpose of getting rid of the decree obtained by Meyappa and the sale held in pursuance of it. It is this part of the order that Mr. Panchapagesa Sastri impugns. The learned Judge apparently seems to think that he has an option either to dispose of the application u/s 47 or refer the parties to a regular suit. In this he seems to be wrong. Is a question to be agitated u/s 47 or by a separate suit? Once it is held that resort to Section 47 is the proper remedy, the Court has no option but is bound to decide the question in execution under that provision. The first paragraph of the section shows that it is incumbent on the Court to decide the question referred to there under that very section. The words used are "shall be determined by the Court executing the decree and not by a separate suit". These words are imperative and vest no discretion in the Court. The second paragraph is no doubt not happily worded, but both the parts should

be read together and the interpretation I have suggested is the only proper one. The order made by the Lower Court reads thus:

Under the above circumstances, I would declare in E A. No. 91 of 1928, that the property sought to be sold in E.P. No. 39 of 1927 is not liable

to be sold until the decree-holder gets the Court sale in favour of the vendor of the petitioner in E.A. No. 91 of 1928 set aside by a decree of

Court and also obtains a declaration that the sale in favour of the petitioner in E.A. No. 91 of 1928 is benami for the judgment-debtor and is not

valid and binding on him (the said decree-holder), and I would dismiss E. P. No. 39 of 1927 with a direction to the decree-holder (petitioner in the

said E. P. No. 39 of 1927) to comply with the abovesaid direction before he seeks to" firing the property to sale in execution of his decree.

2. This order cannot be sustained and the Lower Court should itself decide u/s 47 the question of fact raised by the appellant.

3. The respondent's counsel in supporting the Lower Court's order contends that an executing Court cannot take upon itself the responsibility of

setting aside a decree passed by a competent Court. This argument is based upon a fallacy. In this case, the executing Court is not called on to

pronounce upon the validity of the decree which it is executing. The respondent's title to the property depends upon some decree and the question

is whether that decree is vitiated by fraud or collusion. That is not the decree which the Lower Court is executing and there is nothing to prevent it

from deciding whether that was properly obtained or not, as incidental to the main question, namely, is the appellant's objection that the

respondent is a benamidar well founded? The case relied upon by the respondent's learned Counsel, Venkatasami Naidn v. Gurusami Aiyar

(1919) 38 M.L.J. 441, does not help him. The point under discussion did not arise for decision there. A suit had already been instituted and it was

taken for granted that the parties were to be governed by the result of that suit.

4. The orders of the Lower Court are set aside and E.P. No. 39 of 1927 and E.A. No. 91 of 1928 are remanded to it for disposal in the light of

these observations.

5. The appellant's conduct disentitles him to costs. He raised several objections in the Lower Court which were untenable and repeated them in

the memorandum of appeal filed by him here. For this reason I direct each party

to bear his costs of the appeal.

Reilly, J.

6. I agree. Mr. Muthuswami Aiyar for the Respondent here, that is the Petitioner in E.A. No. 91 of 1928, has maintained that his client rightly

preferred that application to the Subordinate Judge's Court imder Section 47 of the Code, and in that we agree with him. But he has gone on to

contend that, although he came in rightly under that section, the Subordinate Judge had no jurisdiction to make any but one order on that

application, vis., that he was bound to give effect to the applicant's objection without going into the answer of the decree-holder in O.S. No. 39 of

1924, who was the execution-petitioner before the Subordinate Judge. That appears to me an obviously impossible contention. The answer of the

decree-holder in O.S. No. 39 of 1924 was that Muthuswami Aiyar's client was merely a benamidar for the judgment-debtor in O.S. No. 39 of

1924, which would be an effective answer, if true. It is quite impossible for Mr. Muthuswami Aiyar to maintain that his client had the right to come

in " with a petition u/s 47 of the Code but that his opponent had no right to urge his answer ahd to claim that his answer should be heard under that

section.

7. I agree with the order proposed by my learned brother in regard to the disposal of the appeals and as to costs.