

**(1936) 04 MAD CK 0018**  
**In the Madras High Court**

Sundararajan Chettiar and Others

APPELLANT

Vs

Sethuramasami Chetty and Another

RESPONDENT

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**Date of Decision :** 06-04-1936

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 47

**Citation :** AIR 1936 Mad 840 : 166 Ind. Cas. 911 : (1936) 44 LW 287 : (1936) 71 MLJ 344

**Hon'ble Judges :** Pandrang Row, J

**Bench :** Division Bench

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**Judgement**

Pandrang Row, J.—This is an appeal from the decree of the District Judge of Ramnad dated 26th September 1934 setting aside on appeal

the order of the Subordinate Judge of Ramnad at Madura dated 20th December 1933 and remanding the petition on which that order was passed,

namely Execution Petition No. 30 of 1932, to the Subordinate Judge for fresh disposal. That was a petition for restitution presented by defendants

1 and 2 in O.S. No. 36 of 1923. Against them the first plaintiff had obtained a decree for Rs. 3,700 and odd. On appeal the amount was reduced

by Rs. 2,300 and on account of this variance of the 1st Court's decree made by the appellate Court these two defendants applied for restitution of

the amount collected in excess from them in the course of execution of the 1st Court's decree. The amount actually claimed in restitution was Rs.

3,500 and odd. This application for restitution was opposed by the second plaintiff. The first plaintiff did not appear to contest the application. The

second plaintiff's case was that the first plaintiff alone was solely bound to meet the claim for restitution and that he had discharged that claim by

executing a registered Othi deed for Rs. 4,100 in favour of defendants 1 and 2

who made that claim and that the claim to restitution has been satisfied in this manner. He also alleged that these two defendants and the first plaintiff acting in collusion had instituted this application for restitution in order to defraud him, and that he came to know of this only 12 days before he filed his affidavit. The Subordinate Judge dismissed the objections of the second plaintiff apparently on the ground that the adjustment pleaded was one which was made after the decree, and could not be looked into because it was not certified. On appeal the District Judge was of the contrary opinion and he held that the Subordinate Judge was not right in refusing to look into an adjustment pleaded by the second plaintiff because what the second plaintiff pleaded was that actual fraud had been perpetrated against him, and that evidence should have been taken by the Subordinate Judge regarding the alleged fraud. In this appeal it is contended by the second plaintiff-respondent that the appeal does not lie, being one from an order merely remanding the petition for fresh disposal without deciding any question relating to execution or satisfaction of a decree within the meaning of Section 47 Civil Procedure Code. I do not think it is quite necessary to decide this preliminary point because I have come to the conclusion that the appeal must fail on the merits. I shall therefore assume that the appeal is competent. On the merits I have no doubt that the provisions of Order 21, Rule 2, sub-rule 3 do not apply to the present case. That sub-rule prevents the Courts from recognising any uncertified or unrecorded adjustment or payment of the kind referred to in Sub-rule 1. That sub-rule refers only to money payable under a decree or the adjustment of a decree. It is not the second plaintiff's case that he has paid any money payable under any decree or that any one else has paid any money payable under any decree or that any decree has been adjusted. What he says is that the claim to restitution which arose after the variance of the first Court's decree by the appellate Court has been adjusted. The adjustment of a claim to restitution is not the same as the adjustment of a decree; the claim to restitution is no doubt based on the appellate Court's decree, but it is not alleged that that decree was adjusted. It is not the second plaintiff's case that that decree was adjusted. That decree no doubt gave defendants 1 and 2 the right to apply for restitution to the Court of first instance, but it cannot be said that restitution was

granted by that very decree itself so that the amount due could be realised by proceeding in execution of that decree. No doubt when an order for restitution is made u/s 144 CPC such order can be enforced in the manner prescribed for execution of decrees. But a claim for restitution, before it is allowed by the Court of first instance cannot be regarded as a decree or order of the Court, and an adjustment of a claim to restitution does not therefore come within the provisions of Order 21, Rule 2. I am therefore of opinion that this appeal must fail and the order of the District Judge appealed from is right. The appeal is accordingly dismissed with costs.