

(1935) 03 MAD CK 0035
In the Madras High Court

Tirumala Narayanaswami

APPELLANT

Vs

Adabala Narayanaswami (deceased) and Others

RESPONDENT

Date of Decision : 07-03-1935

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1935 Mad 615 : 158 Ind. Cas. 84 : (1935) 42 LW 442 : (1935) 69 MLJ 139

Hon'ble Judges : Varadachariar, J

Bench : Division Bench

Judgement

Varadachariar, J.—The only point for consideration in this second appeal is whether the suit is barred by Section 47 of the Civil Procedure

Code. That objection arises with reference to the fact that the plaintiff obtained a decree for partition and possession in O.S. No. 24 of 1919 on

the file of the Additional District Munsif's Court, Rajahmundry, and that when he went to take possession of his share in execution thereof he was

obstructed by the present contesting defendants. When he filed an application in the execution department to remove the obstruction, he was

referred to a regular suit. The plaintiff appealed against that order and after an elaborate discussion of the question the learned Subordinate Judge

who heard that appeal was of opinion that the case did not fall u/s 47 of the CPC and held that the plaintiff's remedy was by a regular suit and not

by way of appeal. The plaintiff has accordingly brought the present suit.

2. A number of issues were framed in the case and after a trial the Court of first instance dismissed the suit on the merits. But on appeal the learned

Subordinate Judge has confined himself to the question of the objection u/s 47 and dismissed the suit on that ground. In his opinion the order of the

Subordinate Judge on the previous occasion was erroneous and it was the duty of the plaintiff to have appealed against that order and not filed a separate suit.

3. I am unable to agree that it is open to the learned Subordinate Judge now to take this course. It is no doubt true that when the matter was before the Subordinate Judge in the execution appeal, counsel appearing for the present contesting respondents did not himself wish to persist on the objection as to the non-maintainability of the appeal, but the Court discussed the question in a judgment which is binding upon both the parties and held that the plaintiff's proper remedy was to file a suit and not by way of appeal u/s 47. It may be that the withdrawal of that objection by defendant's counsel may remove a possible plea of "estoppel" as it is sometimes put but it certainly will not take away the conclusive character of the adjudication pronounced by the learned Subordinate Judge on the execution appeal.

4. On behalf of the respondents in the present proceeding, reliance has been placed upon a case in *Kuppana Kavundan v. Kumara Kavundan* ILR (1909) 34 Mad. 450 : 20 M.L.J. 961. But that is really not analogous to the present case. The second proceeding there was not one taken in accordance with the direction given in the order on the first proceeding. There was hence no question of the finality of that order as between the parties. In one proceeding the Court had held that no appeal lay. In another similar proceeding at a later stage, it was argued that that adjudication operated as *res judicata* - between the parties for the purpose of deciding that no appeal - would lie even in the second proceeding. That is not the question here.

5. It was next argued that as the defendants could not have appealed against the order of the learned Subordinate Judge on the previous occasion, there can be no *res judicata*. This contention is not well founded. There are no doubt cases where it has been held that if the decree in a case is in favour of a party, any incidental findings in the course of the judgment which may be adverse to the successful party will not constitute *res judicata* in subsequent proceedings. That is material only when a finding on a particular issue is pleaded as *res judicata*, not when the Court has got to deal with the finality of the very order passed in the case. In the present case, the

final order itself was that the plaintiff must seek his remedy by a separate suit and that order is conclusive as between the parties. The appeal is therefore allowed and the case sent back to the lower appellate

Court for disposal on the merits. Refund of court-fee on the Memorandum of Appeal will be allowed.

6. The costs of this appeal will abide and follow the result.