

(1944) 09 MAD CK 0001
In the Madras High Court

Ummaji Javichand Firm of Guntur and Another	APPELLANT
Vs	
Ravula Subbarao Garu represented by agent Hariprasada Rao and Others	RESPONDENT

Date of Decision : 13-09-1944

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144, 151

Citation : AIR 1945 Mad 108 : (1945) ILR (Mad) 482 : (1944) 57 LW 587

Hon'ble Judges : Leach, C.J

Bench : Division Bench

Judgement

Leach, C.J.—The question in these appeals is whether the lower Court had the power to order restitution on a petition or whether it should

have relegated the petitioner to a regular suit. In O.S. No. 64 of 1934 in the Court of the Subordinate Judge of Bapatla respondent 1 sued

Venkataratnarao and Kamaraju, the minor sons of one Ramakoteswara Rao, for the recovery of a sum of money due by them under the pious

obligation rule of Hindu law. He obtained, a decree and attached the judgment-debtors' interest in certain properties belonging to the family. An

auction was held on 1st December 1936 and the decree-holder purchased the interest of the judgment-debtors for a sum of Rs. 2363, which he

paid into Court. The judgment-debtors applied Under Order 21, Rule 90, Civil P.C., for an order setting aside the sale. The application was

dismissed because they failed to comply with the requirements of the rule. On 28th September 1937 the sale was confirmed. There were other

creditors who had attached the judgment-debtors' interest in these properties and they applied for rate able distribution of the Rs. 2363. Their

applications were granted and the money was paid out rate ably.

2. Notwithstanding the provisions of Rule 92 of Order 21, the judgment-debtors filed a suit (O.S. No. 77 of 1937) in the Court of the District

Munsif of Bapatla for a declaration that the sale was void by reason of material irregularity. The District Munsif rightly held that the suit did not lie

and dismissed it on 23rd December 1939. The only contesting defendant in the suit was respondent 1, the auction-purchaser. The creditors who

obtained rate able distribution of the Rs. 2363 were not made parties. The judgment-debtors appealed to the Subordinate Judge. This appeal (No.

92 .of 1940) was decided on 17th April 1940 and was allowed. Certain reasons were given by the Subordinate Judge for his decision; but we

cannot accept them as valid grounds for his decision. Respondent 1 did not support the judgment of the District Munsif and this was in all

probability the deciding factor. The reason why respondent 1 did not oppose the appeal is made plain by what happened in O.S. No. 32 of 1937

in the Court of the Subordinate Judge of Bapatla. That suit was filed by one Kuppuswami Chowdhuri against the judgment-debtors, their father

and respondent 1 to enforce a mortgage which he held over the properties attached by respondent 1 in execution of his decree in O.S. No. 64 of

1934 and other properties belonging to the family. On 20th April 1940, that is, three days after App No. 92 of 1940, had been allowed, a decree

was passed by consent in O.S. No. 82 of 1937 and under it respondent 1 gave up his rights under the attachment which he had obtained in

execution of his own decree, receiving as compensation a second charge for the sum of Rs. 4000 on the properties which he had bought at the

auction held on 1st December 1936. The decree also provided that Kuppuswami Chowdhuri the mortgagee decree-holder should proceed first

against the other properties of the family. There can be no doubt that respondent 1 surrendered the rights which he had obtained in the execution

proceedings because he was given security for the payment of Rs. 4000.

3. In E.A. No. 136 of 1941, respondent 1 applied to the Subordinate Judge for an order directing the creditors who had obtained rate able

distribution of the Rs. 2363 to pay into Court the amounts which they had received. The application purported to be Under Sections 144 and 151,

Civil P.C. The application was successful and this has led to the institution of the two appeals now before us. C.M.A. No. 469 of 1943 has been

filed by a creditor who received Rs. 346-3-6 out of the Rs. 2863 and C.M.A. No. 668 of 1943 by a creditor who drew Rs. 563-12-0. They

were respondents 4 and 7, respectively in respondent 1's application for restitution. The Subordinate Judge considered that the matter was

governed by the decision of this Court in *Rego v. Ananthamathi* AIR 1942 Mad. 472. He held that the case did not fall within Section 144, but he

was of the opinion that he could make the order asked for by reason of the inherent powers of the Court reserved by Section 151. We shall

discuss *Rego v. Ananthamathi* AIR 1942 Mad. 472 presently, but before doing so it will be convenient to refer to certain other cases which were

quoted in the course of the arguments. These are *Raja Rao v. Ananthanarayana Chetti* AIR 1922 Mad. 228, *Macha Koundan v. Kottara*

Koundan AIR 1936 Mad. 50 and *Jai Berhma v. Kedarnath Marwari* AIR 1922 P.C. 269.

4. The facts in *Raja Rao v. Ananthanarayana Chetti* AIR 1922 Mad. 228 which was decided by a Division Bench were these certain properties

were attached in execution proceedings and brought to sale. The purchase consideration was paid by the successful bidders into Court and was

rate ably distributed among other creditors of the judgment-debtor. The sons of the judgment-debtor, who had objected in the execution

proceedings to the properties being sold on the ground that they belonged to a trust, brought a suit to establish this claim. The decree asked for

was granted and the plaintiffs recovered possession of the properties. The auction-purchasers then applied for an order for the refund of the

purchase moneys which had been paid out to the other creditors of the judgment-debtor. The question before the Court was whether Section 144

applied and if it did not, whether Section 151 could be invoked in order to obtain a refund of the moneys paid out to the creditors. It was held that

Section 144 did not apply because the decree under which the sale had taken place had not been varied. The Court considered that Section 151

could not be called in aid because that section had been inserted in the Code in order to meet the ends of justice to prevent an abuse of the

process of the Court. It should not be invoked to obtain an order which only sets right one injustice by the infliction of another.

5. The case in *Macha Koundan v. Kottara Koundan* AIR 1936 Mad. 50 was decided by a Full Bench. A mortgagee sued to enforce his mortgage

and obtained a decree for sale. His legal representative instituted proceedings in execution of the decree and in the sale which followed the

property was purchased by the respondent for a sum of Rs. 825. The mortgagor was a member of a tarwad, the junior members of which sued for

a declaration that the, decree and the sale were not binding on thorn. They further claimed that they were entitled to be put in possession of the

property. This suit was successful. The respondent as the auction-purchaser then filed an application Under Sections 47, 147 and 151, Civil P.C.,

for a refund of the purchase money. The question raised was whether he was entitled to an order on a petition or whether he was bound to institute

a regular suit. The Court held that the remedy was by suit and not by application. The principal judgment was delivered by Kamesam J. who

summarized his conclusions in the following words:

The result is in a case where the sale is set aside in execution by an application Under Rules 89, 90 or 91, the auction-purchaser can obtain a

refund on an application Under Order 21, Rule 93, Civil P.C. But where the sale turns out to be futile by a finding in another suit, the only remedy

that the party has is a regular suit and not an application Under Order 21, Rule 93. There may be defences in that suit, e.g., that the case was not

properly conducted and that the finding is not binding.

6. The Subordinate Judge considered that the judgment of the Full Bench did not apply in the present case because the auction-purchaser was not

the decree-holder but a stranger. For the appellants it is contended that the distinction drawn by the Subordinate Judge has no real bearing. The

Privy Council decided *Jai Berhma v. Kedarnath Marwari* AIR 1922 P.C. 269. There the property had been sold in execution and the sale

confirmed, but the sale had been set aside in an earlier appeal to the Judicial Committee. Some of the properties of the judgment-debtors were

encumbered and some were unencumbered. The unencumbered properties were three-eighths of the whole and the encumbered properties five-

eighths. The decree-holders attached three-eighths of the encumbered properties, but by mistake the Court sold three-eighths of the

unencumbered properties and confirmed the sale, as did the Calcutta High Court but on appeal to the Privy Council their Lordships held that the

sale must be set aside. The purchasers at the auction had paid the amount of

their bid, Rs. 1,12,000 into Court. There were other creditors of the judgment-debtors who held decrees and they attached this money, which was in due course, paid out to them. Having won their appeal to His Majesty in Council, the judgment-debtors applied for an order for possession of the properties by way of restitution. The auction-purchasers were in possession and they contended that they could not be compelled to vacate without recovering their money. This contention was accepted by the Patna High Court which then had jurisdiction and the High Court's decision was concurred in by the Privy Council. The Judicial Committee held that the judgment-debtors could not get possession until they had paid the auction-purchasers the difference between Rs. 1,12,000 and the amount which had been received by the auction-purchasers in mesne profits during the period of their possession. Their Lordships said that the auction-purchasers had parted with their purchase-money by paying into Court on the faith of the order of confirmation and the certificate of sale. This money had been distributed amongst the other creditors and it would be inequitable and contrary to justice that the judgment-debtors should be restored to the property without making good to the auction-purchasers the moneys which had been applied for their benefit. Their Lordships rejected the suggestion that the auction-purchasers should look to the creditors to whom the Rs. 1,12,000 had been paid. In coming to this conclusion their Lordships undoubtedly had regard to the inherent powers of the Court. The facts were, however, very different from the facts in the present case.

7. We now turn to *Rego v. Ananthamathi* AIR 1942 Mad. 472. The suit there was on a mortgage which had been executed by one member of a joint family. The plaintiff said that the properties mortgaged constituted the separate estate of the mortgagor and obtained a decree on this basis. The properties were sold in execution, but in order to prevent the sale being confirmed the other coparceners paid into Court the purchase price, the sum of Rs. 11,470, the amount required by Order 21, Rule 89. In the circumstances they were entitled to have the sale set aside and an order to this effect was passed. Another creditor of the mortgagor attached Rs. 9000 of the Rs. 11,470 and the amount was paid out to him. The other coparceners appealed against the decree which had been passed in favour of the

mortgagee and the appellate Court held that the decree was not binding on the appellants as the properties belonged to the family. Thereupon they applied by a petition for an order on the attaching creditor for the restitution of Rs. 9000. The Court recognized that Section 144, Civil P.C., did not apply but considered that Section 151 enabled a Court to recall money paid out by it to a person not entitled to it. They did not, however, decide whether the equities were such as to entitle the petitioners to an order. They sent the case back to the executing Court to consider and decide the question. The judgment in *Raja Rao v. Ananthanarayana Chetti* AIR 1922 Mad. 228 was distinguished on the ground that the facts there were very different.

8. We are not called upon in these appeals to decide whether *Raja Rao v. Ananthanarayana Chetti* AIR 1922 Mad. 228 and *Rego v.*

Ananthamathi AIR 1942 Mad. 472 can stand together and if not which is to be preferred, nor need we pause to consider how far the judgment of

the Privy Council in *Jai Berhma v. Kedarnath Marwari* AIR 1922 P.C. 269 really goes. We will assume for the purpose of deciding these appeals

that a Court can in a case to which Section 144 does not apply invoke Section 151 when the equities demand it. But this is not such a case. So far

as the equities are concerned the appellants have far the better case. As we have pointed out, respondent 1 did not oppose the appeal (No. 92 of

1940). He allowed the sale to be set aside when the judgment-debtors were not entitled to this and he did so because of the advantage which he

was to receive under the decree to be passed by consent in O.S. No. 32 of 1937. We are not prepared on an application which does not fall

within Section 144 to allow him to recover from the appellants what they received of the Rs. 2363 under the order of the executing Court. As

indicated in *Macha Koundan v. Kottara Koundan* AIR 1936 Mad. 50 the appellants in a regular suit filed would have an opportunity of showing

that the appeal (No. 92 of 1940) should not have been allowed. We are firmly of the opinion that it is not a case in which Section 151 should be

applied and that respondent 1's remedy, if he has one, is by a regular suit to which he must be relegated. The appeals are allowed with costs here

and below.