

(1919) 07 MAD CK 0016
In the Madras High Court

Vedalingam Pillai and Others

APPELLANT

Vs

Veerathal alias Sornathachi and Another

RESPONDENT

Date of Decision : 25-07-1919

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 61

Citation : (1919) 37 MLJ 547

Hon'ble Judges : Seshagiri Aiyar, J;Bakewell, J

Bench : Full Bench

Judgement

Seshagiri Aiyar, J.—One Amirthammal had two sons, Vythilinga the 1st defendant, Dakshinamoorthy, the father of defendants 3 to 5 and at

least one daughter. There was some dispute about the property belonging to the daughter's husband and a suit was pending in respect of it. A

compromise was come to and by Exhibits A and B, the property in suit was given to Amirtham in 1882. Subsequent to this arrangement, disputes

arose between the mother and the sons regarding the right to this property which is of considerable value. The mother gave leases to enable the

lessee to eject the sons. There was some litigation based on these leases. Ultimately in Suit No. 228 of 1908, a decree was obtained for money by

a creditor against Amirtham and Vythilinga. In execution, the property in suit was attached, as belonging to the judgment debtors. Dakshinamoorthi

intervened with a claim petition. Exhibit XVIII (c) is the order thereon dated the 4th February 1910. The exact interpretation of this order will be

dealt with later on. In June 1910, the share of Vythilingam in certain items of the property was sold. It is alleged for the respondent that the sale

proceeds were utilised to pay off the decree and that the decree has been fully satisfied. Mr. Krishnaswami Aiyar for the appellant does not admit

this and contends that as this point was not argued in the court below, it is not open for the respondent to rely on it and to base a legal argument on

it. The suit was brought by the daughters of Amirthammal claiming the property as their mother's stridhanam and praying for an injunction

restraining the defendants from interfering with their enjoyment. The Court of first instance held that the property was taken by Amirthammal under

Exhibits A and B, benami for her sons and dismissed the suit. In appeal the District Judge has reversed the decree. He has held that the benami

character of Exhibits A and B has not been established and that it has not been proved that the sons were holding adversely to their mother. On the

question whether the failure to sue within a year of the order on the claim petition barred the plaintiffs, he held that the title of Amirthammal was

not adjudicated upon in the claim petition and that neither she nor her heirs were bound to sue within a year, (Article 11 of the Limitation Act) to

establish their titles.

2. This Second Appeal is against that decree. The second appeal has been very fully and ably argued before us, as was to be expected from the

learned vakils engaged in the case; and as the matter may not rest here and as the decision affects considerable property, I think it desirable to deal

with the questions at some length.

3. As regards the findings that Exhibits A and B were not executed benami for the sons, Mr. A. Krishnaswami Aiyar rightly stated, that the finding

was not open to attack in Second Appeal. Whatever may be the powers of the Judicial Committee to examine the evidence where two Indian

Courts differ, it has been held that the CPC does not give the Second Appellate Court that power. The same observations apply to the finding as

to the adverse possession.

4. I shall now proceed to consider the question very elaborately argued at the bar. Mr. K. Srinivasa Aiyangar for the respondents addressed us on

the scope and effect of Order 21 Rule. 58 to 61. The question may be considered from two standpoints : (1) Is the order an adjudication which

affects title to the property for all purposes and (2) Is the order effective against all the parties interested in it, namely, the judgment-debtor, the

defendant and the claimant? For the limited scope which the learned vakil suggested for the rules there are some weighty considerations : (a) It is

now well recognised that notwithstanding an adverse order, if the money due under the decree is paid off within a year, the order spends itself out

and the party affected by the order need not seek to have it set aside. See *Koyyana Chittamma v. Doosy Gavarama* ILR 29 Mad. 225. Whether a

payment after the year should have the same effect is open to argument. But it is unnecessary to consider the point now. Speaking for myself, I am

unable to see why the payment after the period fixed in Article 11 of the Limitation Act should have a different effect. (b) It is equally well-

established, that the result of the litigation stated in consequence of an order on a claim petition is to place the parties in status quo ante that is to

the portion they occupied at the time of the attachment objected to. If that is the result, it is suggested that the ad-judication in the claim petition

should be restricted in its scope to the matter arising in execution under the decree and not to concluding the rights of parties which are not within

the purview of the Execution Order. There is much force in this contention. (c) Again, if the decree-holder is unable to establish the title of the

judgment-debtor in answer to a claim, it would not preclude him in execution of another decree, from proving that the property did really belong to

the judgment-debtor. This would go to show that the adjudication has not the force of res Judicata, but it is only operative to conclude rights in

execution. (d) The nature of the inquiry is a summary one. Rights relating to property far beyond the pecuniary jurisdiction of a tribunal in regard to

suits cannot be disposed of on the claim petition. Can the legislature have contemplated such far reaching consequences to an order made under

such circumstances as to conclude the right and title of the parties for all time to come ? I must say that I have been very much impressed by these

considerations and am inclined to think that the scope of the rules should be restricted to concluding the parties regarding the right to attach the

property in execution and not to finally determine the rights of the parties to the property itself.

5. However, I do not want to rest my judgment on this point alone, because there are decisions and observations in the judgments of this Court

which clothe such an order with wider attributes than I am prepared to invest them with.

6. In my opinion, the order in question was not intended to and did not adjudicate upon the right of Amirtham. I shall shortly revise the history of

the question as to how far and to what extent a judgment-debtor is bound by an adverse order in a claim petition. There are three possible views:

(a) He is not a necessary party and is not bound by the order, although it was passed in his presence and after hearing him; (b) he is bound by the

order whether he appeared and contested the claim or not; and (c) the extent to which he is affected will depend upon what was considered and

decided in the enquiry. Mr. K . Srinivasa Aiyangar argued in support of that view. Mr. S. Varadachariar elaborated it by pointing to the language

of Rule 60 and to the final effect the order has. Mr. A. Krishnaswami Aiyar on the other hand referred to the concluding portion of Rule 61 and to

the language of Article 11 of the Limitation Act as pointing to the opposite conclusion. Having regard to the course of decisions, in this Presidency,

I do not feel myself at liberty to hold that the order would under no circumstances be binding on the judgment-debtor. Nor am I prepared to agree

with Mr. A. Krishnaswami Aiyar that the order would bind the judgment-debtor whatever may be the nature of the adjudication on the claim

petition. The intermediate view is what has consistently been acted on in this Court. The view in *Netieom Perengaryprom v. Damodaran*

Nambudry (1869) 4 M.H.C.R. 472, was very soon after limited in its operation by stating that the nature of the relief should be considered in

appraising the effect of the order. See *Arekel Kunhi Kuttilyali v. Imbichi Amma* (1871) 6 M.H.C.R. 416. In *Guruva v. Subbarayudu* ILR (1890)

Mad. 363, to which Mr. S. Varadachariar drew our attention, it was distinctly stated that even if the judgment-debtor had notice, the order will not

bind him. The order must be against him in effect. In *Muthusami Mudaly Vs. Ayyalu Bathadu*, , evidence was given against the claimant by the

judgment-debtor. The learned Judge held that his having notice of the claim and of the adjudication will not bind him, if his rights were not

adjudicated upon. The same view was taken in *Moidin Kutti v. Kunhi Kutti* ILR (1902) Mad.721. To all these judgments Sir Arnold White was a

party; and I think I am justified in deducing the rule from them, that a judgment-debtor will not be bound by the order on a claim petition, unless he

has been a party to it and also unless the order in terms adjudicates upon his title. That was the very view pointedly enunciated in *Sadaya Pilial v.*

Amirthathachy ILR (1910) Mad. 533 after referring to the narrow view held in *Calcutta. Subella Appanna v. Mallidi Appanna* (1914) M.W.N.

833, to which I was a party only held that if there is an adverse order against the judgment-debtor, he can sue within a year. It negated the

contention that the decree-holder alone can sue and not the judgment-debtor. Second Appeal No. 975 of 1918 was a suit by the claimant and

there is nothing in that judgment which is opposed to the authorities I have reviewed. Now comes the question regarding the nature and effect of

the order in the summary enquiry in the present case. In considering this point, the observations in *Ramu Aiyar v. Palaniappa Chetty* ILR (1910)

Mad. 35 : 21 M.L.J. 756, should be borne in mind. It was there pointed out that if the order in terms leaves the question of title open, it cannot be

contended that observations as to possession conclude title as well. Mr. Krishnaswami Aiyar rather insistently argued that possession spoken of in

Rule 60, is possession indicative of title and not bare possession, e. g., that of a trespasser. I find nothing in the rule to warrant this interpretation. It

starts by saying that only the question of possession will be considered. The discussion is all about possession. Bearing these considerations in mind

I proceed to examine the order passed on the claim petition. It starts by saying that only the question of possession will be considered. The

discussion is all about possession. The conclusion relates to possession. I am unable to read with such an order an intention on the part of the

Court to deal with the title of the parties. It is true that Amirtham put in a statement and claimed the property. But the Court wisely did not embark

upon the enquiry claimed by her.

7. My conclusion is that notwithstanding that Amirtham was a party, notwithstanding that she actively contested the claimant's right, the only matter

adjudicated upon was as to who was in possession; and that therefore the conclusive effect predicated by the section only affects possession and

not the title being litigated in this suit.

8. In this view, I am of opinion, the District Judge is right and I would dismiss the Second Appeal with costs.

Bakewell, J.

9. I do not propose to deal with the cases which have been cited and discussed by my learned brother, but intend only to examine the scope of

Rules 58 to 63 of Order XXI of the Code and the effect of the order made upon the claim petition in this case. The ground of an application under

these rules is that property attached in execution of a decree is not liable to that attachment. Section 60 of the Code declares that certain things belonging to the judgment-debtor, or over which or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf," are liable to attachment and sale in execution of a decree, and that certain other things are not so liable. A judgment-debtor may therefore object to any attachment on the ground that the property attached is exempted from attachment and sale and an objection by him falls within Rule 58. A third party may claim that he has some interest in or is possessed of the property attached (rule 59), and since the judgment-debtor is interested in the discharge of the decree by means of the attached property and in any surplus sale proceeds after such discharge he should be made party to the proceedings. The enquiry under Rule 58 is termed an " investigation," not a trial of issues between the parties, and the Court is directed not to make it when the claim or objection has been designedly or unnecessarily delayed. The policy of the legislature is to secure the speedy settlement of questions of title raised at execution sales, *Sardhari Lal v. Ambika Pershad* (1888) I.L.R 15 Cal. 521 (P.C) and the finding of a Court is a summary decision from which the suit allowed by Rule 63 is simply a form of appeal, *Phul Kumari v. Ghanshyam Mishra* (1907) ILR 35 Cal. 202 (P.C). The object of the legislature in prescribing a suit by way of appeal appears to be to give the parties an opportunity of placing their respective cases before a Court, because a summary investigation might not have furnished sufficient material for a decision by an appellate court. From these considerations, I am of opinion that the meaning of the word " conclusive" in Rule 63 is that the realisation of the attached property shall proceed or be stayed as directed by the order of Court, and that there shall be no appeal therefrom except as prescribed by the rule. If the attached property be sold in pursuance of the order, then the purchaser will take it free from or subject to the rights asserted by the claimant or objector as determined by the Court; but if the attachment be raised, the question arises whether the execution proceedings simply come to an end or there is an adjudication as to the title of the judgment-debtor. This question does not arise in the present case and I express no opinion upon it.

10. I agree that the order in this case is not made against the judgment-debtor Amirthammal, because the Court did not decide the title to the property as between her and her co-defendant and the claimant. I think that the Court only decided that the sale should not include any possessory right to a moiety of the property to which the claimant might be entitled. I agree with the order proposed by my learned brother.