

(1947) 08 MAD CK 0032
In the Madras High Court

V.RM.A.S. Chockalingam Chettiar

APPELLANT

Vs

A.SP.S.K.R. Karuppan Chettiar and Others

RESPONDENT

Date of Decision : 08-08-1947

Acts Referred:

Citation : (1948) 61 LW 91 : (1948) 1 MLJ 82

Hon'ble Judges : Patanjali Sastri, J

Bench : Division Bench

Judgement

Patanjali Sastri, J.—This appeal arises in execution of a decree for payment of Rs. 1,15,287-5-9 to the respondent passed in O.S. No. 102

of 1934, on the file of the Court of the Subordinate Judge of Devakotta.

2. The suit was brought for recovery of moneys due to the respondent in respect of a deposit said to have been made in a Nattukottai Chetty firm

of bankers of which the respondent's father Subramanian Chettiar and the appellant, who was the first defendant in the suit were partners.

Subramanian Chettiar who had become divided from the respondent died in July, 1934, before the suit was instituted, leaving his properties by his

will to his widow, who was joined as the second defendant. Subramanian Chettiar's estate having been adjudicated insolvent in I.P. No. 59 of

1935 on the file of the High Court at Rangoon, the Official Assignee, Rangoon, was brought on record as the third defendant in the suit. The main

defence of the appellant was that the sum of money credited in the name of the respondent in the books of the firm really represented menpanam

(additional capital) advanced by Subramanian Chettiar out of his joint family funds for the purposes of the business and was thus an item in the

partnership account. To repel this plea and to show that the deposit was made

out of assets obtained by him at a family partition the respondent relied on certain partition lists [Exs. D-2, D-2 (a) and D-2 (b)], purporting to show the division and allotment of the family assets as between the respondent and his father in 1926. These documents were accepted as establishing division of status, though they were held to be inadmissible in evidence, for want of registration, to prove the terms of the partition. The appellant's plea was accordingly overruled and a decree was passed to the effect

That the plaintiff do recover from the first defendant personally and from the estate of the late A.S. P.S. Subramanian Chettiar in the hands of third defendant and in the hands of the second defendant as the sole legatee of the said estate a sum of Rs. 1,15,287-5-9.

3. The respondent seeks to execute the aforesaid decree by attachment and sale of certain moveable property of the appellant for realising the balance due under the decree after giving credit for payment made by the third defendant. No relief is asked for as against the second and third defendants.

4. The appellant's main contention in the Court below and sole contention before us was that, inasmuch as the respondent was in possession of large assets forming part of the estate of Subramanian Chettiar and as the decree was also passed against the assets of Subramanian Chettiar the decree must be deemed to have been auto-matically discharged to the extent of such assets held by the respondent, and that if an account was taken of those assets, they would be found to exceed in value the amount now claimed to be due under the decree. The learned Subordinate Judge refused to entertain this plea as an answer to the respondent's claim to execute the decree, and the question is whether he was right.

5. Mr. Panchapakesa Sastri for the appellant put the position in two ways: In the first place, it was urged that the respondent, under colour of the allotment under the unregistered documents referred to already, is in possession of considerably more than his due share of the family assets, and as these allotments have been held ineffectual, the assets held by the respondent in excess of his half share should be regarded as forming part of Subramanian's estate, that the respondent must be deemed to have intermeddled with such estate and to have thereby become a "legal

representative"" of Subramania and that the decree-holder having thus become a legal representative of the debtor against whose estate the decree

has been passed, there was a merger, with the result that the decree must be regarded as having been satisfied to the extent of such excess assets.

We are unable to accept this contention.

6. It is true that ""legal representative"" includes any person who intermeddles with the estate of a deceased person. But assuming that the

respondent is in possession of family assets in excess of his due share, such possession dates back to the ineffectual partition of 1926, long before

Subramania died, and cannot therefore amount to intermeddling with the estate of a deceased person (Section 2 (ii), Code of Civil Procedure).

Again the intermeddling must involve the assumption of a representative capacity in relation to the estate and not in assertion of a claim of right

adversely to the estate. The respondent holds the assets if at all in the character of an absolute owner as he obtained them in pursuance of the

allotment under Ex. D-2 series which are admissible to show the character of the respondent's possession. The respondent cannot therefore be

considered to be a legal representative of Subramania any more than a trespasser on his property. Furthermore, even if the respondent were to be

regarded as a legal representative of Subramania in possession of the latter's assets, the decree having been passed for recovery of the amount

from the estate of the late A.S.P.S. Subramanian Chettiar in the hands of the second and third defendants, these defendants alone should be

regarded as the judgment-debtors against whom the decree could be executed and not any other person in possession of the assets of

Subramania though such person may be one of the latter's legal representatives. See *Servaikaran v. Varadarajulu* (1909) 19 M.L.J. 651 : ILR

Mad. 75. This indeed was not disputed by Mr. Panchapakesa Sastri. But he suggested that when the decree-holder himself was in possession of

the assets of the deceased debtor, the position would be different. We are unable to appreciate the distinction. If the decree could not be executed

against a legal representative in possession of assets where the decree did not make him liable in respect of such assets, it is difficult to see how any

assets of the deceased debtor in the hands of the decree-holder could be taken into account in execution of the decree.

7. Mr. Panchapakesa Sastri put his contention also in another way. He sub-mitted that the family properties held by the respondent in excess of his share should be treated as having been transferred to him by his deceased father Subra-mania to defeat the latter's creditors who were therefore entitled to avoid the transfer and call upon the respondent to account for such assets. The appellant, who would be entitled to claim contribution in case he had to pay the entire amount remaining due under the decree, stood in the position of a creditor entitled to relief against the estate of Subramania on the analogy of a promisee under a contract of indemnity claiming to be indemnified in a quia timet action even before discharging the debt due to the creditor.

8. This far-fetched argument must fail, for, assuming, there was a fraudulent transfer of the assets by Subramania to the respondent, the assets transferred would not be assets of Subramania in the hands of the respondent, as the transfer would be operative between the parties to the transfer until it is set aside in a representative action brought on behalf of all the creditors of Subramania, as provided for by Section 53 of the Transfer of Property Act, and the possession of assets by the respondent could be no answer to his claim to execute the decree.

9. We are also of opinion that, besides being untenable for the reasons already indicated the contention of the appellant as to the discharge of the decree by reason of the respondent's alleged possession of excess family assets attributable to Subramania's share cannot be entertained in execution. As pointed out by the Court below if the possession of such assets could automatically reduce the liability of Subramania's estate to the respondent, such reduction should have been pleaded as a defence to the respondent's claim in the suit itself, and not having been then put forward was no longer available as an answer to the claim to execute the decree after it was passed. The decision in Sankaralingam Pillai and Others Vs. Arumugam Pillai and Another, where it was held that if A obtained a decree against X who died leaving A, B and C as his heirs, the decree would be extinguished to the extent of A's share in the estate of X, has no application to the facts of the present case. The respondent did not come into the possession of any assets of Subramania as his heir after his death, and as already pointed out, no question of merger can arise assuming the

facts to be as alleged by the appellant.

10. The appeal fails and is dismissed with costs.