

(1928) 01 MAD CK 0017
In the Madras High Court

Yellamaraju Venkatasubba Rao		APPELLANT
	Vs	
Goteti Vigneswaradu (dead) and Others		RESPONDENT

Date of Decision : 16-01-1928

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2

Citation : AIR 1928 Mad 840 : 110 Ind. Cas. 554 : (1928) 28 LW 82 : (1929) 56 MLJ 52

Hon'ble Judges : Reilly, J;Kumaraswami Sastri, J

Bench : Full Bench

Judgement

Kumaraswami Sastri, J.—This appeal arises out of a suit filed by the plaintiff to recover possession of the lands claimed in the plaint and

mesne profits. The case for the plaintiff is that he purchased the lands on the 20th of July, 1913 for Rs. 40,000, that, out of this sum, Rs. 12,000

was paid to discharge a debt due by his vendor and the balance of Rs. 28,000 was applied towards setting aside a sale held in execution of the

decree in O.S. No. 500 of 1912 against the 1st defendant, that the amount was deposited in Court on the 21st of July, 1913 and the sale was set

aside under the orders of the Court on the 19th of August, 1913, that, after the setting aside of the sale, the 1st defendant who had obtained

another decree against the plaintiff's vendor attached the property in execution of his decree in O.S. No. 1075 of 1912, that a claim was preferred

by the plaintiff which was dismissed on the 12th of January, 1914 and that on the dismissal of the claim the 1st defendant purchased the properties

in the plaint on the 12th of January, 1914 in furtherance of the attachment of the 21st of August, 1913 and took possession of the same through

Court in June, 1914 and has been in possession and enjoyment ever since. The

plaintiff, on his claim being dismissed, filed O.S. No. 1243 of 1914

to establish his right to the properties in dispute and the suit was finally decreed in his favour on the 1st of November, 1920. He, therefore, claims

possession of the properties on the ground that his right having been established the attachment and sale under which the 1st defendant claims are

invalid and the 1st defendant has no title to the properties.

2. Defendants 2 to 4 are impleaded as being lessees in actual possession of the lands.

3. The 1st defendant filed a written statement raising various defences, but it is only necessary to consider some of them in this appeal. The first

ground is that the plaintiff ought in his former suit (O.S. No. 1243 of 1914) to have claimed possession of the properties and not to have confined

himself to a bare declaration as on. the date of that suit he was out of possession and that the present claim for possession is barred under Order 2,

Rule 2, Civil Procedure Code. The next contention is that the sale to the plaintiff was without consideration and was intended to defeat and delay

the creditors and therefore passed no title to the plaintiff. The third contention is that the proceedings in O.S. No. 1243 of 1914 did not preclude

the defendant from raising the objection as to the validity of the sale, as that decision was by the District Munsif's Court which had no pecuniary

jurisdiction to try the question raised in the present suit, Section 11, Civil Procedure Code, therefore not applying to the case.

4. As regards the applicability of Order 2, Rule 2, Civil Procedure Code, I am of opinion that it has no application to the facts of the present case.

When the claim petition was filed and when the order dismissing the claim was passed, the 1st defendant had " not become the purchaser nor was

he in possession of the properties. The plaintiff was in possession.

5. Order 21, Rule 58 refers to claims to attached property. Rule 60 refers to cases where the claim is allowed and provides for the release of the

property from attachment on the allowing of the claims. Rule 61 provides for the dismissal of the claim where the Court is satisfied that the

property when attached was in the possession of the judgment-debtor as his own property. Rule 63 which provides for a suit by an unsuccessful

party runs as follows:

Where a claim or an objection is preferred, the party against whom an order is

made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

6. Article 11 of the First Schedule of the Limitation Act which provides for the period of limitation for such suits runs as follows:

By a person, against whom any of the following orders has been made to establish the right which he claims to the property comprised in the order:

(1) Order under the Code of Civil Procedure, 1908, on a claim preferred to, or an objection made to, the attachment of property attached in

execution of a decree, one year from the date of the order.

7. It will thus be seen that the suit contemplated under Rule 63 is a suit to establish the right which he claims in the claim petition and the cause of

action in the suit filed under Rule 63 must be the cause of action comprised in the claim petition.

8. Turning to the facts of this case it is admitted that the 1st defendant took possession of the properties as purchaser in Court sale held long after

the dismissal of the claim and the accrual of the cause of action to the plaintiff under Rule 63. Order 2, Rule 2 enacts that every suit shall include the

whole of the claim which the plaintiff is entitled to make in respect of the cause of action; and that where a plaintiff omits to sue in respect of, or

intentionally relinquished any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

9. In applying this rule one has to keep in mind the difference between cases where a plaintiff joins in one suit several causes of action which can be

joined under the provisions of the CPC and cases where a plaintiff is entitled to ask for more than one relief in respect of the same cause of action.

In the former case the plaintiff has the option of instituting one suit to cover all the causes of action at the date of the plaint and in the latter case he

is bound to join all the reliefs which he claims in respect of a single cause of action on pain of his right to file another suit in respect of any relief not

so joined being lost. I need only refer to the observations of Lord Moulton in *Saminatheln Chetti v. Palaniappa Chetti* (1913) L.R. 41 IndAp 142 :

18 C.W.N. 617. His Lordship referring to Section 34 of the Ceylon Civil Procedure Act which is the same as Order 2, Rule 2, Civil Procedure

Code, observes:

Their Lordships are of opinion that the learned judge took an erroneous view of the object and meaning of this section. It is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action different causes of action, even though they arise from the same transactions.

10. In *Ponnammal v. Ramamirda Aiyar* ILR (1914) 38 M. 829 : 1914 28 M.L.J. 127 it has been held by a Full Bench of this Court that a claim

for possession and a claim for mesne profits are separate causes of action though they arise out of one act of dispossession.

11. The nature of a suit filed by an unsuccessful claimant under the provisions of the CPC has been considered by their Lordships of the Privy

Council in (1907) L.R. 35 I.A. 22 (Privy Council) .That was a case where a person purchased certain property from a judgment-debtor and was

in possession. In execution of a decree against judgment-debtor the property was attached. A claim filed by the purchaser was rejected and a suit

was brought for a declaration of his right to the property. The question was what was the Court-fee payable. If it was merely a suit to set aside a

summary order rejecting a claim, Rs. 10 would be payable, but if it was treated as a suit to recover possession of property the ad valorem fee

would be payable on the value of the property. The Subordinate Judge and the High Court on appeal required the ad valorem fee to be payable.

Their Lordships of the Privy Council reversed the decision and held that the case fell under Article 17 of Schedule II of the Court Fees Act which

applied to suits to alter or set aside a summary decision or order of a Civil Court not established by Letters Patent or a Revenue Court. Referring

to the suit filed by the unsuccessful claimant in that case their Lordships observe:

Now this is an exact description of the effect of the appellant's suit. It is true that instead of asking the Court to alter or set aside the decree which

is the cause of action, she categorically asks from the Court the several decrees which she had asked from the Subordinate Judge and which the

Subordinate Judge had refused. But this is merely a versar formal difference, and Section 283 of the Civil Procedure Code, under which section

the action is brought, recognises such a suit as not merely an appropriate but the only mode of obtaining review in such cases.

12. It is clear that in the view of their Lordships a suit filed u/s 283 which

corresponds to Order 21, Rule 63 is really a suit to set aside the order

and if that right had accrued to a party long before dispossession, it is difficult to see how a subsequent dispossession can be held to be a part of

his cause of action so as to attract the provisions of Order 2, Rule 2, Civil Procedure Code. In *Krishnappa Chetti v. Abdul Khader Saheb* (1913)

ILR 38 Mad. 535 : 1913 26 M.L.J. 449 Sadasiva Aiyar, J., after referring to (1907) L.R. 35 I.A. 22 (Privy Council) observes:

It is clear from the decision of the Privy Council in (1907) L.R. 35 I.A. 22 (Privy Council) that a suit u/s 283 is one to set aside the order passed

upon the claim to the attached property and is a form of appeal therefrom, and the passing of the order forms the plaintiff's cause of action.

13. Turning to the authorities of this Court, prior to the decision of the Full Bench in *Kristnam Sooraya v. Pathma Bee* ILR (1905) Mad. 151, there

was a conflict of authority but I think the matter is concluded by the above decision. In *Ambu v. Ketlilamma* ILR (1890) Mad. 23 : 1890 1 M.L.J.

28 an unsuccessful claimant got a decree declaring her title and then she filed a separate suit for possession and the question arose whether Section

43 of the old Code which corresponds to Order 2, Rule 2 of the new Code would apply so as to bar the second suit. It was held by Muthuswami

Aiyar and Best, JJ., that Section 43 would not apply. Muthuswami Aiyar, J., observed:

The only question of law that arises for decision upon the facts found is whether Section 43 of the CPC bars the present suit. The ground of claim

in Original Suit No. 508 of 1884 was the order that rejected the Claim Petition No. 1448 of 1883, and u/s 283 the plaintiff was entitled to institute

a suit to establish the right claimed by him and thereby to prevent the order from acquiring the force of a decree in a regular suit. The ground of the

present suit was the wrongful withholding of possession from the plaintiff after his title had been declared in the previous suit. The grounds of action

not being identical, Section 43 is not applicable.

14. In *Kunhiamma v. Kunkunni* ILR (1892) Mad. 140 a contrary view was taken by Sir Arthur Collins, C. J., and Wilkinson, J. The learned

Judges thought that Section 42 of the Specific Relief Act must be read with Section 283 of the CPC and that a bare declaration of title should not

be asked by an unsuccessful claimant if he is out of possession. If this decision is

right and if a party was bound to ask for possession in cases

where his claim was disallowed and he was out of possession, Section 43 would apply. In this conflict of authority the matter was referred to a Full

Bench and in *Kristnam Sooraya v. Pathma Bee* ILR (1905) Mad. 151 Sir Arnold White, C. J., Subramania Aiyar and Davies, JJ., followed the

view taken in *Ambu v. Kettilamma* ILR (1890) Mad. 23 : 18901 M.L.J. 28 and overruled the decision in *Kunhiamma v. Kunhunni* ILR (1892)

Mad. 140. The learned Judges observed:

We are unable to accept the view taken by the learned Judges in the case *Kunhiamma v. Kunhunni* ILR (1892) Mad. 140. In our opinion the

proviso to Section 42 of the Specific Relief Act does not operate so as to take away from a party against whom an order has been made under

Sections 280, 281 or 282 of the CPC the special right conferred by Section 283 to sue for a declaration of his title in so far as it is affected by the

order which he seeks to impeach. We think the law on this question was correctly laid down by Muthuswami Aiyar, J., in his judgment in *Ambu v.*

Kettilamma ILR (1890) Mad. 23 : 18901 M.L.J. 28.

15. This decision of the Full Bench has not been overruled by any subsequent decision of this Court. In *Sabella Appdnna v. Malladi Appanna*

(1914) 16 M.L.T. 300 Seshagiri Aiyar and Old field, JJ., held that in a suit filed under Order 21, Rule 63, it was not necessary to add a claim for

possession.

16. Reference has been made by Mr. Ramadoss for the appellant to *Kovvuri Basivireddi (died) and Others Vs. Nidumoori Ramayya and Others*,

, where it was held that a suit by an unsuccessful claimant for a declaration of his title to move-able property attached in execution of a decree and

for the recovery of its value which was filed more than one year after the date of the attachment but within one year of the date of the order

dismissing his claim petition is governed by Article 11 of the Limitation Act and that the words ""to establish the right which he claims to the

property"" which occur both in Article 11 of the Limitation Act and Order 21, Rule 63, Civil Procedure Code, are wide enough to cover" the case

No question arose in this case as to the applicability of Order 2, Rule 2, but there are observations in the judgment which support the appellant's

view. In consequence of difference of opinion between Wallis and Oldfield, JJ.,

the matter came on before Abdur Rahim, C.C.J., and Seshagiri

Aiyar and Phillips, JJ. The learned judges held that in a suit under Order 21, Rule 63 other causes of action could be joined. Abdur Rahim, O.

C.J., was of opinion that the words "'to establish the right'" in their ordinary grammatical sense do not necessarily mean the obtaining of a mere

declaration of the plaintiff's title to the property and exclude all consequential reliefs. Seshagiri Aiyar, J., after referring to *Kunhiamma v. Kunhunm*

ILR (1892) Mad. 140, held that the language employed in Article 11 is comprehensive enough to include not only a prayer for a declaration but

also the consequential reliefs, if any, dependent on the declaration. Phillips, J., was of similar opinion. The learned Judge observes:

The words of the rule are "a suit to establish the right which he claims to the property in dispute" and these words are wide enough to cover not

only a mere suit for declaration but also one for relief consequential on such declaration. To "establish" a right means something more than to

"declare" a right and would seem to me to imply everything that is necessary to secure the proper enjoyment of the right.... If Order 21, Rule 63, is

only to be applied to a suit for a mere declaration, the claimants would afterwards have to file a subsidiary suit for possession, and this would be in

contravention of Order 2, Rule 1.

17. Though several authorities were referred to by the learned Judges, it is curious that the decision of the Full Bench in *Kristnam Sooraya v.*

Pathma Bee ILR (1905) Mad. 151 was not referred to by any of them. The question before the learned Judges was simply one of limitation and

nothing turned on Order 2, Rule 2, and this probably accounts for it. The decision referred to by Seshagiri Aiyar, J., was expressly overruled by

the decision of the Full Bench in *Kristnam Sooraya v. Pathma Bee* ILR (1905) Mad. 151 and any observations as regards Order 2, Rule 2 were

purely obiter. If the learned Judges intended to lay down that causes of action arising subsequent to the dismissal of the claim ought to be joined in

a suit to set aside the order, I would respectfully dissent from it for the reasons already given by me. All that the case referred to by Mr. Ramadoss

decides is that in a suit u/s 283 of the old Code which corresponds to Order 21, Rule 63, the unsuccessful claimant is not necessarily confined to a

suit for a mere declaration of his right, but that he can join other reliefs. But that

is far different from saying that he is bound to ask for consequential reliefs on pain of being barred by Order 2, Rule 2. Reference has also been made by Mr. Ramadoss to *Naranayyan v. Nageswarayyan* ILR (1893) Mad. 389 where the learned Judges (Muthuswami Aiyar and Best, JJ.) observe that a plaintiff in a suit brought u/s 283, Civil Procedure Code, should ask for consequential reliefs in addition to a declaration. But this view was not accepted by the Full Bench which preferred to follow the decision in *Ambu v. Kettilamma* ILR (1890) Mad. 23 : 1 M.L.J. 28.

18. The next question is whether the Subordinate Judge was right in holding that the question as regards the validity of the plaintiff's sale-deed is *res judicata* by reason of the decision in the suit filed by him to set aside the claim order. I am of opinion that the Subordinate Judge was wrong in holding that the matter was *res judicata*. It is admitted that the value of the property as to which possession is sought in the present suit was above the limits of the pecuniary jurisdiction of the District Munsif who tried O.S. No. 1243 of 1914. That suit being one under Rule 63, Order 21, the value for purposes of jurisdiction was the amount in respect of which the property was attached and consequently the District Munsif had jurisdiction. It is clear that if that suit had been for the recovery of possession of the property like the present suit, the District Munsif would have had no jurisdiction to entertain it.

19. The condition precedent to the applicability of the doctrine of *res judicata* is that the decision of the Court which is pleaded in bar should be the decision of a Court competent to try the subsequent suit or the suit in which the issue has been subsequently raised. In (1882) L.R. 9 I.A. 197 (Privy Council) their Lordships of the Privy Council held that the decision of a Court in order to be conclusive in another Court must have been the decision of a Court which would have had jurisdiction to decide the question raised in the subsequent suit. A similar view was taken in (1884) L.R. 12 I.A. 23 (Privy Council) where their Lordships of the Privy Council approve the view taken by Sir Barnes Peacock, C.J., in *Mussamut Edun v. Mussamut Bechun* (1867) 8 W.R. 175. There are numerous other decisions which enunciate the same principle but it is unnecessary to refer to them in detail as it was conceded by Mr. Varadachariar for the respondent that if Section 11 of the Code had to be applied, the matter would not

be re''s judicata. His contention, however, is that the law of res judicata is not exhaustive and that it is open to us to go outside the section and hold

that the decision in O.S. No. 1243 of 1914 would bind the parties. His argument is shortly this. A suit u/s 283 or Order 21, Rule 63 is in substance

and form an appeal against the order on the claim. If a party to a suit who is exonerated files an objection to the attachment, he comes in u/s 47

and the matter is dealt with in execution and an appeal from the order is allowed by the Code and is final and conclusive in subsequent proceedings

and it cannot be said that if the value of the subject-matter of the claira was beyond the limits of the pecuniary jurisdiction this would enable the

party in subsequent proceedings to get behind the order. This is apart from any question u/s 11 and on general principles. He argues by analogy

that if the law instead of allowing a party to agitate a matter in execution proceedings require a separate suit, the same principle should be applied,

as Order 21, Rule 63 declares that subject to the institution of a suit, the order on the claim shall be conclusive and the same conclusiveness should

be attached to the decree passed in favour of the plaintiff in a suit filed to contest the claim order. Reference has been made to (1921) ILR 48 499

(Privy Council) where their Lordships of the Privy Council held that Section 11 is not exhaustive of the circumstances in which an issue is res

judicata. I am unable to accept this contention. It seems to me to be clear that where a case in terms falls within Section 11, Civil Procedure Code,

we cannot travel outside the section for the purpose of determining whether the matter is res judicata or not. Gokul Mandar and Another vs.

Pudmanund Singh and Others is clear authority for this view. In dealing with the question of res judicata their Lordships state:

They will further observe that the essence of a Code is to be exhaustive on the matter in respect of which it declares the law, and it is not the

province of a Judge to disregard or go outside the letter of the enactment according to its true construction.

20. We have not been referred to any case where it was held that although Section 11 would in terms apply, the matter was still held not to be res

judicata by the application of any different principle. The decisions are all the other way. It is contended by Mr. Varadachariar that as the question

of the property not being liable to attachment is conclusive, the sale necessarily falls through and the defendant having no title cannot resist the

plaintiff's claim for possession. I do not think this concludes the matter. The suit being one in ejectment even though the defendant has no title, he

can still put the plaintiff to the proof of his title and the plaintiff has still to show that the sale-deed on which he relies as having given him a title

superior to that of the defendant is a valid one. It was no doubt held in the previous suit that the plaintiff's sale-deed is genuine, bona fide and

supported by consideration. But as the value of the property now in dispute is beyond the limits of the pecuniary jurisdiction of the Court which

decided the former suit and the decision is not *res judicata*, it is open to the defendant to agitate the question in the present suit. I think the

Subordinate Judge is wrong in not going into the question. I would therefore reverse the decree of the Lower Court and remand the suit for

disposal on issues 4, 5 and 6, which relate to want of consideration and to the sale being void u/s 53 of the Transfer of Property Act. The costs of

the appeal memo. will be refunded.

Reilly, J.

21. That an unsuccessful claimant under Rule 58 of Order 21, Code of Civil Procedure, may sue under Rule 63 of that order to establish the right

which he claims to the property attached without praying for recovery of possession, even when out of possession and able to sue for that relief,

Section 42 of the Specific Relief Act not being applicable to such a case was in effect decided by the Full Bench in *Kristnam Sooraya v. Pathnui*

Bee ILR (1905) Mad. 151, a decision which would be binding on us even if we did not agree with it. With that decision *Kovvuri Basivireddi*

(died) and Others Vs. *Nidumoori Ramayya and Others*, on which Mr. Rannadoss relies, is not incompatible, as the actual decision in the latter

case, so far as it was not confined to a question of limitation, was that in the suit provided for in Rule 63 of Order 21, the claimant may include

consequential relief such as recovery of possession.

22. It is true that two of the learned Judges who heard the Letters Patent Appeal in that case, *Seshagiri Aiyar and Phillips, JJ.*, supported their

conclusion by references to Rule 2 of Order 2. But their view of that rule, from which with great respect I must differ, is not binding on us. The first

contention raised by Mr. Ramadoss in this case is that the plaintiff, having omitted in his former suit O.S. No. 1243 of 1914 to sue for possession,

is precluded by Rule 2 of Order 2 from doing so in the present suit. That would be correct only if his loss of possession was the cause of action or included in the cause of action of his former suit. The former suit he brought in accordance with Rule 63 of Order 21 to establish the right which he had failed to establish in his claim petition, and this cause of action was clearly, as he stated in his plaint, the adverse order made on his claim petition. The fact that he had then available another cause of action, his loss of possession in consequence of the execution-sale to defendant 1, which he might have added to his suit and on which he could have prayed for further relief, could not affect the nature of the cause of action on which alone he chose to sue. If any authority is needed to show what is the cause of action in the kind of suit provided for in Rule 63 of Order 21, it is made clear by their Lordships of the Privy Council in (1907) L.R. 35 I.A. 22 (Privy Council) The plaintiff could not have sued for possession merely on the ground that an adverse order had been made against him on his claim petition; for that purpose it would have been necessary for him to allege a further cause of action, his subsequent dispossession in consequence of the sale to defendant 1. As it is not on the cause of action of his former suit that he now sues for possession, I agree that his present suit is not barred by Rule 2 of Order 2.

23. I agree also that defendant I's contentions, which are the subject of issues 4 and 5 in the present suit, are not res judicata by virtue of the decision in the former suit. That was a suit tried by a District Munsif, who was not competent to try the present suit. To treat his findings on these questions as res judicata would not be to apply the principle of Section 11, Civil Procedure Code, to proceedings other than a former suit, as was done by their Lordships of the Privy Council in (1921) ILR 48 499 (Privy Council) and 26 CWN 713 (Privy Council) but to extend the principle of that section in a manner implicitly forbidden by its wording so as to treat the decision of an inferior tribunal as binding on a superior tribunal, that would be not to apply but to violate the principle of the section. In my opinion Mr. Varadachariar is right in his contention for the plaintiff that by the decision in the plaintiff's former suit his claim that the property was not liable to attachment in execution of defendant I's decree, which was dismissed in the execution proceedings, has been allowed, the attachment to which he objected has been set aside, the property attached has been

released and the basis of the execution-sale to defendant 1 has therefore gone. That is what has been done by the act of a competent Court as the final result of the former %suit. It can be proved, if necessary, in the present suit by producing the decree in the former suit and cannot be disputed by defendant 1. Indeed I do not understand from his pleadings that defendant 1 in the present suit has any intention of disputing it. But the result of that is that, though he is in possession, defendant 1's title to the property has gone, not that he is bound to admit the plaintiff's title or is precluded by the findings of an inferior Court, incompetent to try the present suit, from requiring the plaintiff to prove again his title in the present suit if he thinks it worth while to adopt that course. I agree that this appeal should be allowed and that the suit should be remanded to the Subordinate Judge for fresh disposal after trying issues 4, 5 and 6.