

Allada Eswarappa and anr. Vs. M. Krishna Reddy and ors.

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Court : Andhra Pradesh

Decided On : Mar-28-1963

Reported in : AIR1964AP99

Judge : P. Chandra Reddy, C.J. and ;Gopalakrishnan Nair, J.

Acts : Limitation Act, 1908 - Schedule - Articles 11 and 120; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11 and 47 - Order 21, Rule 58 - Order 38, Rule 8

Appeal No. : Letters Patent Appeal Nos. 99 and 100 of 1961

Appellant : Allada Eswarappa and anr.

Respondent : M. Krishna Reddy and ors.

Advocate for Def. : O. Chinnappa Reddy and ;C. Padmanabha Reddy, Advs.

Advocate for Pet/Ap. : N.M. Sastry and ;B. Rama Rao, Adv.

Disposition : L.P.A. 99/61 allowed. L.P.A. 100/61 dismissed

Judgement :

Chandra Reddy, C.J.

1. This appeal under Clause 15 of the Letters Patent is directed against the judgment of Qamar Hasan, J., in C. M. S. A. No. 5 of 1957 modifying the decree of

the Subordinate Judge, Kurnool, made in A. S. No. 105 of 1956. The learned Judge gave leave for filing this appeal.

2. The material facts lie in a short compass and may be stated as follows. The first respondent brought O. S. No. 172 of 1953 on the file of the Court of the District Munsif of Adoni for recovery of Rs. 1,000/- said to be due on a promissory note impleading the executant of the promissory note and his son as defendants 1 and 2 respectively. Pending the suit, he filed I. A. No. 419 of 1953 for attachment before judgment of five items of immovable property. The second defendant put forward a claim to items 1, 2 and 5 as his separate properties said to have been got under a will of his paternal grandfather, while no objection was taken by him in regard to attachment of items 3 and 4.

3. The District Munsif raised the interim attachment in regard to items 1, 2 and 5 accepting the claim.

4. The aggrieved plaintiff carried an appeal (C. M. A. 48 of 1953) to the District Court, Kurnool. The appellate Court allowed the appeal and made the interim attachment of the disputed items absolute observing that it was open to the second defendant to agitate his absolute rights to the properties by a separate suit. Notwithstanding this, the second defendant did not raise any action to set aside this order and to establish his claim to these properties.

5. After the passing of the decree in O. S. No. 172 of 1953, the plaintiff filed E. P. No. 328 of 1954 seeking to proceed against all the five items of property. At that stage, the second defendant filed E. A. No. 302 of 1955 under Section 47 Civil Procedure Codn claiming all the items of property as his own.

6. The District Munsif, who was executing the decree, negated his contention in the view that the properties belonged to the joint family and as such they were answerable to the decree debt.

7. The second defendant, who was dissatisfied by this adjudication, preferred an appeal to the Subordinate Judge's Court, Kurnool. The Subordinate Judge disagreeing with the trial Court found that they were the separate properties of the

second defendant having been got under the will of his paternal grand-father to whom these properties belonged as his self-acquisitions. In the result, he held that none of these items of property was liable to be attached.

8. It is the correctness of this conclusion that was canvassed in the civil miscellaneous second appeal preferred to this Court by the aggrieved plaintiff. The main point that was debated before our learned brother was whether the determination of the District Judge in C. M. A. No. 48 of 1953 stood in the way of the second defendant filing objections under Section 47 C. P. C., a suit not having been filed within one year from the date of the order in the C. M. A. Our learned brother, Qamar Hasan, J., took the view that the second defendant should have filed a suit within one year of the order in C. M. A. No. 48 of 1953 and this not having been done the order of the District Judge governing items 1, 2 and 5 had become final and consequently the execution could proceed against these items. He, however, dismissed the appeal as regards items 3 and 4, as no adjudication, was made in regard thereto, the second defendant not having questioned the validity of the attachment as regards them.

9. Both parties have preferred appeals (L. P. A. Nos. 99 and 100 of 1961) against this judgment in so far as it went against them. We are here concerned with the appeal filed by the second defendant, L. P. A. No. 99 of 1961. In support of this Appeal, it is urged by Sri N. M. Sastry, learned counsel for the appellant, that the conclusion of the learned Judge that an order under Order 38, Rule 8 Civil Procedure Code is governed by Article 11 of the Limitation Act and, therefore, a suit should be brought within one year is erroneous and that the learned Judge has misunderstood the scope of the decision *Arunachalam Chetty v. Periasami Servai*, ILR 44 Mad 902 : (AIR 1921 Mad 163) (FB).

10. This contention is well founded. The learned Judge referred to the following observations of Wallis, C. J., who spoke for the majority of the Judges constituting the Full Bench.

'Where, however, as in the present case, there is an order in execution for the sale of the attached property, that order appears to me to proceed upon the footing that the property is to be considered as attached in execution by virtue of Rule 11, and

I think a claim put in after that order may properly be regarded as a claim to property attached in execution of a decree within the meaning of Article 11 and would answer the reference accordingly.'

We feel that these observations are irrelevant in the context of the present case because such a situation does not obtain here. In the instant case, after the decree was passed, the plaintiff levied execution and within a short time thereof objections were formulated under Section 47 Civil Procedure Code questioning the right of the judgment-creditor to proceed against these properties. No order has been made in the execution petition by the executing Court before the petition under Section 47 Civil Procedure Code was filed by the judgment-debtor. Therefore, the statement of law contained in the above-mentioned passage is inapplicable to the present case. It was definitely stated in that case that Article 11 of the Limitation Act would not govern attachments before judgment, as it could not be said that the attachment was made in execution of the decree, since at the time of attachment there was no decree in existence. A plain reading of Article 11 of the Limitation Act would make it clear that it would not apply to claim made under Order 38 Rule 8 Civil Procedure Code. If Article 11 is not attracted to the case of attachment before judgment -- and not in execution of the decree, there is no other specific Article in the Limitation Act and as such Article 120 would spring into operation.

11. It is not necessary to labour this point any further, having regard to the authoritative pronouncement of the Full Bench of the Madras High Court consisting of five Judges in ILR 44 Mad 902 : (AIR 1921 Mad 163) (FB).

12).C. M. A. No. 48 of 1953, it would have been in time. But in this case, this remedy was not availed of by the second defendant. On the other hand, he preferred objections about sixteen months after the order of the District Judge. In this situation, the learned counsel for the appellant requests us to treat this as a suit by virtue of the provisions of Section 47(2) Civil Procedure Code. It is true that this request was not made within six years. However, there is no legal impediment in the way of granting this permission since the application was made within six years. We think that this is a proper case in which we should treat the application

as a suit subject to the appellant paying the deficit court-fee and also a sum of Rs. 50 (fifty) by way of costs to the other side. Time for payment of the deficit court-fee in the lower Court and costs to the other side here--on or before 15th June, 1963. Here we would like to make it clear that we have not considered the question whether the appeal was competent against the order under Order 38 Rule 8 Civil Procedure Code and if not whether that order could be disregarded as having been made without jurisdiction as the appeal could be disposed of on the other grounds. For the purpose of this appeal, we have proceeded on the assumption that it was the appellate order that should form the subject of the suit to be brought within six years.

13. In the result, the appeal is allowed to the extent indicated above. Parties will bear their own costs in the Courts below and in the C. M. S. A.

L. P. A. No. 100 of 1961.

14. We will now proceed to dispose of L. P. A. No. 100 of 1961, brought by the aggrieved plaintiff. The chief argument advanced on behalf of the appellant is that the second defendant not having chosen to urge any objection or claim in regard to items 3 and 4, he is precluded from questioning the liability of these two items of property in regard to the decree-debt. In support of his stand the learned counsel invokes the general principle underlying Section 11(4) Civil Procedure Code. We do not think that we can give effect to this argument. It is to be borne in mind that Order 21, Rule 58 Civil Procedure Code or Order 38, Rule 8 Civil Procedure Code does not make it obligatory on the part of any person to prefer claims or objections to the attachment. All that they contemplate is that if objections or claims are preferred, they have to be investigated and a decision given thereon. But the person claiming the property as his own is Under no duty to invoke Order 38, Rule 8 Civil Procedure Code. If he wishes, he can lay a claim to the property; but his failure to do so does not entail the penalty contemplated by the principle underlying Section 11(4) Civil Procedure Code. We, therefore, feel that the omission to take an exception to the validity of an attachment before judgment does not bar the investigation of the claim to be put forward in execution of the decree. The only effect of attaching the property before judgment is that by reason of the

attachment the decree-holder could proceed against the property. If before execution could proceed further the person claiming the property as his own should raise objections, they will have to be investigated and a decision given thereon.

15. There is abundant authority in support of our view. (Vide *Ashna Eibi v. Awaljadi Bibi*, ILR 44 Cal 698 : (AIR 1917 Cal 669); *Beni Mahto v. Chaturgun Sao*, AIR 1937 Pat 245 and *Basiram Malo v. Kattyayani Debi*, ILR 38 Cal 448). It is not necessary for us to multiply citations. Suffice it say that a person, who omits to prefer a claim under Order 38, Rule 8 Civil Procedure Code, does not run the risk of being prevented from raising an objection under Section 47 Civil Procedure Code after the execution of the decree is levied. We, therefore, affirm the judgment of Qamar Hasan, J., on this aspect of the matter.

16. This appeal, therefore, fails and is dismissed. The parties will bear their own costs throughout.

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