

**Gummadi Appayya and ors. Vs. Gavini Venkataratnam**

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**Court :** Chennai

**Decided On :** Feb-13-1953

**Reported in :** AIR1954Mad1; (1953)2MLJ225

**Judge :** Krishnaswami Nayudu, J.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) - Sections 11 - Order 21, Rules 22 and 23

**Appeal No. :** A.A.O. No. 667 of 1949

**Appellant :** Gummadi Appayya and ors.

**Respondent :** Gavini Venkataratnam

**Advocate for Def. :** G. Venkatarama Sastri, Adv.

**Advocate for Pet/Ap. :** M.S. Ramachandra Rao and ;M. Krishna Rao, Adv.

**Disposition :** Appeal allowed

**Judgement :**

Krishnaswami Nayudu, J.

1. The appellants are the judgment-debtors in O. S. No. 276 of 1936 on the file of the District Munsif's Court, Repalle, and this appeal arises out of the execution proceedings taken out by the plaintiff-decree-holder. The main point for determination in this appeal is as to whether the execution petition is barred by limitation. The decree was passed on 8-3-1939. The first execution Petn. was on 2-3-1942 which was dismissed on 21-3-1942 as not pressed. The second execution was taken out in E. P. No. 72 of 1946 filed, on 31-1-1946 admittedly more than three years after the disposal of the prior execution. In E. P. No. 72 of 1946 the decree-holder alleged a payment of Rs. 25 said to have been made by the judgment-debtors on 6-2-1944 and relied on that payment as an acknowledgment saving the proceeding from the bar of limitation. That petition was returned from time to time for information as to the fact and mode of the payment of Rs. 25 and eventually on 28-2-1946, the Court ordered notice under Order 21, Rule 22, C. P. C. and the endorsement on the petition on that date was as follows:

'The previous E. P. was rejected on 21-3-1942 as it was not pressed. This E. P. is filed on 31-1-1946 after the lapse of the three years from the date of last order and as such the decree is barred by limitation. But the petitioner relies on an uncertified payment of Rs. 25 on 6-2-1944, which is shown in col. 7 of this E. P. He further represents that mere showing of a payment in an execution petition amounts to certifying the payment. Authority is not cited in support of this contention. Notices subject to questions of limitation 28-3-1946.'

On 18-4-1946 arrest was ordered. The present execution petition out of which this appeal arises is E. P. No. 37 of 1947 presented on 3-2-1947. Objection was taken on behalf of the appellants that in fact no payment of Rs.

25 or any other sum, was made, as urged by the plaintiff, that the earlier E. P. No. 72 of 1946 was barred by limitation and 'the present E. P. was equally barred and that, in any event, the payment relied upon could not save the bar of limitation, not having been certified by Court and not having been evidenced in writing. The objection of the appellants was upheld by the learned District Munsif and, in appeal, the learned Subordinate Judge, Tenali, while holding in favour of the appellants that the payment relied upon in E. P. 72 of 1946 was not true and that, even if it was true, it would not save limitation, as there was no evidence in writing, however, allowed the appeal and remanded the petition holding that the order dated 18-4-1946 in E. P. No. 72 of 1946 operates as 'res judicata' and the judgment-debtors are barred in the present E. P. from raising the question that E. P. No. 72 of 1946 was barred by limitation.

2. It is contended on behalf of the appellants that the notice under Order 21, Rule 22, C. P. C. did not mention that the question as to whether the execution application was in time was to be decided, that is, that the question of limitation was raised and remained to be adjudicated upon though the notice that was directed to the appellants was subject to the question of limitation, the Court intending thereby that the appellants should be given notice that a question of limitation had been raised and would be decided and the appellants had to show cause why it should not be decided against them and execution issued) and that unless the notice did in express terms inform the judgment-debtors of the point to be decided, any order allowing execution to proceed expressly or impliedly deciding the question in favour of the decree-holder would not be 'res judicata' on subsequent proceedings. Reliance is placed in support of this proposition on the following decisions, viz., -- 'Adaikappa Chettiar v. Natesan : AIR1931Mad381 (A); -- 'Subra-manian Aiyar v. Raja Rajeswara Sethupathi', AIR 1918 Mad 1167; -- 'Narayana Pattar v. Gopalakrishna Pattar', 28 Mad 355 (C); -- 'Ilangaswami Naik v. Ramaswami Chetti', 30 Mad 255 (D); -- 'Richharam v. Pasupathi Banerjee', : AIR1928Pat471 (E); -- 'Chandulal Agarwala v. Khalilur Rehman (F). In -- : AIR1931Mad381, this question has been exhaustively dealt with in the judgment of Madhavan Nair J. It was held that though neither Section 11. nor any of its explanations can in terms apply to, an execution proceeding because the question arises in a proceeding which is a continuation of the same suit and not in a second suit, yet where a point has been decided in execution by a competent Court after notice to the counter petitioner, either expressly or by necessary implication, that decision is binding upon the parties in subsequent execution proceedings; and, when applying this principle, it must be steadily kept in view that the party, who is sought to be affected by the bar of 'res judicata', should have notice of the point likely to be decided against him and should have an opportunity of putting forward his contentions against such decision. In that case all the relevant decisions were fully considered. This principle was also recognised by Seshagiri Aiyar J. in -- AIR 1918 Mad 1167 (B)', as could be seen from the following observations of the learned Judge at page 1172:

'At the same time, as pointed out by the Judicial Committee, parties should not be allowed to agitate the same question after it has been once decided; and this dictum of their Lordships has been extended to cases where the parties had an opportunity to object to the decision, but did not avail themselves of that opportunity. One principle seems to be clear, & that is, that the party who is sought to be affected by the bar of 'res judicata' should have notice of the point which is likely to be decided against him. and should have an opportunity of putting forward his contentions against such a decision.'

In -- : AIR1928Pat471 (E)', in execution, of the mortgage decree the first petition was filed and the Court directed issue of notice under Order 21, Rule 22, C. P. C. with special mention of the question of limitation. The service was found defective and substituted service was allowed and the decree-holders were ordered to take further steps. This execution petition was dismissed for failure of the decree-holders to do so. In a latter execution the property was sold. The judgment-debtor applied under Section 47 contending that the execution was time barred. With reference to a contention, that as the objection was not taken in the first execution case, it was 'res judicata', it was held that there was no adjudication in the previous proceedings, that the execution was not barred by limitation and that the judgment-debtor was entitled to raise the question of limitation and to have it decided.

3. In -- (F)', the question, of the application of the doctrine of 'res judicata' arose as between parties, who have

been co-defendants in a previous suit. It was held that the principle of 'res judicata' would apply as between co-defendants, but that, in addition to the conditions for the application of 'res judicata', the qualification must be added that, if such a party is to be bound by a previous judgment, it must be proved clearly that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided. Though this decision does not deal with a case arising in execution, it is an extension of the principle laid down in Section 11, C. P. C. that is made applicable to co-defendants and in such a case it found eminently necessary that the person, who is sought to be bound by the decision, must have notice of the question that was in issue and required to be decided. That qualification should, with greater emphasis, be made applicable to execution proceedings where the plea of 'res judicata' is raised (barring the judgment-debtor from raising the objection) which he is debarred from contending by reason of an order made in previous execution, where the question to be decided was not given notice of to the judgment-debtor.

4. That the general principles of law underlying the doctrine of 'res judicata' are applicable to execution proceedings has been held in a series of cases including decision of the Privy Council, The leading case of the Privy Council in -- 'Mungul Pershad Dichit v. Girija Kant Lahiri', 8 Cal 51 (G), has been- relied upon successively as laying down the proposition that the principles of 'res judicata' are applicable to execution proceedings. What was laid down by the Privy Council in that case was, where a decree-holder applies for execution and the judgment-debtor being entitled to and having had an opportunity to raise a plea of limitation does not do so, and an order for execution by attachment is made on the application, the judgment-debtor is precluded from raising that plea at a subsequent stage, Their Lordships of the Privy Council observed :

'The order was made by a Court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it; it was acted upon, and the property sought to be sold under it was attached, and remained under attachment until the application for the sale now under consideration was made.'

In -- 'Venkataranga Reddi v. Chinna Sithamma', AIR 1941 Mad 440 (H), a Bench of this Court consisting of Wadsworth J. and Patanjali Sastri J. (as he then was) held that an order for execution made after notice to the judgment-debtor, who did not appear, precludes him from raising a plea of limitation in subsequent proceedings, even though the application on which the order was passed did not 'fructify' and was eventually dismissed. The learned Judges dissented from the view taken to the contrary by . the Full Bench of the Allahabad High Court in -- 'Genda Lal v. Hazarilal' : AIR1936All21 . In -- 'AIR 1941 Mad 440 (H)', the question that really fell to be decided was whether an order passed in a previous execution petition which was dismissed could be held to preclude parties from raising in subsequent proceeding matters which are not expressly determined by the prior order and not so much as to the decision of the question that is now before me as to whether the notice that is issued under Order 21, Rule 22, C. P. C. should state the question that has been raised and requires to be decided before execution could issue, especially when the Court ordering notice directs that the notice has been issued only subject to the question of limitation.

5. In -- : AIR1936All21 , the execution application was filed more than three years after, the decree on the strength of an alleged payment by the judgment-debtor. Notice was served on the judgment-debtor in which there was intimation given to the judgment-debtor that the decree-holder had alleged certain payment, but there was no intimation that there was a slip containing an acknowledgment of liability which was lost. The judgment-debtor, however, did not appeal in Court. It was held that the Court had not before it any acknowledgment or affidavit showing that an acknowledgment had existed and the mere fact of the payment of a sum of money by the judgment-debtor or its being certified by the decree-holder in Court did not amount to any step which would extend the period of limitation and also that the mere fact that the judgment-debtor did not appear in response to the notice did not imply that he admitted that the application was in time when, on the face of it, it was barred by limitation and therefore the application was barred by time and the Court should not have issued any notice at all. The facts of this case are almost similar to the one I am now considering and, when there was no acknowledgment in writing, the Court should not have issued notice in the earlier E. P. (72 of 1946) and should have dismissed the application. The fact that execution was ordered

could not amount to an adjudication as to whether the petition was barred by limitation and, unless there is such an adjudication, it cannot be contended that an order in the petition for arrest would be a bar to the judgment-debtor raising the question as to limitation in a subsequent proceeding.

6. The principle of 'res judicata' as enacted in Section 11, C. P. C. has been applied to execution proceedings. Section 11 in terms applies to a subsequent suit and does not apply to applications in execution. But the principle of it has been extended to execution applications on the basis that an order at one stage of the proceeding in a suit would be binding on the parties at a subsequent stage of the same suit, the execution proceeding being considered as a later stage of the suit itself, and it is not therefore Section 11 as such that is made applicable, but the principle of estoppel by judgment that has been applied to execution proceedings, the purpose being to avoid a question once decided being agitated against in a subsequent proceeding. The principle of 'res judicata' as enacted in Section 11 cannot be extended indiscriminately and with all its implications to execution proceedings. The dominant purpose with which the principle of Section 11, C. P. C. is made applicable to execution proceedings is that a party should not be entitled to re-agitate a question once decided. Once there has been a decision on the question between the same parties, it should not be allowed to be reopened in the same suit or a subsequent proceeding between the same parties except in appeal or revision if one lies. To preclude parties from raising the question over again, it goes without saying that there must be a decision, that is an adjudication of the question that is sought to be raised in the subsequent proceedings. Could it be said that a notice under Order 21, R 22 to the judgment-debtor without intimating to him the point that is in dispute and which has to be decided and an order after such notice in the absence of the appearance of the judgment-debtor or any objection by him, amounts to an adjudication on the question that is raised, in this case, the question of limitation. Prima facie E. P. No. 72 of 1946 was barred on the date it was presented as it was beyond three years from the last order in the E. P. and the Court, in the first instance, should satisfy itself that it is not barred by limitation, and in this case the Court not having been satisfied has issued notice subject to the question of limitation. Nothing more appears to have been done, excepting that notice was served without any indication in it that Court has to adjudicate as to whether the petition was barred by time. In such a case could the principle of explanation (4) to Section 11, C. P. C. be canvassed in support of the decree-holder that the judgment-debtors having failed to raise this ground of defence when they were given notice, it must be deemed that the matter as to limitation was directly and substantially in issue in the proceeding and the same decided by reason of the order of arrest that was directed to be issued

7. Sulaiman C. J. in his judgment in --' : AIR1936All21 (I)', while dealing with the argument that once a notice is issued under Order 21, Rule 22, and the judgment-debtor does not appear and the Court passes an order under Rule 23, Sub-rule (1), then he is debarred from raising any objection whatsoever to the validity of the application, observed that it was the duty of the Court under Rule 17 to examine the application and satisfy itself that it was in accordance with law. Here, the Court has satisfied itself 'prima facie' that it was barred by limitation. The proper course then for the Court should have been to dismiss the application, as observed by Sulaiman C. J. summarily without issuing any notice to the judgment-debtor at all. But not having done so, the Court chose in this case to issue a notice subject to the question of limitation, but not notifying the judgment-debtors that the question of limitation was at issue. Sulaiman C. J. further points out the distinction that exists in the nature of the orders that are contemplated by Sub-rules (1) and (2) of Rule 23 of Order 21. Sub-rule (1) says that where the person to whom notice is issued under Rule 22 does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed, while Sub-rule (2) provides that where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit. Sulaiman C. J. is of the view that

'where the judgment-debtor has appeared and offered any objection, the Court is bound to consider such objection, and must make an order thereon as it thinks fit. Such an order would therefore, if against the judgment-debtor, amount to overruling his objection and dismissing it. It would, by virtue of Section 2 read with Section 47, C. P. C. be a decree which would be appealable at once. On the other hand, if the judgment-

debtor does not appear at all and does not offer any objection, and the Court had issued notice on the supposition that the application was in time) no occasion arises for the Court to enter upon an enquiry as to whether the application is or is not barred by time.' The learned Chief Justice further observes: 'A mere order that the decree should be executed which under the sub-rule has to be automatic, cannot be regarded as an adjudication of the question as between the decree-holder on the one hand and the judgment-debtor on the other so as to operate as a bar by implication at all subsequent stages in the same proceedings.'

8. These observations were considered by Patanjali Sastri J. (as he then was) in 'AIR 1941 Mad 440. (H), and the learned Judge observed as follows :

'There is thus no justification for the view that an order under Sub-rule (1) 'has to be automatic' and that an order under Sub-rule (2) alone amounts to an 'adjudication' such as would fall within the definition of a decree, and we are unable to see any such distinction as the learned Judge (Sulaiman C. J.) supposed to exist between these sub-rules.'

While I am in agreement that the order under Sub-r, (1) is not automatic, with respect to Patanjali Sastri J., I feel myself unable to subscribe to the opinion expressed by him that there is no distinction between these two sub-rules pointed out by Sulaiman C. J. in ' : AIR1936All21 (I)'.

9. A reading of Rule 23, Sub-rules (1) and (2) would show that a distinction was sought to be maintained as between an order passed under Sub-rule (1) and an order passed under Sub-rule (2). Under Sub-rule (1), if a notice is issued under Rule 22 and the judgment-debtor does not appear, it would be open to the Court to order the decree to be executed or if the judgment-debtor appears and does not show cause to the satisfaction of the Court, that is, if he appears but does not raise any objection, then also the Court shall order the decree to be executed. But if the judgment-debtor appears and raises an objection, Sub-rule (2) would come into the picture and the objection has to be considered by the Court and the Court should make such order as it thinks fit, either upholding the objection or rejecting the objection, in either case giving reasons for the conclusion, and such an order alone would, as pointed out by Sulaiman C. J. amount to an 'adjudication' which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to the matter in controversy that is raised and would therefore be an appealable order by virtue of Section 2 read with Section 47, C. P. C. Patanjali Sastri J. in 'AIR 1941 Mad 440 (H)' points out that Sub-r, (1) covers not only cases where the judgment-debtor does not appear, but also those where he appears and objects but fails to satisfy the Court that the decree should not be executed, and in all such cases the Court shall require the decree to be executed, that is, even in cases where the judgment-debtor appears and offers any objection to the execution of the decree and the Court considers such objection, it has to act under Sub-rule (1), if it is not satisfied that the objection is valid, and where such objection is found to be tenable, the Court has to make 'such order as it thinks fit', that is to say, according to the nature and scope of the objection upheld. If what is contemplated under Sub-rule (1) could come within Sub-rule (1), that is, where the judgment-debtor appears and offers any objection, the Court before ordering the decree to be executed has necessarily to consider the objection and, if it rejects the objection, has to order execution, there is no need for Sub-rule (2) at all. If the objection is upheld even under Sub-rule (1), the Court could not order the decree to be executed and has to dismiss it. There is no purpose in enacting Sub-rule (2) unless it was intended that when once an objection is raised that objection has to be considered and adjudicated upon and the Court should make such order as it thinks fit, either ordering execution or rejecting the objection. I am inclined to agree with the reasoning of Sulaiman C. J. as regards the scope of Order 21, Rule 23, Sub-rules (1) and (2) and hold that unless an objection had been raised by the judgment-debtor and had been considered, there could not be an adjudication of the question arising out of the objection, which would have the effect of barring the judgment-debtor, from raising it in any subsequent proceeding. The mere fact that the judgment-debtor has not filed an objection which in this case has led to the Court making the order apparently under Sub-rule (1) of Rule 23, would not constitute it as a final determination of the question raised justifying the application of the principle of 'res judicata' to such an order.

10. To preclude the judgment-debtor from raising the question of limitation, as he has sought to do in the subsequent application, it is necessary to rely on the principle underlying explanation (4) to Section 11 and make it applicable to this case; that is the judgment-debtor having received notice ought to have raised the defence that the execution petition was barred by limitation and having failed to do so the question of limitation must be deemed to have been directly and substantially in issue, and by the order passed in execution must be deemed to have been decided against the judgment-debtor. It will be inequitable to apply 'in toto' the provisions of Section 11, C. P. C. to execution proceedings, and Section 11 has been expressly enacted and confined to suits alone. In suits, a copy of the plaint is served on the defendant and the defendant is thereby put on notice of the case of the plaintiff and the issues that would arise in the suit, and so if he fails, after receiving summons and a copy of the plaint, to raise his defence, then it could reasonably be held, relying on explanation (4) to Section 11, that he should raise the defence and having failed to raise it, the case as set up in the plaint must be deemed to have been decided against the defendant. But in execution petition a copy of the E. P. is not furnished to the judgment-debtor and only a notice to show cause why execution should not issue under Order 21, Rule 22 is issued, which does not contain any particulars mentioned in the execution petition. In this case, if the copy of the execution petition had been served on the judgment-debtor, he would have known that a payment of Rs. 25 was relied upon to save limitation, in which event it could be justifiably argued that the judgment-debtor having been aware of the fact of the payment relied upon to save the bar of limitation, should have appeared and stated what his case was regarding the payment relied upon as acknowledgment. In the absence of such intimation, which could only be by serving a copy of the petition, there being no provision in Order 1, Rule 22 enjoining the decree-holder to serve a copy of the execution petition, the judgment-debtor must be deemed to have had no knowledge of the contents of the execution petition and in such a case the principle embodied in explanation (4) of Section 11 could not be applied to him and to execution applications generally. If the notice under Order 21, Rule 22 was served on the judgment-debtor, the notice containing information as to payment of Rs. 25 and also that the Court has not admitted the application but issued notice only subject to the question of limitation being decided, and even after such knowledge on the part of the judgment-debtor that the question of limitation was to be enquired into, the judgment-debtor did not appear and object to the execution there might be justification for holding that he is precluded from raising the question by applying the principle of explanation (4) to Section 11. In this case, the judgment-debtors not having had knowledge of the question to be decided, the principle of 'res judicata' cannot be applied so as to preclude them from raising the question in the present execution petition.

11. The scope and extent of the application of the general principles of 'res judicata' and as enacted in Section 11, C. P. C. to execution and other proceedings in a suit have been the subject of judicial decisions ever since the pronouncement of the Privy Council in -- 'Ram Kirpal v. Rup Kuari', 6 All 269 (J) and '8 Cal 51 (PC) (G) and there have been numerous decisions on the subject. Courts have only to rely on the Judge-made law as found in such decisions which cannot be expected, as all judicial precedents are, to be capable of being applied to the varying facts of each case, more so when some of them are conflicting. It appears to me that the Civil Procedure Code may be amended to incorporate within itself a provision making applicable to execution and other proceedings in a suit the general principle of 'res judicata\*' to a limited extent and in the light of the decisions on the subject and defining the scope of its application in relation to particular proceedings.

12. In the result, the finding of the learned Subordinate Judge that the order dated 18-4-1946 in E. P. No. 72 of 1946 ordering notice of arrest operates as 'res judicata' and the judgment-debtors are barred in the present E. P. from raising the question that E. P. No. 72 of 1946 was barred by limitation is set aside, and the E. P will stand dismissed in view of the finding of the fact that the payment of Rs. 25 is not true.

13. The appeal is allowed with costs. No.leave.