

Lingama Naidu Vs. the Official Receiver

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Court : Chennai

Decided On : Jan-11-1928

Reported in : 110Ind.Cas.511

Judge : Kumaraswami Sastriar ;Devadoss, JJ.

Appellant : Lingama Naidu

Respondent : The Official Receiver

Judgement :

This is an appeal Bgainst the order of the District Judge confirming the judgment of the Subordinate Judge setting aside an alienation in favour of the appellant. The District Judge did not go into the meritB but confined himself to the question whether the non-filing of a regular suit by the appellant prevented him from establishing his title to the property as against the Official Receiver.

The facts are shortly these. The appellant claims under a sale-deed dated the 7th February, 1923. In execution of a decree against his vendor the property was attached. A claim petition was put in by the appellant. When objection was taken upt the appellant applied to withdraw the claim petition saying that he would file a regular suit. The District Munsif without going into the merits of the claim on this application to withdraw dismissed the claim petition on the 9th July, 1923. The attachment was an attachment before judgment. About 3 months after this withdrawal the defendant filed an application in insolvency on the 4th October,

1923. So far as it appears on the record, no decree seems to have been obtained, at any rate no steps were taken in execution to sell the property already attached. The appellant did not file a suit. The Official Receiver put in a petition to set aside the sale as fraudulent. The Subordinate Judge on the merits held that the sale was fraudulent and collusive and also held that a suit not having been filed within one year the Bale was invalid owing to the adverse order on the claim. The District Judge, as we said before, did not go into the question, on the merits but agreed with the Subordinate Judge as regards the effect of the order withdrawing the claim. It is admitted before us that in the claim proceedings the defendant in the suit was not a party and it is clear that he was not bound by any orders passed on the claim petition. We may refer to *Vadalingam Pillai v. Veerathal* 54 Ind. Cas. 530; 1920 37 M.L.J. 547 ; 26 M.L.T. 513 ; (1920) M.W.N. 77 where it was held by Seshagiri Ayyar and Bakewell, JJ., that a judgment debtor who has not been made a party to the claim proceedings will not be bound by the order. We may also refer to the observations of the learned Judges in *Kumara Goundan v. Thevaraya Reddi* : AIR1925 Mad1113 --if the defendant is not bound by the order it is difficult to see how the Official Receiver in the insolvency of the defendant can be bound by any such order or can take advantage of that order in order to defeat the sale executed by the defendant on the ground that the suit was not filed within one year. So far as the order on the claim petition is concerned, as we said before there was no adjudication and the petition was not dismissed because it was filed too late. In the present case it does not appear that the petition was disposed of in any of the ways mentioned in Order XXI, Rule 58 of the Code of Civil Procedure which provides that a Court shall either proceed to investigate the claim or dismiss it on the ground that it was filed too late and not investigate the question raised. Rule 63 provides that where a claim or 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 the order shall be conclusive. It is argued for the appellant that this section does not apply and a person is not bound to institute a suit unless the claim has been investigated or unless it has been dismissed as too late as provided for in Rule 58 and any other mode of disposal not on the merits, but for example, a withdrawal by a claimant would not attract the provisions of Rule 63. In *Gade Lakshminarasamma v.*

Navugotla Pydanna : AIR1925 Mad265 Coutts Trotter, C.J., and Ramesam, J., were of opinion that where a claim petition under Order XXI, Rule 63 was simply withdrawn and the order of the Court was 'Not pressed. Dismissed.' Rule 63 did not apply and the claimant was not bound to file a suit within one year. In Ayya Pattar v. Attupurath Manakkal 52 Ind. Cas. 938 ; (1919) M.W.N. 805 it was held by Abdur Rahim and Spencer, JJ., that where a defendant files a claim petition simply praying that his objection may be recorded and not asking for an investigation it is not obligatory upon him to file a suit within one year to set aside the attachment. The learned Judges after referring to the Full Bench decision in Venkataratnam v. Ranganayakamma : (1918)35MLJ335 where it was held that Rule 63 applied even to cases where there was no investigation but the claim was rejected as being too late observed: 'In the present case, the defendants in their petition did not ask for their claim or allegations to be investigated at all. Though they set out their objections in an affidavit filed along with the petition, the only thing they asked for in the petition by way of prayer was that the objections might be recorded, and the Court passed an order to the effect that the objections were recorded. But it would be going too far to say that the rule applies to a case where a person, while putting in a petition setting out his objections, does not ask the Court to investigate his claim but expressly prays that his objections might be recorded. Whether the Executing Court was justified in merely recording his objections, it is unnecessary to consider. But it could not be said that there was any order against the petitioner, because the petitioner did not ask for any order and the Court did not profess to pass any order on the merits of the petition.' These observations will apply to a case like the present where the party instead of merely asking the objections to be recorded puts in a petition but subsequently asks that the Court should not adjudicate on the matter but merely allow him to withdraw it and the Court permits this. In Abdul Kadir Sahib v. Somasundaram Chettiar 70 Ind. Cas. 648 ; 45 M. 827 ; 16 L.W. 485 ; 43 M.L.J. 467 ; 31 M.L.T. 441 ; A.I.R. 1923 Mad. 76 a claim petition put in was dismissed on the ground that the sale had taken place and that the Munsif had no power to pass any order. A suit was not filed within one year to set aside the order and the question arose as to the effect of that order. It was held that Order XXI, Rule 63 had no application to such a case. Schwabe, C.J., was inclined to treat the Full Bench decision in Venkataratnam v. Ranganayakamma

(5) as being confined to the facts of that particular case and to cases where a claim was dismissed as too late, the Munsif acting on the power conferred on him under Rule 58. The learned Chief Justice agreed with the view taken by Spencer, J. The result of the authorities seems to us to be that Rule 63 has no application to cases where a claim has not been disposed of on the merits or rejected as being too late. All other modes of disposal are treated as modes of disposal which do not entail on the party on whom an adverse order is made the duty of filing a suit to set it aside. In other words, Rule 63 does not apply to such methods of disposal and the Full Bench decision in Venkataratnam V. Ranganayakamma (5) should be confined to cases where the disposal has been either on investigation or refusal to investigate on the ground that the claim is filed too late. Having regard to some observations in some of these decisions, it may be that the decisions in Venkataratnam v. Ranganayakamma (5) may have to be re-considered but it is unnecessary to express any opinion on the correctness of the decision.

Another ground taken is that as the attachment has fallen through owing to the insolvency there was no necessity to file any suit and reference has been made to Gollampalli Subbayya v. Sankara Venkataratnam (7) where it was held that when a claim petition was dismissed but the attachment was withdrawn the claimant is not bound to file a suit to set aside the order as there is no attachment and there is nothing which needs to be set aside. We are of opinion that the District Judge was wrong in holding that the Official Receiver was entitled to plead the non-filing of a suit within one year as a bar to the plaintiff's right. We reverse the decree of the District Judge and remand the appeal for disposal before him on the other question as to, whether sale-deed invalid and binding on him on the merits. The costs of the appeal and in the lower Appellate Court will abide and follow the result. The appellant will be entitled to refund of the Court-fee paid.