Madras High Court
M.S.M.M. Meyyappa Chetty Alias ... vs A.V.P.L. Chidambaram Chetty And ... on 22 April, 1920
Equivalent citations: 61 Ind Cas 349, (1920) 39 MLJ 603
JUDGMENT

1. The order under appeal was passed against the appellants, auction purchasers, in their application under Order XXI, Rule 97, C.P.C. and we shall deal first with the lower Court's conclusion on the facts, that the 1st respondent's title to item 2, to which alone the appeal relates, was established. It is common ground that the property belonged to one Velayuda, who died in 1896. Appellants' title, which is that of the Judgment debtor, whose interest they purchased, is based on a sale by Velayuda's widow to the latter on 3-5-1897 by Ex. E, 1st respondent's on a sale by Chittanatha, alleged to have been adopted by Velayuda, by Ex. II to one Avichi Chetty on 16-4-1897, subsequent changes in ownership being evidenced by Exs. III, IV and VI. The question is whether the adoption of Chittanatha is established. It must of course be dealt with on consideration not only of the direct evidence but also of the subsequent dealings with the property.

2. We have gone through the evidence carefully and regret that we cannot agree with the lower Court that the adption is established.

[The judgment then discusses the evidence as to the alleged adoption].

3. In the result we think that the Lower Court has erred because it failed to realize the necessity for evidence of affirmative value of the adoption which respondents were bound to prove, and has accordingly applied an insufficient scrutiny to the evidence which they adduced. We cannot find the adoption of Chittanatha established and must therefore hold that 1st respondent claiming through him could derive no title to the property.

4. This conclusion on the merits makes it necessary for us to examine the argument also relied on by 1st respondent that the appeal does not lie, the Lower Court's order being one of refusal to remove his obstruction to the delivery of item 2 to appellants and therefore being conclusive under Order XXI, Rule 103, C.P.C. until it is displaced by a suit. On the other hand it is urged that, as appellants are decree-holders purchasers and 1st respondent was 2nd defendant in O.S. No. 48 of 1913, in which the decree under execution was obtained against S. N. already referred to, the order is one under Section 47 and is appealable as a decree.

5. The question has been argued fully with the result that it was common ground that the case would have been covered by Section 47, if Order XXI, Rule 103 had not been passed. The alternatives are then that the rule is applicable only to cases not covered by the section and that it deals with some of the cases, which would otherwise be covered by it, as exceptions to it. In the first alternative the rule will be inapplicable in cases, in which (to omit reference to representatives) a decree holder seeking possession as purchaser or otherwise is opposed either to the judgment-debtor or any other party to the decree; in the second it will be inapplicable only in the event indicated in it of an order for possession having been made against the judgment debtor.

6. There is nothing in the wording of Rule 103 and the rules connected with it to indicate directly their relation to Section 47. It is clear however that if they are regarded as uncontrolled by it and if the second of the alternatives referred to is preferred, an anomaly will result. In the case for instance of an order adverse to a judgment-debtor, the rule does not provide for the means by which it can be displaced and, as it is not suggested that it will be conclusive, the applicability of Section 47 must, as Mr. Krishnaswami Aiyar for the 1st Respondent conceded be assumed. This is of course, consistent, if the order was obtained by a purchaser, even a stranger, with the recent decision in Veyindramuthu Pillai v. Maya Nadan (1919) I.L.R. 43 Mad. 107 : 38 M.L.J. 32. But then it is difficult to understand why such an order, when it is against the judgment-debtor, can be displaced by appeal, but when it is in his favour and against the purchaser or decree-holder seeking possession, can be displaced only by suit. And a similar difficulty arises in connection with Rule 102, under which obstruction by a transferee from the judgment-debtor pendente lite is excluded from the purview of Rules 99 and 101. Such obstruction must be dealt with under one of these rules and not by separate suit in the first instance, since Rule 97 is exhaustive ; and it must therefore be dealt with under Rule 98, with the result that an order against such transferees from the judgment-debtor can, even if he is a party, if Section 47 is regarded as abrogated in these cases, be displaced only by suit, whilst an order against the judgment-debtor will be appealable. The anomaly is marked in cases between a party transferee and a decree-holder purchaser because if the former's rights had come into question in claim proceedings under Order 21, Rule 58, the final decision would have been obtainable under Section 47 and notwithstanding Rule 63 in an appeal against the provisonal order. This was decided in Ramanathan Chettiar v. Levvai Marakayat (1899) I.L.R. 23 Mad. 195 : 10 M.L.J. 64 and Marivittil Mathu Amma v. Pathram Kunnot Cherukot (1906) I.L.R. 30 Mad. 215 under the former code and there is nothing in the differences between Section 244 in it and the present Section 47 entailing a change in the law. The application of Section 47 admittedly necessary although not explicitly provided for in the case of a discomfited judgment-debtor, would avoid anomaly also in the cases just referred to ; it would be consistent with the opinion expressed by the Judical Committee as to the scope of the section in Prosunno Kumar v. Kali Das (1892) I.L.R. 19 Cal. 683 and if, as it appears to us there is justification for its application to certain classes of cases, to which Rule 103 is applicable in terms, that is ground for a conclusion that the rule creates not exception to it but deals with cases which it does not cover.

7. It is next material that under the Code of 1882 no such question as this could have arisen, an appeal or its equivalent lying against the order passed by the executing Court, in cases in which the decree holder and the judgment-debtor or any party were opposed. This was clear, when the decree was for possession, the case of a party to the suit other than the judgment debtor being specially excepted from Section 332 in connection with which alone a separate suit was necessary to displace the court's order. It was also made clear in cases in which a decree-holder purchaser sought possession against such a party by Ramaswami Sastrulu v. Kameswaramma (1900) I.L.R. 23 Mad. 361 : 10 M.L.J. 126 one of the decisions in consequence of which the explanation to Section 4 relating to exonerated defendants was added in 1908. There is no reason for supposing that there was any intention to curtail the existing rights of appeal by the code of that year. In it however these provisions were redrafted, those relating to decree-holders being combined with those relating to purchasers and the portions of Sections 332, and 335 relating to the right of suit to set aside the Court's order being replaced by Rule 103, in which the exception of the judgment-debtor from the

general obligation to sue, was introduced. This exception is no doubt the best support to the contention that the application of Section 47 is ousted by these rules, since as Mr. Krishnaswami Aiyar contends, the specification of one exception would ordinarily negative the intention to recognize others. But its strength is greatly impaired, when it is noticed that the result of its acceptance is the denial of an existing right of appeal and that it is based on one portion of a redrafting, the effect of which may not have been foreseen.

8. These considerations, are material when the prima facie character of the order before us as a decree, which is conferred by Sections 2(2) and 47, is remembered and the attempt is made to decide whether the right of appeal against it is nagatived by the saving clause at the beginning of Section 96(1). Under that Section all decrees are appealable in the absence of express provision to the contrary in the body of the Code or by other law; and although the orders made under the Code may be other law, it is in our opinion clear that Order 21, Rule 103 cannot be read as providing expressly against any right of appeal which would otherwise be available because the reason against a comprehensive interpretation of the expression " any party " or a strict interpretation of the exception in favour of the judgment-debtor are too strong and the anomalies involved are too great.

9. It may be added that there is very little authority as to the construction, Order 21, Rule 103 in its presnt form. The conclusion just reached is in accordance with our decision in Siva-samba Iyer v. Kuppan Samban (1915) 29 M.L.J. 629 and in Veyendra Muthu Pillai v. Maya Nadan (1919) 33 M.L.J. 456 and so far as the views expressed by us in this judgment are opposed to the decision of Bakewell, J. and one of us in A.A.A.O. 118 of 1916, the latter may be of doubtful correctness. The argument in Zipru v. Hari Sup-dushet (1917) I.L.R. 42 Bom. 10 took a different course and the observations of Scott, C.J. so far as they support Mr. Krishaswami Aiyar's contentions do not appear to have been the result of full consideration. It is material that their lordships regarded no intention to change the law in 1908 as established. In these circumstances authority affords no reason for rejection of the conclusion reached. We therefore hold that the appeal lies.

10. The result is accordingly that the appeal is allowed, the Lower Court's order being set aside, and the appellants being awarded possession as prayed with costs throughout. The 1st Respondent will pay appellants costs throughout.