

[4 Mad. 292.]

APPELLATE CIVIL.

The 6th and 31st October, 1881.

PRESENT :

MR. JUSTICE INNES AND MR. JUSTICE MUTTUSAMI AYYAR.

Visalatchi Ammal.....(Second Defendant), Petitioner
and
Sivasankara Taker.....(Plaintiff), Respondent.*

Civil Procedure Code, Section 230—Obstacle to execution—Fraudulent alienation.

The respondent, as plaintiff in a Small Cause Suit in 1867, obtained a decree against the husband of the petitioner, since deceased. The decree was kept alive till 13th December, 1876, when the decree-holder brought a suit to set aside certain alienations made by the judgment-debtor and alleged to be fictitious and fraudulent. Having succeeded in the suit and in rendering the property alienated available for attachment under his decree, the respondent again applied for execution in 1879, but not against the property fictitiously alienated. Lastly, the respondent applied on September 28th, 1880, more than 12 years after decree, for execution against certain immoveable property of the Judgment-debtor, other than the property fictitiously alienated in the petitioner's possession,

Held that having regard to the fraud of the judgment-debtor the application was not barred by Section 230 of the Code of Civil Procedure.

THE facts of the case sufficiently appear in the Judgment of the Court (INNES and MUTTUSAMI AYYAR, JJ.)

Hon. T. Rama Rau for Petitioner.

Bhashyam Aiyangar for Respondent.

Judgment :—The question is whether the application of the 28th September 1880 is barred under the provisions of Section 230 of the Civil Procedure Code; that section in clause 3 says that if an application has been made under Section 230 and granted, no subsequent application to execute the same decree shall be made after 12 years from the date of decree. The present application is made considerably more than 12 years after the date of a decree. But an exception to this rule is allowed by a latter clause of the same section, *viz.*, that the rule shall not apply if the judgment-debtor has prevented the judgment-creditor by fraud or force from executing his decree.

It is alleged that the judgment-debtor died between the date of the decree and 1876. The decree was kept alive up to 13th December 1876, on which date an application was made to transfer the decree to Tanjore for execution.

The decree-holder then brought Suit 211 of 1877 to have alienations of several parcels of property of defendant's husband declared invalid and available for execution of the decree. The decree in 271 declared the alienation which had been made by the widow's father and ratified by her fictitious and fraudulent, and the property available in execution of the decree of 1867. The District Munsif, however, directed the plaintiff first to execute against some other property in possession of the widow.

* C. M. P. 220 of 1881 against the order of G. A. Parker, Acting District Judge of South Tanjore, confirming the order of S. Subbayar, District Munsif of Tanjore, dated 15th December 1880.

On the 23rd August 1879, the petitioner again applied for execution, not against the property declared to have been fraudulently alienated, but against the house in the possession of the widow.

[294] If the petitioner was prevented from executing his decree, the prevention was caused by the heirs of the original judgment debtor, who, within the meaning of the section, may be said to be the judgment-debtor. Then was petitioner prevented from executing his decree by reason of the petitioner's alienations?

It appears to us that he was. The Suit 211 of 1877 would not have been instituted had it been possible for the decree-holder without instituting it to obtain execution against the properties comprised in that suit.

The obstacle to execution lay in the antecedent fraud which had operated to create a fictitious transfer of the property from the judgment-debtor. It may be said that there was the house in possession of the widow against which execution could have been had, and which the District Munsif in his decree indicated as the property against which execution should first be taken out. But there is nothing to show that this house is sufficient to satisfy the decree. The decree-holder, as the result of Suit 211 showed, had a right to execute against all the properties comprised in it, and if he was obstructed, as the institution of Suit 211 shows he must have been, in obtaining execution against those properties, he was prevented within the meaning of the section. We think, therefore, that the decree-holder is not barred in respect of the present application. The question is not affected by the fact of the application being made in respect of property other than that comprised in the Suit 211 of 1877. We therefore dismiss the appeal with costs.

NOTES.

[It is not necessary to show that the fraud continued so as to prevent execution at any time :—(1899) 22 Mad., 320.

Locking up house so as to prevent moveables being attached is fraud :—(1899) 22 Mad., 320. See also (1906) 11 C. W. N., 440 ; (1883) 6 Mad., 365 ; (1885) 9 Bom., 318.]

[295] APPELLATE CIVIL.

The 3rd October, 1879.

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE
MUTTUSAMI AYYAR.

Sultan Ackeni Sahib and others.....(Petitioners), Appellants
and
Shaik Bava Malimiyar.....Respondent.*

Religious Endowment Act, Section 5—Appeal.

An appeal lies under Section 647 of the Code of Civil Procedure against an order of a District Court under Section 5, Act XX of 1863.

THE Trustees of the Nagur Durga having been removed from their office for malfeasance by the decree of the District Court of South Tanjore in Suit 2

* C. M. A. No. 150 of 1879 against the order of W. H. Glenny, Acting District Judge of North Tanjore, dated 24th March 1879.