PADAKANNAYA v. NARASIMMA.

on which the contention is based, evidences only an undertaking on the part of the mortgagor to pay the mulageni rent due to the landlord out of each year's produce. Further, the landlord was no party to this instrument, and we cannot say that the contention is well founded. However this may be, the decree under execution is only a money decree, and in the case of a competition between the decree-holder and a mortgagee, the former is certainly not entitled to bring to sale the execution debtor's property free of existing incumbrances.

We decree the appeal and reverse the decrees of our Lower Courts. The first respondent will pay the appellant's costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

1887. April 19.

ÁLWAR AYYANGÁR AND ANOTHER (PLAINTIFFS), APPELLANTS,

and

SÉSHAMMÁL AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, ss. 98, 99, 157, 158.

A District Múnsif struck a case off the file of his Court on neither party appearing. Subsequently on an application by the plaintiffs the case was restored. The order of restoration was reversed by the District Judge.

Held, (1) that the order to strike off the case was illegal;

(2) that assuming that the case was dismissed, no appeal lay to the District Judge whose order was accordingly made without jurisdiction.

SECOND appeal against the decree of J. H. Nelson, District Judge of Chingleput, reversing the decree of N. R. Narasimhayyar, District Múnsif of Trivellore, and Civil Revision Petition, under s. 622 of the Code of Civil Procedure, praying the High Court to revise an order of J. H. Nelson, District Judge of Chingleput, dated 18th April 1885, reversing an order of N. R. Narasimhayyar, District Múnsif of Trivellore, dated 21st January 1885.

A suit filed in the Court of the District Múnsif of Trivellore was by an order, dated 13th December 1884, struck off the file on neither party appearing. On 21st January 1885 the District Múnsif on an application by the plaintiffs made an order restoring

* Second Appeal No. 770 of 1885 and Civil Revision Petition No. 245 of 1885.

the case to his file. Against the last-mentioned order the defendants appealed.

The District Judge reversed the order of 21st January 1885.

The plaintiffs appealed.

Subramanya Ayyar for the appellants argued that the proceedings, dated the 13th December 1884, having, according to the Múnsif, been passed under s. 98 of the Code of Civil Procedure, no appeal lay to the District Court against the order, dated 21st January 1885; and that if the case was one falling under s. 158 of the Code of Civil Procedure, the District Court should have upheld the order of the District Múnsif, dated the 21st January 1885, whereby the order, dated the 13th December, was set aside.

Mr. Subramanyam and *Srírangácharyár* for respondents.

The further arguments adduced in this case appear sufficiently for the purpose of this report from the judgment of the Court (Kernan and Parker, JJ.).

JUDGMENT.—The order of the 13th day of December 1884 of the Múnsif records that neither party appeared and that he struck the case off the file. That was illegal. There is no authority in law justifying the Múnsif to make such order. He had power under ss. 98 and 157 to dismiss the suit as neither party appeared.

Assuming he did dismiss it, then it was open to the plaintiff to apply under s. 99 to restore it. The Múnsif on notice restored the case, and against that order no appeal lay.

An appeal was, however, made to the District Court, and that Court finding that there was no appeal against an order to restore, treated the order to strike off the file as decision under s. 158. Now s. 158 did not apply to this case, as the application to adjourn to the 13th was not made by the plaintiff alone, but was made on the joint application of defendants and plaintiffs. Section 158 applies where any one party had a case adjourned and on the day of adjournment he is not ready. That is not this case. Again the Múnsif did not decide the case, as he was bound to do if s. 158 applied. His order was to strike the case off the file.

In *Comalammal* v. *Rungasawmy Iyengar*(1), *Ambalavana Padeiyátchi* v. *Subramánia Padeiyátchi*(2), the plaintiff who got time did not produce his witnesses on that day.

(1) 4 M.H.C.R., 56. (2) 6 M.H.C.R., 262.

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The Múnsif says he proceeded under ss. 98 and 157.

We think that the order of the District Judge was made without jurisdiction, and we accordingly reverse his decree of the 18th of April 1885 and restore the order of the Múnsif of the 21st of January 1885 with costs of the appeal in the Court below and the costs of this appeal.

This judgment disposes also of the Civil Revision Petition 245 of 1885.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

1886. November 22. 1887. April 5.

VENKATACHALAM (PLAINTIFF), APPELLANT,

and

MAHÁLAKSHMAMMA (DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act VIII) of 1859, *s.* 148—Res judicata. *Previous suit by next friend dismissed for default—Evidence of fraud of next friend—Limitation—Contract by a minor—Ratification by acquiescence.*

A sued in 1885 to recover certain estates from B, alleging claim under his adoption which took place in 1865. A suit to recover the same estates had been filed on behalf of A by his next friend and had been dismissed for default in 1872. In 1875 A, being still a minor, relinquished his claim to the estates for Rs. 12,000 under exhibit B; but now alleged that he thought he was relinquishing it only in favor of the defendant's predecessor in title who died in 1883, having been in possession of the estates since 1867. The plaintiff attained his majority in 1878:

Held, that the claim was *res judicata*, the plaintiff having failed to prove fraud on the part of his next friend: that whether the cause of action arose in 1865 or 1867, it was equally barred from 1879: that assuming the plaintiff was a minor of 15 years of age at the date of the deed of relinquishment, it is not likely he would not have understood its effect, or that he failed to ascertain it when he attained his majority in 1878.

Per cur.—The plea of *res judicata* ordinarily presupposes an adjudication on the merits; but s. 148 of the Code of Civil Procedure (Act VIII) of 1859 contains a statutory direction that in case the plaintiff neglects to produce evidence and to prove his claim as he is bound to do, the Court do proceed to decide the suit on such material as is actually before it, and that the decision so pronounced shall have the force of a decree on the merits, notwithstanding the default on the part of the plaintiff.

APPEAL against the decree of J. Kelsal, District Judge of Vizagapatam, in Original Suit No. 6 of 1885.

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* Appeal 146 of 1885.