It is the evidence on this latter point which appears to me to fix the guilt upon the prisoner. Had he not been really guilty, the discovery of the jewels by his agency would seem to have been impossible.

As to the sentence the accused is a mere youth and a relative. The murder does not appear to have been premeditated, and I am inclined to think the prisoner may have yielded to sudden impulse and temptation when he found himself alone in the company of his little cousin. Having regard to his youth and the time that has elapsed, I think we may perhaps be justified in commuting the sentence to transportation for life and I would order accordingly.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

ATCHAYYA (PLAINTIFF), APPELLANT,

v.

BANGARAYYA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1892. March 29. April 12.

Civil Procedure Code, ss. 13, 272—*Execution proceedings*—Res judicata—*Matter which ought to have been raised as a ground of defence.*

A and B obtained a decree against X and Y, on which about Rs. 9,000 was due. Z obtained a decree against A and B, on which about Rs. 6,400 was due, and in execution attached the first-mentioned decree. A and B alleged in the matter of the execution of their decree for the first time, that the suit against them had been instituted really by X though in the name of his son Z, and consequently contended that the decree amount, which they paid into court, was the property of X and so liable to satisfy their claim. The above allegation was substantiated and Z's claim on the money in court was disallowed on appeal:

Held, (1) that A and B were not precluded from asserting their claim to the money in court by reason of the above allegation not having been made by way of defence to the suit of Z;

(2) that A and B were entitled to enforce any claim, which X might enforce, for the purpose of satisfying their decree, and accordingly that Z's claim on the money in court was rightly disallowed.

APPEAL against the order of H. R. Farmer, District Judge of Vizagapatam, dated 19th February 1891, and made on civil mis-

* Civil Revision Petition No. 238 of 1891 and Appeal against order No. 95 of 1891.

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cellaneous petitions Nos. 16 and 23 of 1891 in execution of the decree passed in original suit No. 10 of 1886 on the file of the District Court of Vizagapatam, and petition under Civil Procedure Code, s. 622, praying the High Court to revise another order made by him on civil miscellaneous petitions Nos. 76 and 100 of 1891, and dated 25th March 1891 in execution of the decree in original suit No. 3 of 1886.

In original suit No. 3 of 1886 on the file of the District Court of Vizagapatam, the present respondents obtained against two persons, one of whom was the father of Achayya, a decree for land with mesne profits and costs, on which about Rs. 9,000 was now due. In original suit No. 10 of 1886, Achayya obtained a money decree against the present respondents, on which Rs. 6392 was now due and in execution attached the decree in the first mentioned suit. The above petitions were presented to the District Court in the matter of the execution of the decrees in both suits.

The present respondents alleged that the second suit had really been brought by Achayya's father in the name of his son, and they paid into court the amount due on the decree against them, and prayed that it should be kept in deposit pending the determination of their claim to it as money of their judgment-debtor.

The District Judge held on the authority of *Luckmidas Khimji* v *Mulji Canji*(1) and the cases there cited, distinguishing *Ramphal Rai* v. *Ram Baran Rai*(2) and *Subramanian Pattar* v. *Panjamma Kunjiamma*(3), that it was open to the defendants in the second suit to show that the amount due on the decree was the property of their judgment-debtor, although the question of Achayya's right to maintain the suit against them had not been raised by way of defence, and he held on the evidence that their allegation was substantiated, and consequently disallowed Achayya's claim on the money in court.

Achayya, the decree-holder in original suit No. 10 of 1886, preferred the above-mentioned appeal and petition to the High Court.

Rama Rau for appellant.

Subramanya Ayyar for respondents.

BEST, J.—The appellant and petitioner Achayya Garu obtained, in original suit No. 10 of 1886 on the file of the Vizagapatam

(1) I.L.R., 5 Bom., 305. (2) I.L.R., 5 All., 53. (3) I.L.R., 4 Mad., 324.

District Court, a decree for money against the respondents, while the latter obtained, in original suit No. 3 of 1886 of the same court, a decree for land, mesne profits and costs against the appellant's father and another. The amount due to appellant under his decree was Rs. 6,392, whereas that due to respondents under their decree against appellant's father is nearly Rs. 9,000. Respondents tried to get the amount due from them to appellant set off in part satisfaction of the amount due to them from appellant's father; but this was disallowed on the ground that appellant is not a party to the respondent's decree, and as respondents were unable to execute their decree against appellant's father in consequence of the appellant having attached the same in execution of his decree, the respondents paid into court the amount due under the latter decree, and asked that this money might be kept in deposit, pending disposal of their claim to the same, as being money really due to their judgment-debtor, who had obtained in his son's name the claim on which was obtained the decree in original suit No. 10 of 1886, in which suit, they say, the father was the real plaintiff though it was brought in the name of the son. The District Judge, without deciding the question whether the money was in fact due to appellant or his father, ordered attachment of the same under section 272 of the Code of Civil Procedure, observing that the "decree-holder in original suit No. 10 of 1886 will have an opportunity either under section 244 or 278 of showing that he is the real, as well as the nominal, owner of the decree amount in that suit."

It is contended on behalf of the appellant that respondents are not at liberty to set up in execution proceedings a claim which they might have set up as a plea in the suit. They certainly might, as defendants in the suit, have pleaded that the suit was not maintainable by the appellant, as his father, and not himself, was the real purchaser of the claim against them on which the suit was brought. They might have done so, and had they so done the father might have been included as a party to the suit and the complications which have since arisen might have been thus avoided. But I do not think the omission to raise this plea in the suit is fatal to the present claim. It must be remembered that the respondents are minors and consequently can have had no personal knowledge of the facts, and it is quite probable that their guardian *ad litem* was not sufficiently well informed of the facts to be able to object to

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the suit on this ground, as the document on which it was brought stood in the name of the then plaintiff. Though this *might* have formed a ground of defence in the suit, I am unable to say that it is a plea that *ought* to have been then raised. I would, therefore, disallow the objection that the claim now set up by the respondents is barred by section 13 of the Code of Civil Procedure.

As the question, whether the money in deposit belongs to appellant or his father, is one between the parties to the appellant's decree (No. 10 of 1886) and relates to the execution of that decree, the Judge should have decided it in these proceedings. Consequently if nothing further had been done in the matter, it would have been necessary to remand the case for a finding as to the ownership of this money. But there has been an enquiry subsequently and the Judge's finding is that the money, in fact, belongs to appellant's father, and that the assignment of the claim on which the suit No. 10 was brought was obtained by the father merely in the son's name. *Vide* the Judge's finding of 25th March 1891 in proceedings *in re* the present appellant's petition No. 100 of 1886, to which these respondents were also parties. The Judge has given valid reasons for the finding at which he has arrived.

I would therefore dismiss with costs both the appeal and petition.

MUTTUSAMI AYYAR, J.—I come to the same conclusion. I was at first inclined to think that the decision in original suit No. 10 of 1886 was conclusive in regard to the ownership of the money decree as due by respondents to appellant and petitioner Achayya. It is no doubt so for the purposes of that suit and of the execution of the decree passed therein. The appellant's father was, however, *not* a party to that suit, and it was open to him to satisfy the decree passed against him in original suit No. 3 of 1886 with the money decreed to his son if it really belonged to him, and if he only caused the son to obtain a decree upon a promissory note taken in his name, but really for the father's benefit and with the father's money. As execution-creditors in original suit No. 3 of 1886, the respondents might enforce any claim which the father, their judgment-debtor, might enforce for the purpose of obtaining satisfaction of their decree. In attaching, therefore, the money standing to the credit of original suit No. 10 of 1886, the respondents only exercised their right as execution-creditors in original suit No. 3

of 1886 to enforce a claim which their judgment-debtor had, and this claim which they derived from their judgment-debtor existed, notwithstanding the decree in original suit No. 10 of 1886, and was not extinguished by it inasmuch as the father was no party to it. This being so, the only other question for decision is whether the finding of the Judge that the money attached really belonged to the father is correct. I agree with my learned colleague that it is fully supported by the evidence recorded at the subsequent enquiry held in connection with petition No. 100 of 1886.

I would also dismiss the appeal and the petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

PERUMAL (DEFENDANT No. 2), APPELLANT,

v.

KAVERI AND OTHERS (PLAINTIFFS AND DEFENDANT No. 1), RESPONDENTS.*

1892. May 6. September 1.

Mortgagor and mortgagee—Purchase by first mortgagee—Suit by second mortgagee—Inconsistent cases set up in the alternative—Relief not asked for—Practice.

Defendant No. 1 mortgaged certain premises to defendant No. 2 in 1884 and to the plaintiff in 1885. The mortgage to the plaintiff was a usufructuary mortgage. In 1887 defendant No. 2 obtained a decree on his mortgage, and in execution brought to sale and himself became the purchaser of the mortgage premises. The plaintiff, who was in possession under the mortgage of 1885, prayed in this suit that the prior mortgage be declared fraudulent and void, and the sale in execution be set aside, and in the alternative that she be declared entitled to redeem the prior mortgage. The plaint was stamped as in a redemption suit and the Court of first appeal passed a decree for redemption:

Held, that the suit should be dismissed, since after the sale of the mortgage premises in execution of the decree obtained by defendant No. 2, the only right which remained to the puisne mortgagee was the right to retain possession until her mortgage should be redeemed.

Semble per BEST, J.—It is open to a plaintiff who is not a party to the transaction in respect of which allegations are made to come into Court seeking relief in the alternative, dependent upon what may be found by the Court to be the true facts of the case.

Quære: Whether the Court can pass a decree for redemption when the plaint seeks only a declaration of the right to redeem.

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* Second Appeal No. 1262 of 1891.