

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

SHANMUGA PILLAI (DEFENDANT No. 1), APPELLANT,

v.

RAMANATHAN CHETTI (PLAINTIFF No. 2), RESPONDENT.*

1893.
December 22.
1894.
January 25.

Civil Procedure Code—Act XIV of 1882, ss. 25, 223—Madras Civil Courts Act, s. 12—Jurisdiction of Munsif's Court—Execution of decree of superior Court.

As in suits so in execution proceedings the competent *forum* is ordinarily that indicated by s. 12 of the Civil Courts Act, but in the five cases mentioned in s. 223 of the Civil Procedure Code special reasons exist for departing from that rule and creating a special or extraordinary jurisdiction, the object whereof is to secure to judgment-creditors in certain cases a special facility or convenience. The condition as to the jurisdiction of the Subordinate Court to which a suit can be transferred under s. 25 of the Code of Civil Procedure is not laid down in s. 223 of the Code, which relates to transfers of applications for execution of decrees, and was omitted therefrom for the special reasons mentioned therein. *Narasayya v. Venkatakrishnayya*(1) followed. *Gokal Kristo Chunder v. Aukhil Chunder Chatterjee*(2) and *Durga Charan Mojumdar v. Umataru Gupta*(3) dissented from.

APPEAL against the order of W. F. Grahame, District Judge of South Arcot, dated 30th August 1891, passed on civil miscellaneous appeal No. 20 of 1891, confirming the order of the District Munsif of Chidambaram passed on execution petition No. 354 of 1891 and miscellaneous petitions Nos. 503 and 598 of 1891 (original suit No. 19 of 1888 on the file of the District Court of South Arcot).

The facts of this case were as follows:—

The defendant had mortgaged to the plaintiff certain property, only half of which belonged to him, the other half belonging to his brother, one Theagaraja Pillai, who instituted a suit for partition and had his share delivered to him. The plaintiff instituted a suit and attached and sold the defendant's share of the property, the decree in the said suit having been, on the plaintiff's petition, sent by the District Court to the District Munsif's Court for execution. When the plaintiff applied for attachment of the defendant's other property, the defendant presented a petition demanding that the remainder of the property

* Appeal against Appellate Order No. 70 of 1892.

(1) I.L.R., 7 Mad., 397. (2) I.L.R., 16 Calc., 457. (3) I.L.R., 16 Calc., 455.

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which he had mortgaged should be first sold before his other property was proceeded against. On both the Lower Courts rejecting this petition, the defendant preferred this appeal alleging, *inter alia*, that the District Munsif had no jurisdiction to execute the decree of the District Court for more than Rs. 2,500, the limit of his jurisdiction.

Sundara Ayyar for appellant.

Rangaramanujachariar for respondent.

JUDGMENT.—Two questions arise for determination in this appeal and the first is whether the District Munsif had jurisdiction to execute the decree in original suit No. 19 of 1888. Though the objection was not taken in either of the Courts below, it relates to the inherent jurisdiction of the District Munsif and is patent on the face of the proceedings, and I am of opinion that such objection may be taken at any stage of the case. The decree which is being executed by the District Munsif was passed upon a hypothecation bond for more than Rs. 5,000 which is considerably in excess of his pecuniary jurisdiction, and it is contended on appellant's behalf that the Judge had no power to transfer such decree for execution to a District Munsif. As to the question whether this contention ought to prevail, there is a conflict of opinion among the different High Courts. It was decided in the negative in *Narasayya v. Venkatakrishtnayya*(1) and in civil miscellaneous appeal No. 47 of 1888, but in the affirmative in *Gokul Kristo Chunder v. Aukhil Chunder Chatterjee*(2) and *Durga Charan Mojumdar v. Umatara Gupta*(3) and in *Shri Sidheshwara Pandit v. Shri Harihar Pandit*(4). The last case was decided in 1887, the case was decided in 1884 and the Calcutta case in 1889. The learned Judges at Calcutta who decided *Gokul Kristo Chunder v. Aukhil Chunder Chatterjee*(2) considered the Madras case and expressed themselves as being unable to concur in the decision therein.

That decision depends on the construction put on section 223 of the Code of Civil Procedure. Section 25 which relates to transfer of suits authorises the transfer to a Subordinate Court "competent to try the same in respect of its nature and the "amount or value of its subject matter." These words of limit-

(1) I.L.R., 7 Mad., 397.

(3) I.L.R., 16 Cal., 465.

(2) I.L.R., 16 Cal., 467.

(4) I.L.R., 12 Bom., 155.

ation are not found in section 223 which relates to transfer of applications for execution of decrees. That section not only omits the condition that the Court to which it is sent for execution must be competent to determine the suit in which the decree was passed, but also substitutes for it five other conditions. The first condition clause (a) premises that the judgment-debtor resides or carries on business or works for gain within the local limits of the jurisdiction of the Court to which the decree is sent for execution. The second condition clause (b) presupposes that the judgment-debtor has not sufficient property within the jurisdiction of the Court which passed the decree, but has property within the jurisdiction of the Court to which the decree is sent for execution. The third condition clause (c) premises a case in which immovable property is ordered to be sold, and such property is situated outside the jurisdiction of the Court which passed the decree. The fourth condition clause (d) postulates the existence of some special reason for the transfer which the Court that orders the transfer is required to state in writing. The fifth condition premises that the Court to which the decree is sent for execution is subordinate to the Court which passed the decree. Looking at the nature of the several conditions, they suggest the inference that the legislature contemplated a special convenience, or a special facility or some special reason or a special relation as subordinate and Appellate Courts, as grounds for the transfer. There is thus reason to conclude that the condition as to jurisdiction, inserted in section 25, was omitted from section 223 for the special reasons mentioned therein. It follows that if the condition as to jurisdiction mentioned in section 25 and intentionally omitted from section 223 were imported into it, the special facility or convenience which it was the intention of the legislature to secure to judgment-creditors in certain cases might be taken away from them, and the object which the legislature had in view, might be defeated. Suppose for instance the case of a decree passed by a District Court or Subordinate Court for Rs. 2,600 and of the judgment-debtor residing within the jurisdiction of a District Munsif or possessing property only within that jurisdiction; why should the special convenience or facility which might exist if the decree were executed by the District Munsif be denied to the judgment-creditor? Again, the specification of five special cases in section 223 implies that in

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other cases the Court executing the decree must be competent to decide the suit in which the decree was passed. Hence it was inferred in *Narasayya v. Venkatakrishnayya*(1) that in framing the five conditions, the legislature intended to denote the statutory exceptions founded on special considerations to the rule which regulates the ordinary jurisdiction. Further, the penultimate clause of the section states expressly that when a decree transferred for execution is that of a Provincial Court of Small Causes, the Presidency Small Cause Court to which it is transferred must also have jurisdiction over the suit in which the decree was passed as regards its subject-matter. The express mention of the ordinary rule in this paragraph emphasizes its omission in the five cases mentioned in the first paragraph of the section. There is also reason for holding that the Code of Civil Procedure contemplates certain exceptions to the ordinary rule, that a Court can only exercise jurisdiction, over proceedings of civil nature when the subject-matter therein does not exceed in value the pecuniary limit of its jurisdiction as defined by section 12 of the Civil Courts Act. Take for instance a claim preferred in regard to a house of Rs. 3,000 value in the Court of a District Munsif during the execution of a money decree passed by him for Rs. 2,400. Which is the Court competent to investigate the claim? Is it the District Munsif who passed the decree or the Subordinate or District Court, as the case may be, that has jurisdiction to try a suit relating to a house of Rs. 3,000 value. The language of section 278 shows that it is the District Munsif who was executing the decree that is authorized to investigate the claim.

The reason mentioned for holding that no exceptions were intended to be created is that intricate questions of importance are likely to arise as often in execution of decrees as in the trial of suits; but it must also be remembered that there are cases in which execution of decrees may be a simple matter giving rise to no questions of special difficulty. In order that the cases may be differentiated, the legislature has given a discretion to the District Court in whom the power of transfer is vested, and also enacted section 239 in addition to section 228. Furthermore, the special relation of the Court to which the decree is sent for execution, under paragraph 6 as a Subordinate Court will enable

(1) I.L.R., 7 Mad., 397.

the District Court to call up the application for execution for disposal by itself when questions of exceptional difficulty arise therein for consideration.

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The grounds on which the decision in the Madras case rests may be thus formulated. As in suits so in execution proceedings, the competent *forum* is ordinarily that indicated by section 12 of the Civil Courts Act, but in the five cases mentioned in section 223 special reasons exist for departing from that rule and creating a special or extraordinary jurisdiction. In view to show that this view is not tenable, the High Court at Calcutta refers to sections 3, 6, 9, 228 and 649 in addition to section 25 of the Civil Procedure Code and section 12 of the Civil Courts Act. The learned Judges think that this Court overlooked the rule that the word 'suit' may include as well proceedings after decree as proceedings before decree.

First as to section 12 of the Madras Civil Courts Act it is referred to in the Madras decision and its applicability to cases other than those specified in the second and third paragraphs of section 223 is recognised. But what is stated there is that an extraordinary or a special jurisdiction was conferred by the Code of Civil Procedure in cases to which paragraphs 2 and 3 relate. The absence of this special jurisdiction would render ineffectual the considerations of special convenience and facility implied by the five conditions in section 223 to which reference has already been made. As regards section 25, the word 'suit' may no doubt include in its extensive sense proceedings after as well as before decree; but it may also possibly be used in its popular and restricted sense to connote proceedings before decree, as contradistinguished from execution proceedings. The presence of additional words in section 12 of the Civil Courts Act and in section 3 of the Code of Civil Procedure lends weight to the view that in section 25 it was used by the legislature in its restricted sense. Even assuming that it includes execution proceedings, the limitation as to jurisdiction can only be imported into section 223 so far as it is consistent with that section. To import it into that section so far as it relates to the special cases founded on special considerations would be incongruous and not only do violence to the plain grammatical interpretation, but also deny to judgment-creditors the special convenience and facilities contemplated in these cases.

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As to section 3 it exempts pending proceedings from the operation of the code, and refers in terms to proceedings prior to decree in any suit instituted or appeal presented before the 1st June 1882, or to proceedings after decree that may have been commenced and were still pending at that date. This section furnishes an argument in support of the view that when proceedings after decree are intended to be denoted the legislature said so expressly. As to sections 6 and 9 they are relied on as indicating that the term 'suit' may be taken to include execution proceedings, but I have already stated that on that view the limitation as to jurisdiction in section 25 can only be imported into section 223 so far as it can be done without incongruity.

With reference to section 649 it recognises the principle which ordinarily regulates the jurisdiction in execution proceedings, but it does not negative an intention to create a special jurisdiction in the five cases specified in section 223. After carefully considering the Bombay and Calcutta decisions, I do not see where the fallacy lies in the reasoning adopted in *Narasayya v. Venkatakrishtnaya*(1), and I must, therefore, adhere to the principle of that decision therein until the Full Bench overrules it.

The second question for decision is whether appellant's omission to bring to sale Tiyagaraja Pillai's share is a bar to the execution of his decree against other than mortgaged property until he cures the omission. In the present case there is no doubt a direction in the decree that respondent shall first execute the decree against the mortgaged property, but the direction presupposes that the property belongs solely to appellant, or that the decree is binding on Tiyagaraja Pillai. It must be observed here that Tiyagaraja Pillai was not a party to that decree, and that the partition suit brought by Tiyagaraja Pillai was pending at the date of decree under execution. It is not even alleged that in the decree since passed in the partition suit the mortgage debt was either mentioned as a family debt or that Tiyagaraja Pillai had his share decreed to him, subject to payment of a moiety of that debt. The respondent was therefore justified in not proceeding against Tiyagaraja Pillai's share, lest by so doing he may run the risk of involving himself in litigation which may entail

(1) I.L.R., 7 Mad., 397.

on him expense. The direction is binding only so far as it does not compel him to invade the rights of third parties who were not parties to the decree. This view is in accordance with that taken by the High Court at Allahabad in *Zalim Gir v. Ram Charan Singh*(1). In that case a zamindar executed two mortgages of his zamindary property in favour of one Panna Lal—one on the 10th October 1871 and the other on the 10th October 1872. On the 27th January 1874 he mortgaged about 117 bighas out of his zamindary for Rs. 700 to the defendant in that case. On the 10th September 1877 he made a conditional sale of the zamindary property in favour of the plaintiff for Rs. 4,500 to pay off the two charges created in favour of Panna Lal. On the 10th August 1878 the zamindar made another mortgage to the defendant for Rs. 300 of the same 117 bighas. On the 8th November 1881 the defendant obtained a decree on his two mortgages of the 27th January 1874 and of the 10th August 1878, and on his application for execution of the decree, the mortgaged property was advertised for sale on the 20th November 1883. Meanwhile the plaintiff took the necessary proceedings to foreclose his conditional sale, and upon the 18th March 1883 the sale was foreclosed. On the 19th November 1883 the plaintiff brought a suit to have it declared that defendant was not entitled to bring the property to sale, and it was held that he was not entitled to do so before first recouping the plaintiff the amount due on the prior encumbrances. It is therefore competent to respondent in the case before us to apply for execution against other than the mortgaged property if he can show that the portion of the mortgaged property not brought to sale belongs to appellant's divided brother. It is urged on behalf of appellant that the decree under execution was passed against appellant as the managing member of a joint Hindu family during the subsistence of co-parcenary, for a debt contracted for purposes binding on all the co-parceners; but the decree is not produced before me; nor am I referred to any document showing that the decree was passed against appellant as the representative of the joint family whilst the absence of all allusion to the debt and to Tiyagaraja Pillai's liability for his moiety thereof negatives the contention.

The appeal fails, and I dismiss it with costs.

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