

APPELLATE CIVIL.

*Before Mr. Justice Subrahmania Ayyar and Mr. Justice
Sankaran Nair.*

1904.
July 15.

RANGASAMY NAICKEN (PLAINTIFF COUNTER-PETITIONER),
APPELLANT,

v.

THIRUPATI NAICKEN (SECOND DEFENDANT PETITIONER),
RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 244—Execution of decree—Decree passed ex parte against father and son on promissory note signed by father alone—Application in execution for arrest of son—Objection to arrest on ground that decree was wrongly passed against son—Maintainability.

A judgment-creditor sued a Hindu father and his son on a promissory note signed only by the father. Neither defendant appeared or defended the suit and a decree was passed against both. The father died and the judgment-creditor made the present application in execution and asked for the arrest of the son. The latter asked the Court to direct that he was not liable to arrest under the decree :

Held, that the decree had not been passed without jurisdiction and the judgment-debtor was precluded, in execution proceedings, from impeaching the decree, which had been passed without opposition and which had not been set aside.

If a decree is passed by a Civil Court which had absolutely no jurisdiction to pass it, even a party to the proceeding may impeach it as a nullity, though it has not been set aside in appeal or otherwise. This was not such a case, as the District Munsif was competent to pass a personal decree against the present judgment-debtor if the evidence required to establish the personal liability had been then produced. The fact that a decree had been passed in the absence of such evidence would not make it a decree passed without jurisdiction.

Sardarmal v. Aranwayal Sabhapathy, (I.L.R., 21 Bom., 205), and *Gomatham Alamelu v. Komandur Krishnamachari*, (I.L.R., 27 Mad., 118), approved.

EXECUTION PETITION, asking for relief by arrest of the judgment-debtor. The judgment-debtor applied for an order that he was not liable to arrest under the decree. The decree-holder had obtained a decree against the judgment-debtor in Original Suit No. 485 of 1901. The judgment-debtor was second defendant in that suit

* Civil Miscellaneous Second Appeal No. 100 of 1903, prosecuted against the order of Verner A. Brodie, Esq., District Judge of Coimbatore, in Appeal Suit No. 33 of 1903, presented against the order of M.R.Ry. P. Sadasiva Ayyar, District Munsif of Coimbatore, in Execution Petition No. 455 of 1902 (Original Suit No. 455 of 1901).

which was on a promissory note executed by the father alone. It was alleged that the money for which the promissory note was given had been advanced by plaintiff for the marriage expenses of the present judgment-debtor. In the plaint, relief was asked for personally against father and son, but neither appeared or contested the claim, and a decree was passed as prayed for. An application to set aside the decree was made by the present judgment-debtor, but it was rejected as he failed to comply with the terms of the order, which directed him to furnish security. The father was now dead. The District Munsif rejected the judgment-debtor's petition. The District Judge, on appeal, held that the present judgment-debtor was not liable personally for the debt.

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The decree-holder preferred this appeal.

Hon. Mr. P. S. Sivaswami Ayyar for appellant.

S. Kasturivanga Ayyangar for respondent.

JUDGMENT.—The plaintiff, in Original Suit No. 485 of 1901, obtained a decree, against the respondent, who was the second defendant therein, and his father, for the payment of a sum of money lent to the father and alleged to have been paid for the marriage of the respondent. The suit was on a promissory note executed by the father alone. The plaint contained a prayer for a personal decree against both the defendants. Neither of them appeared or contested the claim. A decree was passed as prayed for. An application to set aside the decree was made by the respondent, but the application was rejected as he failed to comply with the terms of the order which directed him to furnish security. The father, the first defendant, is dead. An application was once before made to execute the decree against the second defendant and he was arrested in pursuance of the order then passed to execute the decree. The amount was not then realized. The plaintiff now applies to execute the decree and the District Judge has held that the decree making the second defendant personally responsible was not a valid decree, apparently on the ground that the circumstances which alone would warrant a personal decree against the second defendant did not exist and had not been proved.

If a decree is passed by a Civil Court which had absolutely no jurisdiction to pass it, even a party to the proceeding may impeach it as a nullity, though it had not been set aside in appeal or otherwise.

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This, however, is obviously not such a case; as the District Munsif, in Original Suit No. 485 of 1901, was quite competent to pass a personal decree against the second defendant if the evidence required to establish the personal liability had been then produced.

The fact that a decree was passed in the absence of such evidence would not make it a decree passed without jurisdiction and a party to the suit is precluded in execution from impeaching the decree which was passed without opposition and which has not been set aside. (Cf. *Revell v. Blake*(1), *Sardarmal v. Aranyaya Sabhapathy*(2) and *Gomatham v. Alamelu Komandur Krishnamacharlu*(3)).

The case of *Lakshmanaswami Naidu v. Rangamma*(4) is clearly distinguishable. The decision proceeded on the footing that the decree there in question was on the face of it null and void.

We, therefore, reverse the order of the District Judge and direct that the application for execution be replaced on the file and proceeded with in accordance with law. The respondent will pay the appellants' costs in this and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Sankaran Nair.

VEERABADRAN CHETTY AND OTHERS (RESPONDENTS),
APPELLANTS,

v.

NATARAJA DESIKAR (PETITIONER), RESPONDENT.*

Letters Patent, Art. 15—Appcal—Order by single Judge ordering commission to issue to examine a witness—Civil Preccadure Code—Act XIV of 1882, ss. 383, 386—Power of Courts to issue commission—Cases enumerated in sections exhaustive—Court may prevent abuse of its process.

The present appellants obtained a decree against the late head of a muti, and in execution thereof, attached certain gold and silver articles. The respondent,

(1) L.R., 8 O.P., 533.

(2) I.L.R., 21 Bom., 205 at p. 211.

(3) I.L.R., 27 Mad., 118.

(4) I.L.R., 26 Mad., 31.

* Appeal No. 6 of 1904, presented under Article 15 of the Letters Patent, against the judgment of Mr. Justice Boddam in Civil Revision Petition No. 486 of 1903, presented against the order of the Subordinate Judge of Madurai (East), in Miscellaneous Petition No. 115 of 1903.