APPALA-NARASIMHULU v. SANYASI.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

held to be landholders and the suit for rent by them against the defendants is one cognizable by the Sub-Collector. This view is in accordance with the judgment of ABDUR RAHIM, J., in *Surya-narayana* v. *Ballayya*(1), who upheld the view taken by the Subordinate Court of Cocanada although no reasons are stated in the judgment.

The decrees of the lower Courts must therefore be reversed and the suit remanded to the Court of First Instance for disposal according to law. No objection to jurisdiction was raised by the defendants. In the circumstances all costs up to date must abide the result of the trial.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sadasiva Ayyar.

1912. May 3, September 24 and October 2.

B. GOVINDAPPA (PLAINTIFF), APPELLANT,

v.

B. HANUMANTHAPPA (FIRST DEFENDANT), RESPONDENT.*

Assignee of a money-decree of the Original Court—Decree reversed in appeal—Assignee not a party to the appeal—Money realised by assignee in execution—Application by judgment-debtor for restitution—Objection by assignee to application—Suit by judgment-debtor against assignee—Fraud and collusion between judgment-debtor and original decree-holder, effect of—Civil Procedure Code (Act XIV of 1882), sec. 583—lis pendens.

A judgment-debtor, from whom the assignee of a money-decree has realised the decree-amount in execution, is entitled to recover it back from him when the decree is afterwards reversed in appeal even if the assignee of the original decree was not brought on the record in the appeal.

Neither the fact that the assignment was made before the appeal was filed nor the fact that the judgment-debtor had knowledge of the assignment before he lodged his appeal makes any difference.

Where the decree of the Appellate Court was the result of fraud and collusion between the judgment-debtor and the original decree-holder, it is possible that such a plea if made and proved would be a sufficient answer to a suit by the judgment-debtor against the assignee of the decree.

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(1) Civil Revision Petition No. 895 of 1910.

* Second Appeal No. 187 of 1911.

Money obtained under an invalid process of Court must be treated as money had and received to the use of the person from whom it was realised.

A suit for restitution by the judgment-debtor was maintainable, where he had sought his remedy for restitution by an application made to the Court which executed the decree and it was on the objection of the defendant (assignee of the decree) that he was driven to institute the suit; the defendant cannot now be heard to say that the procedure to which he himself successfully objected was the proper procedure.

Settappa Gounden v. *Muthia Goundan* (1903) I.L.R., 31 Mad., 268, and *Doraisami Ayyar* v. *Annasami Ayyar* (1900) I.L.R., 23 Mad., 306, followed.

Tangi Joghi v. *Hall* (1900) I.L.R., 23 Mad., 203, referred to.

Lalta Prasad v. *Sadiq Husen* (1902) I.L.R., 24 All., 288, dissented from.

SECOND APPEAL against the decree of N. LAKSHMANA RAO, the Subordinate Judge of Bellary, in Appeal No. 73 of 1908, preferred against the decree of C. V. SAMPATH AYYANGAR, the Acting District Munsif of Hospet, in Original Suit No. 32 of 1908.

Govindappa, who is the plaintiff in the present suit which has given rise to the present appeal, was the judgment-debtor in a previous suit (Original Suit No. 135 of 1905), which was brought against him by one Basavva on a promissory-note executed by Govindappa in favour of one Adivayya. Basavva brought the said suit (Original Suit No. 135 of 1905) alleging that Govindappa really owed money to her and at her instance executed that pro-note in favour of Adivayya who was also a defendant in that suit. Basavva obtained a decree in her favour in the Original Court against Govindappa. Basavva transferred the said decree in Original Suit No. 135 of 1905 to Hanumanthappa who is the first defendant in the present suit. Subsequent to the assignment of the decree, Govindappa filed an appeal against the decree in Original Suit No. 135 of 1905 but did not make the assignee a party to his appeal. When the appeal was pending, the assignee Hanumanthappa executed the decree in Original Suit No. 135 of 1905 as Basavva's assignee and, having realised the decree-amount, received it from Court on furnishing security under the orders of the appellate Court, the second defendant in the present suit having stood surety for him. Subsequently the appeal was disposed of in favour of Govindappa (the present plaintiff), and the decree in Original Suit No. 135 of 1905 was reversed. Govindappa moved the first Court in execution for an order for restitution under section 583 of the Civil Procedure Code (Act XIV of 1882), but the application was

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disallowed on objection taken by Hanumanthappa. Hence this regular suit (Original Suit No. 32 of 1908) was brought by Govindappa against Hanumanthappa (the assignee of the decree) and his surety as the first and second defendants. The District Munsif decreed the suit in favour of the plaintiff, but the decree was reversed on appeal by the Subordinate Judge. The plaintiff preferred this second appeal.

Mr. *T. V. Muthukrishna Ayyar* for the appellant.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the respondent.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—This Second Appeal raises the question whether a judgment-debtor from whom the assignee of a money-decree has realised the decretal amount in execution is entitled to recover it back from him when the decree is afterwards reversed in appeal, if the assignee of the original decree was not brought on record in the appeal. I may mention that it is not necessary to consider the question whether the plaintiff could and should have sought his remedy for restitution by an application made to the Court which executed the decree, for he did make such application and it was on the objection of the defendant that he was driven to institute the present suit and the defendant cannot now be heard to say that the procedure to which he himself successfully objected was the proper procedure.

Upon the merits what is urged in support of the judgment of the Subordinate Judge who has decided against the plaintiff's claim is that he not having impleaded the present defendant who had obtained an assignment of the decree of the first Court as a respondent in the appeal against the decree, the decree of the appellate Court cannot bind him because it might be that the decision of the appellate Court was the result of collusion between the present appellant and the original decree-holder, the assignor of the defendant. Now no such fraud was ever pleaded and it is possible that if it was pleaded and proved that that would be a sufficient answer to the suit. But in the absence of fraud it is difficult to see why the decree of the appellate Court should not bind a person who has chosen to obtain an assignment of the decree of the first Court. It is not contended that a judgment-debtor wishing to appeal against the decree is bound to make the assignee of the decree a party to his appeal though it might

be open to him to apply for an order to that effect. The judgment-debtor's right of appeal is in no way affected by any intermediate assignment of the first Court's decree. The assignee himself might apply to be brought on record in the appeal and if he chose to leave the conduct of the appeal to the decree-holder it does not stand to reason that it should be open to him to question the decree that may be passed by the appellate tribunal. It is the decree of the latter Court that is the final decree in the case, being in substitution of the original decree and the doctrine of *lis pendens* clearly applies to an intermediate assignment of the original decree. The fact that the assignment was made before the appeal was filed cannot make any difference in this respect [see *Settappa Goundan* v *Muthia Goundan*(1)] nor for reasons already stated, the fact that the judgment-debtor had knowledge of the assignment before he lodged his appeal.

On behalf of the respondent much reliance is placed on *Lalta Prasad* v. *Sadiq Husen*(2) which is certainly a decision directly in his favour. On the other hand the appellant cites in support of his contention the authority of *Tangi Joghi* v. *Hall*(3). With all respect to the learned Judges who decided the former case we are unable to accept their view of the law. The main reasoning on which that ruling is based seems to be that because in case the judgment-creditor himself had executed the decree of the first Court and made over the money realised to a third person, the judgment-debtor who succeeded in appeal could not follow the money in the hands of that third person. It must be held that where the assignee of the decree himself realised the decree in execution the judgment-debtor would have no cause of action against him when the original decree is reversed in appeal. In my opinion the two cases are not based on the same legal considerations. Money is not ear-marked property and therefore in the first case there is no principle of law according to which it can be followed in the hands of a third person. But the other case is quite different. Here one person by a compulsory process of Court obtains money from another and it is afterwards declared by a superior tribunal that the original process was unjustified. It seems to me that money so obtained under an invalid process of Court must be treated as money had and

(1) (1903) I.L.R., 31 Mad., 268. (2) (1902) I.L.R., 24 All., 288.
(3) (1900) I.L.R., 23 Mad., 203.

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received to the use of the person from whom it was received That is the principle on which the doctrine of restitution which underlies section 583 of the Civil Procedure Code of 1882 rests. The decision in *Tangi Joghi* v. *Hall*(1) in my opinion supports the distinction which we have drawn between a case where the act complained of and in respect of which restitution is sought was done by the agency of the Court and a case where such act was independent of any process of Court. There is no doubt that the property of which restitution was sought in the Madras Court was immoveable property, but the principle of the decision is, to my mind, equally applicable in cases like the present. That principle is well expressed in the observations of an American Court cited by the learned Judges in *Dorasami Ayyar* v. *Annasami Ayyar*(2). But the cases have no application when the party seeking to be restored to the possession has been wrongfully dispossessed by the agency of the Court. He does not stand in the position of the actor in a suit who seeks the aid of a Court to regain any possession lost by his own negligence or misfortune. On the contrary he is out of possession only because the Court has wrongfully put him out, and whoever is in is there only because the Court has wrongfully made room for him to get in . . . The plaintiff, in my opinion, is entitled to restitution. The decree of the lower Appellate Court must therefore be reversed and that of the District Munsif restored with costs in this Court and in the lower Appellate Court.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I entirely agree and I do not think that I can usefully add any words of my own.

(1) (1900) I.L.R., 23 Mad., 203. (2) (1900) I.L.R., 23 Mad., 306.