

notice to determine whether good faith existed before that question had been decided at the trial. Government undertakes the defence of their servants in actions brought against them personally for official acts done by them in cases where those acts are deemed defensible. The issue of notice gives time to the public officer to make amends for his act or to report the case to Government and get himself defended at the public cost. So notice is made compulsory in all suits against public servants for acts done officially.

A number of English cases have been cited in the arguments and Mr. Justice SESHAGIRI AYYAR has referred to some of them in his ORDER OF REFERENCE. I find that little assistance is to be derived from them, as they are all pronouncements as to the meaning of the language used in particular English statutes, which is not identical with the language of the Civil Procedure Code which we have to consider.

KOTI REDDI
v.
SUBBIAH.
—
SPENCER, J.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

LAKSHMANAN CHETTY AND TWO OTHERS (PETITIONERS),

1918.
March 18.

v.

P. P. V. PALANIAPPA CHETTY AND TWO OTHERS
(RESPONDENTS).*

Civil Procedure Code (V of 1908), O. XLI, r. 5—Whether applicable to stay execution not of the decree appealed against, but of some other decree—Petition to stay sale of immoveable properties—Jurisdiction of Appellate Court to grant.

An application under Order XLI, rule 5 to stay the sale of immoveable property in execution of a decree pending an appeal therefrom can be made not only to the Court which passed the decree but also to the Appellate Court, both of which have concurrent jurisdiction.

The rule however did not authorize an application to the Appellate Court for stay of execution in another suit.

* Civil Miscellaneous Petition No. 248 of 1918.

LAKSHMANAN
 CHETTY
 v.
 P. P. V.
 PALANIAPPA
 CHETTY.

Kanniappan Chetty v Manickavasagam Chetty (1912) 23 M.L.J., 677, dissented from; *Triboni Sahu v. Bhigawat Bux* (1907) I.L.R., 34 Calc., 1037 and *Rama Prasad v. Anukul Chandra* (1914) 20 C.L.J., 512, referred to.

PETITION praying the High Court to stay further proceedings by way of confirmation of sale in execution of the decree in O.S. No. 75 of 1914 on the file of the Temporary Subordinate Judge of Rāmnād at Madura pending the disposal of Appeal No. 350 of 1917 preferred to the High Court against the decree in Original Suit No. 102 of 1916 on the file of the Temporary Subordinate Judge of Rāmnād at Madura.

The petitioners in the above petition to the High Court brought Original Suit No. 102 of 1916 in the Subordinate Judge's Court of Rāmnād to restrain the defendants by an injunction from executing the decree in Original Suit No. 75 of 1914 on the file of the said Court. The suit having been dismissed the petitioners filed therefrom an appeal (Appeal No. 350 of 1917) to the High Court. In the meanwhile the defendants obtained an order for sale of immoveable properties in execution of the decree in Original Suit No. 75 of 1914 and got the properties sold in execution. The petitioners then filed this petition under Order XLI, rule 5, Civil Procedure Code, in the High Court for an order not to confirm the sale.

K. V. Krishnaswami Ayyar for petitioners.

K. Bashyam Ayyangar for respondents.

The ORDER of the Court was delivered by

SADASIVA
 AYYAR, J.

SADASIVA AYYAR, J.—As regards the preliminary objection that no petition under Order XLI, rule 5, of the Code of Civil Procedure lies in this Court, in respect of stay of sale of immoveable property, WALLIS, C.J., and HANNAY, J., doubted in Civil Miscellaneous Petition No. 1595 of 1914 (in Appeal Against Order No. 173 of 1914) the soundness of the decision in *Kanniappan Chetty v. Manikavasagam Chetty*(1) which was quoted in support of the objection. We are inclined to go further and dissent (with great respect) from the decision in *Kanniappan Chetty v. Manikavasagam Chetty*(1). The inherent powers of the appellate Court clearly recognized by Order XLI, rule 5, cannot be held to have been cut down or limited by the special and exceptional power conferred on the executing Court by Order

(1) (1912) 23 M.L.J., 677.

XLI, rule 6, which rule seems to have been clearly intended in order that the executing Court might be compelled to exercise it in emergent cases for the benefit of the judgment-debtor (see also the pertinent observations of MOOKERJEE, J., in *Triboni Sahu v. Bhagwat Bux*(1) and *Rama Prosad v. Anukul Chandra* (2). We overrule the preliminary objection.

LAKSHMANAN
CHETTY
v.
P. F. V.
PALANIAPPA
CHETTY.
—
SADASIVA
AYYAR, J.

On the merits it is not the decree under appeal that is sought to be executed by the sale of immoveable property but another decree against the execution of which the decree under appeal refused to grant an injunction. The present petition is not for a temporary injunction but it is for stay of execution of the decree under appeal. The decree appealed against not being under execution, Order XLI, rule 5, does not apply and this petition is misconceived.

It is therefore dismissed with costs.

N.R.

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice
Spencer.*

PALANIAPPA CHETTIAR AND THREE OTHERS

(DEFENDANTS NOS. 3, 5 TO 7), APPELLANTS,

v.

SHANMUGAM CHETTIAR AND TEN OTHERS (PLAINTIFF,
DEFENDANTS NOS. 2, 4 AND 8 TO 15), RESPONDENTS.*

1918,
March 28 and
1917,
April 2.

Negotiable Instruments Act (XXVI of 1881), ss 26, 27 and 28—Agent, meaning of—Hundi or promissory note drawn or made by a trustee of a charity—Personal liability of trustee—Liability of charity property and other members of the family—Signature of trustee with vilasam of charity prefixed, effect of—Liability of non-executants.

A person drawing a hundi or bill of exchange or making a promissory note as trustee of a temple or of a charity is *personally* liable on such bill or note.

(1) (1907) I.L.R., 34 Calc., 1037. (2) (1914) 20 C.L.J., 512.

* Original Side Appeal No. 61 of 1915.