

proceedings of the Government Agent must, in the first instance, be submitted to the Government and then it is open to the Government to refer the matter to the High Court or to the Board of Revenue, as the case may be. There can be no doubt that the Government Agent in this case was not justified in setting aside the order dismissing the suit for default without giving an opportunity to the defendant to be heard.

The proper remedy of the petitioner is to submit a petition to the Government and it is for the Government if it so chooses to refer the petition to the High Court for disposal. The present petition must be dismissed with costs.

K.B.

VENKATA
NAGA-
BUSHANAM
v.
MAHA-
LAKSHMI.
—
ABDUL
RAHIM
AND
KUMARA-
SWAMI
SASTRIYAR,
JJ.

APPELLATE CIVIL.

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

M. R. M. A. SUBRAMANIAN CHETTIAR (JUDGMENT-DEBTOR),
APPELLANT,

v.

HON. P. RAJARAJESWARA SETHUPATHI *alias* MUTHU-
RAMALINGA SETHUPATHI AVARGAL, RAJA
OF RAMNAD (DECREE-HOLDER), RESPONDENT.*

1917.
August
9 and 10.

Civil Procedure Code (Act V of 1908), O. XLI, r. 5 (3)—Order under—Immoveable property given as security for decree by judgment-debtor, whether realizable in execution—Judgment-debtor taking advantage of a favourable order in execution—Estoppel.

Immoveable property given by a judgment-debtor as security for the due performance of a decree, pursuant to an order made under Order XLI, rule 5 (3), Civil Procedure Code, can be realized in execution without attachment, the matter being one relating to execution within section 47, Civil Procedure Code, and a separate suit does not lie.

Sadasiva Pillai v. Ramalinga Pillai (1875) 2 I.A., 219, applied.

Shyam Sundar Lal v. Bajpai Jainarayan (1903) I.L.R., 30 Cal., 1060, followed.

* Appeal Against Order No. 195 of 1917.

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Mukta Prasad v. Mahadeo Prasad (1916) I.L.R., 38 All., 327, and *Saminatha Pathan v. Sornatha Ammal* (1912) 22 M.L.J., 190, referred to.

Tokhan Singh v. Girwar Singh (1905) I.L.R., 32 Calc., 494, distinguished.

Where a judgment-debtor who could have been arrested for the entire amount of a decree is on his objection ordered to be arrested only for a certain amount on the ground that the balance could be realized by the sale of the lands given by him as security for the decree amount, he is estopped from afterwards disputing the right of the decree-holder to sell the lands for all the then balance of the decree even though such balance may exceed the amount for which the lands were originally tendered as security.

Sadasiva Pillai v. Ramalinga Pillai (1875) 2 I.A., 219, followed.

APPEAL against, and Civil Revision Petition under section 115 of Civil Procedure Code (Act V of 1908) and section 107 of the Government of India Act of 1915, to revise, the order of P. SUBBAYYA MUDALIYAR, the Subordinate Judge of Ramnad at Madura, in Execution Application No. 515 of 1917 (in Execution Petition No. 91 of 1917 in Original Suit No. 6 of 1902).

A security bond given by the judgment-debtor for the purpose of staying the execution of the decree against him pending his appeal against the decree was in these terms :—

“ Security bond, dated 12th October 1903, executed to the Court of the Subordinate Judge, Madura East, by Subramanian Chettiar, son of Devakottai M. R. A. Ramanathan Chettiar, Nattukottai Chetti, money-lender, residing in North Veli Street, Municipal sixth ward, Madura town. As the suit O.S. No. 6 of 1902 on the file of this Court in which I am the first defendant has been decided against me, I have now preferred an appeal to the High Court. I presented a petition in the High Court that the execution of the said decree be stayed till the disposal of the appeal. Thereupon the High Court passed on 31st August 1903 an order in C.M.P. 771 that I should give a security for the said decree appeal amount Rs. 39,087-8-4 and for interest thereon for two years at the current rate among the Madura Chetti people which interest was ascertained to be Rs. 6,967-1-4, that is, Rs. 46,054-9-8. For this sum of Rupees forty-six thousand and fifty-four, annas nine and pias eight, I have given as security the immoveable properties to which I am entitled, which are in my enjoyment and which are specified herein below. I have not subjected the said properties to any encumbrance whatever. In case the said High Court appeal be decided against me, I content to the plaintiff recovering the amount of this Court's decree from the undermentioned properties . . . ”

The facts of the case which are extracted from the judgment of the lower Court are as follows :—

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“In this case decree was passed on 30th March 1903 for Rs. 39,000 odd against the first defendant. The first defendant preferred an appeal to the High Court and the plaintiff filed memorandum of objections. Pending disposal of the appeal, their Lordships ordered that the execution of the decree be stayed except with respect to costs, on first defendant giving security for the amount of decree of this Court together with interest for two years at the *Chetti Nadappu* rate. The first defendant executed a security bond in favour of the Court on 12th October 1903 for Rs. 39,000 and odd and two years' interest or in all for Rs. 46,054-9-8 on the security of two items of immoveable property valued at Rs. 50,000 and Rs. 20,000 respectively. The bond recites that if the appeal went against the first defendant, the latter agreed to the amount of the decree of this Court being recovered from the secured properties. On the 21st April 1909 the High Court modified the decree of this Court and passed a decree against the first defendant for Rs. 41,092-11-7 with interest thereon at 9 per cent per annum from the date of the plaint. Their Lordships also allowed Rs. 2,022-14-10 to the plaintiff for his costs of the appeal and Rs. 392-4-3 for his costs on the memorandum of objections. Then on 11th October 1909 the plaintiff applied for execution of the decree for the full amount due under the High Court's decree including costs, i.e., for Rs. 74,492-0-2 by arrest of the first defendant and by sale of the secured properties without attachment. Then the first defendant appeared by vakil and contested the execution petition only so far as it prayed for his arrest. After hearing both sides the following order was passed on Execution Petition No. 291 of 1909 on 20th October 1909 :—

‘I can see no valid objection at all to this application. It is however seen that property accepted as worth Rs. 70,000 has been given as security for the satisfaction of the decree. That being so, I do not consider it necessary to allow both arrest and sale of the property at the same time, for the entire amount. But seeing that the decree amount now to be paid exceeds Rs. 70,000, I think it will be sufficient to safeguard the plaintiff's interest to direct arrest for Rs. 7,000 in the decree amount at present and postpone issue of arrest or other process for the balance, if any, remaining unpaid after the sale of the property Meanwhile arrest also will issue for the present for payment of Rs. 7,000 in the decree amount if the same is not paid in fifteen days; returnable 6th December 1909’.

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“The sale however did not take place. The defendant paid Rs. 7,000 and the petition was closed. Subsequently the matter went up before Privy Council and their Lordships dismissed the first defendant's appeal on 30th November 1915.

“Now the plaintiff's costs before the Privy Council have been recovered and he now seeks to recover the balance still due as per High Court's decree, by sale of the first defendant's secured properties without attachment. The first defendant took various objections to the plaintiff's execution of the decree.”

The Subordinate Judge ordered, without effecting an attachment, the sale of the properties given as security for the entire balance of the decree amount.

The first defendant preferred this appeal.

A. Krishnaswami Ayyar (with *M. Patanjali Sastryar*) for appellant.—A security bond making immoveable property liable for any decree that may be passed in the case operates as a mortgage, and such a bond requires to be registered; being unregistered it cannot be acted upon; *Nagaruru Sambayya v. Tangatur Subbayya*(1). Even if it can be acted upon the security can be realized only by a suit and not by a petition in execution. Section 99 of the Transfer of Property Act was in force when the security bond was given; hence, a suit alone is the proper remedy: see *Tokhan Singh v. Girwar Singh*(2). Even if it could be realized in execution, order to sell without an attachment is invalid. The security bond made the lands security only for Rs. 46,000 and they cannot therefore be sold for any higher amount. The prior order in execution does not operate either as estoppel or as *res judicata*. The questions now argued were not the subject of the prior order.

Hon. Mr. *S. Srinivasa Ayyangar*, the Advocate-General, with *R. Krishnama Achariyar* for the respondent.—Realization of security given for a decree is a matter relating to execution within section 47, Civil Procedure Code: *Sadasiva Pillai v. Ramalinga Pillai*(3), *Chutterdharee Lall v. Rambelashree Koer*(4), *Abdool Wahed v. Fareedonnissa*(5), *Saminatha Pathan v.*

(1) (1908) I.L.R., 31 Mad., 330.

(2) (1905) I.L.R., 32 Cal., 494.

(3) (1875) 2 I.A., 219 at p. 233.

(4) (1878) I.L.R., 3 Cal., 318.

(5) (1889) I.L.R., 16 Cal., 323.

Sornatha Ammal(1), *Mukta Prasad v. Mahadeo Prasad*(2) and *Shyam Sundar Lal v. Bajpai Jainarayan*(3). Attachment is not necessary, as the property has been given as security. The sale can now be ordered not only for Rs. 46,000 but for the whole amount due under the decree. Rupees 46,000 was mentioned in the security bond as that was the whole amount then due. At the time of the previous execution, when the judgment-debtor could have been arrested not only for the Rs. 70,000 for which he gave security but also for nearly Rs. 7,000 more, he was after his objection allowed to be arrested only for Rs. 7,000, the Court accepting his statement that the rest of the decree amount could be realized from the sale of the lands tendered as security. Having taken advantage of that order, the judgment-debtor is now estopped from contending that the property could not be sold for all the present balance of the decree amount. *Sadasiva Pillai v. Ramalinga Pillai*(4) *Subbaraya Ayyar v. Ramasawmi Pillai*(5), *Durga Prasad Bannerjee v. Lalit Mohan Singh Roy*(6) and *Gokhai v. Gones Lal*(7).

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A. Krishnaswami Ayyar in reply.—*Sadasiva Pillai v. Ramalinga Pillai*(4) does not lay down that the security is realizable in execution. The decision therein turned upon the construction of the particular security bond given in that case.

The following judgment of the Court was delivered by

WALLIS, C.J.—The question raised in the appeal, which is of WALLIS, C.J some importance is, when immoveable property has been given by the judgment-debtor as security for the due performance of a decree pursuant to an order made under Order XLI, rule 5 (3) (c), Civil Procedure Code, whether that property can be realized by the decree-holder in execution or can only be realized in a separate suit. We have been referred to a decision in *Tokhan Singh v. Girwar Singh*(8) that a separate suit is necessary. But the learned Judges who decided that case proceeded upon the prohibition in section 99 of the Transfer of Property Act, as it then was, against bringing mortgaged property to sale except by means of a suit under section 67 of that Act. That section has been repealed and the prohibition has been limited in Order

(1) (1912) 22 M.L.J., 190.

(3) (1903) I.L.R., 30 Calc., 1060.

(5) (1912) 22 M.L.J., 166.

(7) (1912) 16 C.L.J., 404.

(2) (1916) I.L.R., 38 All., 327.

(4) (1875) 2 I.A., 219 at p. 233.

(6) (1893) I.L.R., 25 Calc., 86.

(8) (1905) I.L.R., 32 Calc., 494.

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XXXIV, rule 14, Civil Procedure Code, and that decision is therefore inapplicable to the present case and affords no reason for refusing to follow the earlier decision of the same Court in *Shyam Sundar Lal v. Bajpai Jainarayan*(1). Further in that case the point was not taken before the learned Judges that such a sale comes within the provisions of section 47 (formerly section 244), Civil Procedure Code, which provides that

“all questions arising between the parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit.”

If we look at the question on principle and independently of authority, it is difficult to see how the realization of the security given to the Court pursuant to an order of the Court, for the purpose of satisfying the decree-holder can possibly be said to be a matter not relating to the execution, discharge or satisfaction of the decree, or not to be a question arising between the parties to the decree. The fact that the bond is given to the Court does not make it a question arising between the judgment-debtor and a third party so as to take it out of the section. The bond was given to the Court in *Sadasiva Pillai v. Ramalinga Pillai*(2), and yet the case was held to come within the section of the Code corresponding to section 47. If the section is applicable, then that being the special provision governing these matters, it would have overridden any general provision contained in section 99 of the Transfer of Property Act. We are therefore clearly of opinion that apart altogether from authority it is a matter arising in execution within the meaning of section 47, Civil Procedure Code. The effect of immovable property being given as security is something more than attachment because it makes the property applicable solely in discharge of the judgment-debt and not liable to rateable distribution among other judgment-creditors. But the realization by the Court of such security in execution is of the same nature as sale by the Court of the immoveable property attached, that is to say, it transfers the right, title and interest of the judgment-debtor who has given security. There is no need in such a case that there

(1) (1903) I.L.R., 30 Cal., 1060.

(2) (1875) 2 I.A., 219 at p. 233.

should be anything in the nature of a mortgage suit for sale under section 67 of the Transfer of Property Act with all the expense and delay which would be thereby involved. It would be a most mischievous state of law if such a thing were necessary and it would fetter the discretion of the Court in accepting immoveable property as security for the execution of the decree. This view is in accordance not only with *Shyam Sundar Lal v. Bajpai Jainarayan*(1), but also with *Mukta Prasad v. Mahadeo Prasad*(2), and the dictum of two learned Judges of this Court in *Saminatha Pathan v. Sornatha Ammal*(3). What is more important is, that it is strongly supported by the decision of their Lordships of the Judicial Committee in *Sadasiva Pillai v. Ruma-linga Pillai*(4), where security of immoveable property given for mesne profits which were not awarded by the decree was held to be realizable in execution for such mesne profits, instead of leaving the parties to recover them in a separate suit. Their Lordships observe at page 232 that the security bonds were

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“proceedings in Court importing a certain liability to be enforced in the suit against the defendant to that suit.”

They further observed at page 233 that the liability incurred under those bonds amounts to a “question relating to the execution of the decree” within the meaning of the latter clause of section 11 of Act XXIII of 1861. If the question in that case was one relating to the execution of the decree, *a fortiori* it is so in the present case where security has been furnished to the Court pursuant to an order of Court under Order XLI, rule 5 (3) (c), Civil Procedure Code. It is unnecessary in this case to deal with cases of security given by third parties under section 145, Civil Procedure Code, or with the decisions on that question.

The second objection taken to the order under appeal is that it was for the enforcement of the security for a larger amount than that provided for in the bond. Now we think that that bond has already formed the subject of adjudication because the property has been ordered to be sold for the full decree amount and that order was allowed to become final. Further on the basis that this security was enforceable for the full amount of

(1) (1903) I.L.R., 30 Calc., 1060.

(2) (1916) I.L.R., 38 All., 327.

(3) (1912) 22 M.L.J., 190.

(4) (1875) L.R.,² I.A., 219.

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the decree, the Court refused to enforce the decree personally against the judgment-debtor as it would have otherwise been bound to do, except to the extent of Rs. 7,000, the balance of the decree amount over the estimated value of the immovable property given as security. In these circumstances we think the appeal also fails on this point.

In the result, the appeal fails and is dismissed with costs. The Civil Revision Petition is dismissed. As regards the Civil Miscellaneous Petitions Nos. 1684 and 1685 of 1917 for stay no order is necessary.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling.

1917.
March 29,
April 24,
and
August
24 and 27.

KOROTH MAMMAD AND ANOTHER (PRISONERS NOS. 1 AND 2),
APPELLANTS,

v.

THE KING-EMPEROR, RESPONDENT.*

*Penal Code (Act XLV of 1860), sec. 370—Buying and selling as a slave,
what amounts to.*

The appellants in these cases were convicted by the Sessions Court of North Malabar under section 370, Penal Code, the second appellant having been found to have sold, and the first to have bought, a Pulayan named Vellan as a slave. The document recording the above transaction ran as follows:—
“I execute to you and give you this day this jenmam deed giving you Velandi's son Pulayan Vellan with his heirs. The sum that I received from you in cash to-day is ten rupees. For this sum of ten rupees, you should get work done for you by the said Vellan and his offspring that may come into being as your jenmam, and act as you please.”

On a difference of opinion between ABDUR RAHIM and NAPIER, JJ., as to whether the said transaction amounted to an offence under section 370, Indian Penal Code :

Held by AYLING, J., that the transaction in question was a sale of Vellan and his offspring as mere chattels and that the appellants were guilty of an offence under section 370, Penal Code.

Empress of India v. Ram Kuar (1880) I.L.R., 2 All., 723, and *Amina v. Queen Empress* (1884) I.L.R., 7 Mad., 277, referred to.

* Criminal Appeals Nos. 26 and 27 of 1917.