

not Rs. 1,663-15-7 but thrice Rs. 1,371-5-9 plus thrice Rs. 294-8-6. (This will not affect the amount given separately for chamayams.)

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The lower Courts' decrees will be modified accordingly. Time for redemption extended till six months from this date. The appellant will get half his costs from plaintiffs here and in the lower appellate court. The appeal so far as it is directed against respondents Nos. 6 to 9 is dismissed with costs.

SADASIVA
AYYAR, J.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

ARUMUGAM PILLAI, APPELLANT (PETITIONER)

v.

KRISHNASAMI NAIDU AND FIVE OTHERS RESPONDENTS
(RESPONDENTS)*

1920,
March 16.

Execution—Pre-decree arrangement that decree should be inexecutable in part, whether recognizable in execution proceedings.

An arrangement made prior to decree in a suit that the decree that might be passed should be inexecutable in part is one that cannot be enforced in execution; hence a sale held in execution of such a decree in spite of the arrangement is good.

Chidambaram Chettiar v. Krishna Vathiyar, (1917), I.L.R., 40 Mad., 233 (F.B.) distinguished.

APPEAL against the Order of F. A. COLERIDGE, in Appeal No. 106 of 1917, on the file of the District Court of Madura preferred against the Order, of M. R. SANKARA AYYAR, District Munsif of Dindigul, in Execution Application No. 801 of 1916, in Execution Petition No. 860 of 1915, in Original Suit No. 255 of 1912.

This appeal arose under the following circumstances:—One Palaniyappa Chetti, who is the second respondent herein, and who held the first and third mortgages on a certain property, filed Original Suit No. 255 of 1912 for the recovery of the mortgage amount due on his first mortgage against the mortgagors and the third defendant, who was the second mortgagee of the same properties. The third defendant is the third respondent in this

* Appeal against Appellate Order No. 31 of 1918 and Civil Revision Petition No. 629 of 1918.

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appeal. In execution of the decree obtained by Palaniyappa Chetti the properties were brought to sale and purchased by one Krishnasami Naidu, the first respondent in this appeal. The appellant in this appeal had purchased the very properties in execution of another decree but subject to the decree in the abovementioned Original Suit No. 255 of 1912. He filed a petition which has resulted in this appeal under section 47, and under rule 90 of Order XXI, Civil Procedure Code, stating that the sale held in execution was null and void for the reasons (1) that there was an agreement made prior to the decree between the plaintiff and the third defendant, that the third defendant should pay Rs. 300 towards any decree that might be passed in the suit and that the plaintiff should not execute the decree thereafter to the prejudice of the third defendant but should use it only to get what money he could from other defendants, (2) that a person who had ceased to be the authorized agent of the plaintiff got the final decree passed, without notice to the interested parties and conducted the sale proceedings from beginning to end. The plea of the purchaser was that the agreement, if any, was unenforceable in execution proceedings, that he was not aware of any such arrangement and that he was utterly ignorant of any fraud in the obtaining of the decree or in the conduct of the sale. Both the lower Courts held that the purchaser was not aware of any fraud and that the agreement could not be recognized in execution and accordingly dismissed the petition. Thereupon the petitioner preferred this appeal to the High Court. He also preferred a Civil Revision Petition (No. 629 of 1918) to the High Court against the order of the District Court.

K. S. Jayarama Ayyar and S. Panchapagesa Sastriyar for appellant.

K. S. Ganapati Ayyar for respondent.

OLDFIELD, J.

OLDFIELD, J:—On the question whether effect has been wrongly refused to the arrangement made before decree, I observe that *Chidambaram Chettiar v. Krishna Vathiyar*(1), dealt with an arrangement to postpone execution, not with one, such as is pleaded here, for the decree being treated as in part inexecutable. An arrangement of the latter description has

(1) (1917) I.L.R., 40 Mad., 233 (F.B.).

received effect in this Court, so far as appears from the authorized Reports only in one case, *Rama Ayyar, v. Sreenivasa Pattar*(1), the decision of a single Judge; and I do not think that *Chidambaram Chettiar v. Krishna Vathiyar*(2), obliges us to extend the principle to the extent required by appellants' contention.

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OLDFIELD, J.

The other objection to the sale is that it was obtained and carried through by a person having no authority from the decree-holder in the matter. This objection is pressed here in the shape of a contention that the whole proceedings from and including the final decree were taken without notice going to appellant or the judgment-debtor and that they therefore were vitiated by fraud and cannot be sustained. But on the assumption, which at present rests on mere assertion that the purchaser was a party to that fraud, there is still the fact that the absence of notice to appellant or the debtor was never distinctly alleged or, so far as appears, relied on in the lower Courts or in the grounds of appeal here. In fact, so far as we have been able to test this case, by reference to the final decree, we observe that the mention in it of the judgment-debtor as absent is ground for a presumption that he had had notice and disregarded it; and then his remedy was by proceedings to have that decree set aside. This objection also to the Lower Appellate Court's decision is therefore unsustainable.

The appeal against Appellate order is dismissed with costs. The Civil Revision Petition is dismissed; no order as to costs.

SESHAGIRI AYYAR, J.—I agree in the main with the observations of my learned brother in the judgment just now delivered. In *Chidambaram Chettiar v. Krishna Vathiyar*(2), I rested my conclusion on the theory of *stare decisis*. It is argued before us by MR. JAYARAMA AYYAR that it follows from my judgment in that case that all the cases referred to therein as supporting the theory of *stare decisis* must be taken to have been accepted by me as correct. I do not think this suggestion is well founded. The course of decisions was referred to for the general proposition that pre-decree arrangements are within the language of section 47. I did not intend to accept as correct every one of the decisions I quoted for that purpose.

SESHAGIRI
AYYAR, J.

(1) (1896) I.L.B., 19 Mad., 230. (2) (1917) I.L.R., 40 Mad., 233 (F.B.).

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—
SESHAGIRI
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On the other hand I want to make it clear that *Chidambaram Chettiar v. Krishna Vathiyar*(1), should not, in my opinion, be applied to what are termed cognate cases. Further, I am clear that an attack against the decree as having been obtained by fraud by one of the parties thereto is not within the principle of *Chidambaram Chettiar v. Krishna Vathiyar*(1).

I agree therefore with my learned brother that this appeal should be dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Krishnan.

NANA TAWKER (FIRST PLAINTIFF), APPELLANT,

v.

BHAWANI BOYEE AND ANOTHER (SECOND DEFENDANT AND SECOND PLAINTIFF), RESPONDENTS.*

Will—Fixed deposit—Direction to pay to another after death of depositor, whether a will.

A person depositing money with a fund filled in a form provided by the fund, whereby he nominated another as the person entitled to receive the money after his death.

Held that this amounted to a will, and if made in the town of Madras, the nominee could not recover the deposit unless the nomination was duly executed and attested as a will and probate thereof obtained.

Per KRISHNAN, J.—The direction created neither a charge nor a trust in favour of the nominee or a contract on which he could sue.

Towers v. Hogan, (1889) 23 L.R., Ir., 53 and *In re Williams*, [1917] 1 Ch., 1, followed; *Florine Marties v. Pinto*, (1917) 33 M.L.J., 476, distinguished.

APPEAL against the decree of C. R. THIRUVENKATA ACHARIYAR, Judge of the City Civil Court, in Original Suit No. 306 of 1918.

The facts are stated in the Judgment of KRISHNAN, J.

T. R. Venkatarama Sastri, K. Sundara Rao, Ponnuswami Ayyar and Narayanaswami Ayyar for appellant.

A. Krishnaswami Ayyar, A. Nanabhay Devay, A. V. Seshayya and M. Patanjali Sastri for respondents.

(1) (1917) I.L.R., 40 Mad., 233 (F.B.).

* City Civil Court Appeal No. 17 of 1916.