KOTHANDA-RAMA CHETTIYAR v. ANNAMALAI PILLAI.

DEVADOSS, J.

that Code extended the Act to all Civil Courts but there is nothing in the Act itself to show that the Act was extended to Small Cause Courts or Courts exercising small cause jurisdiction. Under the Small Cause Court Act of 1865, therefore, the Small Cause Court had no jurisdiction to attach immovable property. The decision in *Marthamma* v. *Kittu Sheregara*(1) is, therefore, correct with regard to the law as it then stood.

But as the law stands at present, it cannot be said that the Small Cause Court has no jurisdiction to attach before judgment immovable property. As we have already observed, the present Code is quite clear on the point and therefore the decision in *Marthamma* v. *Kittu Sheregara*(1) cannot apply to the present state of the law.

We, therefore, answer the question referred to us in the affirmative.

We are very much indebted to the learned Government Pleader for assisting us by arguing the point fully as *amicus curiae*.

N. R.

ORIGINAL CIVIL.

Before Mr. Justice Kumaraswami Sastri.

1924, April 17.

PERURI SURYAPRACASAM, PLAINTIFF

v.

P. T. MUNUSWAMY CHETTY, DEFENDANT.*

Execution of decree—Power of Court to stay execution—Decisions not reported in authorized series, whether binding on Court.

The Court has power, on an application by the judgment-debtor or his surety, to stay execution of the decree against his person for a reasonable time to enable him to satisfy the decree.

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(1) (1871) 6 M.H.C.R., 91.

* Judge's Summons in C.S. No. 545 of 1922.

Held also that the observations of SCHWABE, C.J., to the contrary in *Syed Aga Jan* v. *Abdul Majid*, O.S.A. No. 16 of 1923, are not binding on the Court, the case not being reported in the authorized reports.

A. Narasimhachariar for plaintiff.

T. D. Srinivasa Achariyar and *T. Chakravarti Ayyangar* for defendant and sureties.

JUDGMENT.

This is an application by the sureties praying that they may be given two months' time to pay the amount of the decree which they are liable to pay as sureties and that execution may be stayed for two months in order to enable them to pay the amount.

The suit was filed under Order VI-A of the Original Side Rules against the defendant and leave to defend was given on condition that the defendant gave security. The applicants stood as sureties. A decree was ultimately passed and execution is now sought against the sureties.

The affidavit of Chandrasekhara Chetti (one of the sureties), filed in support of the application, states that the defendant has been promising to settle the claim with the plaintiff and pay up the decree amount, and the sureties therefore did not take any steps to find the money, that ten days before the filing of the present application notice was issued to the sureties to show cause why execution should not be issued against them, that the judgment-debtor is still promising to find the amount due, that the sureties are persons possessing property but that, owing to the suddenness with which the application for execution against them has been made, they are unable to find the money at once.

A counter-affidavit has been filed stating that the application is not sustainable in law, that the defendant got several extensions of time, that the three months' time which was granted to the defendant at the time of

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passing the decree expired on 12th of January 1924, that the sureties are aware of the several attempts of the defendant in trying to get time and that, as the sureties are men possessing property, there is no reason why they should not pay the amount which they have undertaken to pay.

It was not disputed before me at the trial that the sureties are persons who have got immovable property sufficient to pay the amount of the decree nor was it disputed that this was the first application taken out against them for execution. The defendant was a dubash in Messrs. Walker & Co. and the sureties state that as he was promising to pay the decree amount they did not take steps earlier to raise money and pay off the decree amount. I do not think I can stay execution of the decree altogether for two months; but it seems to me that this is a fit case for staying execution of the decree for one month in so far as the decree-holder wants to arrest the sureties, in order to enable them to raise money and pay off the decree amount, and for allowing the decree-holder to proceed at once against immovable properties by attachment and sale. This course, while it would not prejudice the decree-holder, would enable the sureties to pay up the decree amount.

It often happens that, though men have got property, the conditions in the money market may be such that they could not raise a large sum at once but have to negotiate for some time to raise money. The sureties are merchants and it seems to me that a warrant for their arrest would ruin their business.

In cases of applications for execution, whether against the defendant or the sureties, the primary consideration must be the interest of the decree-holder, and where his interests are likely to be jeopardised by the granting of any application for time, courts have no

option but to execute the decree. But where without any detriment to the interests of the decree-holder the granting of time to the judgment-debtor or the sureties to pay would not only enable the decree amount to be paid but would prevent serious loss or ruin, I think the Court ought to have power to stay execution against the person for such time as it thinks reasonable unless there is something in the Code which prohibits such power. A surety may be perfectly solvent and may be able to pay the amount if a few days' time is given to raise the money; and he may, if a merchant, be ruined by the sudden issue of process for arrest and I can see no justice in refusing his request. Of course if the law is otherwise, he cannot be helped; but I see nothing in the Code which prohibits such a course.

Rule 37 (1) of Order XXI empowers the Court, where an application is made to arrest the judgment-debtor, to issue notice to him to show cause why he should not be arrested. Rule 37 (1) runs as follows :—

"Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the Civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling on him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the Civil prison."

Rule 40 (1) enables a Court for sufficient cause to disallow the application for arrest and detention and to direct his release. So that the combined effect of these two rules is that the Court may, the moment an application for arrest is filed, direct notice notwithstanding any other provisions in the Code and prevent his being arrested if sufficient cause in shown.

It is not denied that, if the sureties in the present case are arrested to-morrow and brought before the

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Court, I can pass the order which I now propose to pass. But it is contended that, though this can be done if the sureties appear on notice or are actually arrested, the Court could not prevent the arrest and pass an order which it would have passed if the sureties were arrested and brought to Court. It seems to me that such a contention ought not to prevail unless there is something in the Code which warrants it. As a matter of fact, such orders have been passed on the Original Side both by myself and COUTTS TROTTER, J., when he was presiding on the Original Side, and I believe that such orders have been usual on the Original Side for several years. I do not think the practice should be lightly disturbed unless there are any compelling reasons, especially when it seems to me to be founded on fair and equitable considerations. What the Court can do after a man is actually arrested and brought before it or after it issues notice to him, I think can be done before the actual arrest. When an application for arrest is made, it is open to the Court to order notice and to disallow arrest if sufficient cause is shown. There is no reason why the sureties should not forestall the issue of notice and, the moment they hear of the application for arrest, come before the Court and lay before it matters which render it just and equitable that the sureties should not be arrested but that some time should be given. To hold that, because there is no express provision for that purpose, the power is by implication withdrawn from the Court is, in my opinion, not warranted.

Section 151 of the Civil Procedure Code has been in my opinion expressly enacted for the purpose of preventing hardship which may exist in certain cases. Section 151 runs as follows :—

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders

as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

It is no doubt true that this section would not enable the Court to act against any of the express provisions of the Code or the rules; but where there is no express provision which prohibits a course or where it does not violate any of the rules, there seems to be no reason why section 151 should not be resorted to in order that the Court may do what in its opinion is fair and equitable.

There have been numerous decisions as regards the inherent power of the Court both before and after the passing of the present Civil Procedure Code. The effect of the authorities is that the provisions of the Civil Procedure Code are not exhaustive and that where there is no prohibition in any of the sections the Court has ample power to pass such orders as would effectively do justice between the parties.

It has been held in more cases than one that the Code of Civil Procedure is not exhaustive and that the Court possesses inherent powers to act *ex debito justitia* in order to do real and substantial justice between the parties. In *Hukum Chand Boid* v. *Kamalanand Singh*(1), WOODROFFE, J., in an exhaustive judgment dealing with all the authorities held that the Civil Procedure Code is not exhaustive, that it does not affect previously existing powers unless it takes them away and that, in matters with which it does not deal, the Court will exercise an inherent jurisdiction to do that justice between the parties which is warranted under the circumstances and which the necessities of the case require. (See also *Jogendra Chandra Sen* v. *Wazidunnissa Khatum*(2), where costs were awarded on the analogy of section 583

(1) (1906) I.L.R., 33 Calc., 927. (2) (1907) I.L.R., 34 Calc., 860.

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of the Code on the ground that the Civil Procedure Code was not exhaustive and in the inherent jurisdiction of the Court.) In *Mungle Chand* v. *Gopal Ram*(1) it was held that the powers of the High Court to grant temporary injunctions are not confined to the terms of sections 492 and 493 of the Civil Procedure Code. *In Ghuznavi* v. *The Allahabad Bank, Ltd.*(2) it was held by a Full Bench of the High Court that the inherent power given under section 151 of the Civil Procedure Code can be invoked for the purpose of making a remand which was not covered by section 107 and Order XLI, rule 23 of the Civil Procedure Code. In *Perumbra Nayar* v. *Subramanian Pattar*(3), which was a case under the Code of 1882, the inherent power of the Court to remand was also recognized. In *Nanda Kishore Singh* v. *Ram Golam Sahu*(4) it was held, invoking the power conferred by section 151 of the Code, that the High Court is competent to make an order staying proceedings in execution of its decree in view of an application by the judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council, even though there was no direct provision in the Code. In *Rash Behary Dey* v. *Bhowani Churn Bhose*(5) it was held that the High Court has power under its general equity jurisdiction to grant an injunction, restraining the defendant from proceeding with a suit instituted by him in the Small Cause Court, independently of the Code of Civil Procedure. A similar view was taken in *Uderam Kesaji* v. *Hyderally*(6), where MACLEOD, J., refers with approval to the observations of WOODROFFE and MOOKERJEE, JJ., in *Hukum Chand Boid* v. *Kamalanand Singh*(7). Prior to the enactment of section 144 of the

(1) (1907) I.L.R., 34 Calc., 101.
(2) (1917) I.L.R., 44 Calc., 929.
(3) (1900) I.L.R., 23 Mad., 445.
(4) (1913) I.L.R., 40 Calc., 955.
(5) (1907) I.L.R., 34 Calc., 97
(6) (1909) I.L.R., 33 Bom., 469.
(7) (1906) I.L.R., 33 Calc., 927.

Civil Procedure Code it was held in *Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meah*(1) that the Court has inherent power to grant restitution where a decree of the lower Court is reversed. A similar view was taken in *Raja Singh* v. *Kooldip Singh*(2), *Collector of Meerut* v. *Kalka Prasad*(3) and *Shiam Sunder Lal* v. *Kaisar Zamani Begam*(4). In *Alagappa Chettiar* v. *Muthukumara Chettiar*(5) it was held that the Court has inherent power to order a defendant to repay money with interest where he was allowed to draw the money on an undertaking to repay it if the plaintiff succeeded. In *Jai Bahram* v. *Kedar Nath*(6) their Lordships of the Privy Council referred to the inherent jurisdiction of the Court to do justice between the parties in restitution proceedings.

Reference was made to Order XX, rule 11 of the Civil Procedure Code which states that the Court, when passing a decree, may order that the payment of the amount decreed shall be postponed or shall be made by instalments with or without interest, and that after the passing of the decree such an order can be passed only with the consent of the decree-holder. I do not think that this rule limits the power of the Court in execution proceedings to *postpone* the execution of a warrant for the arrest of the defendant. The Court does not stay execution of the decree *absolutely* but only postpones one mode of relief granted by the Code in execution. As I have already pointed out, Order XXI, rule 40, expressly gives the Court power when the defendant comes before the Court either on notice or after arrest, and the only question is whether there is anything in the Code which prevents the Court from exercising that power when the

(1) (1887) I.L.R., 14 Calc., 484.
(2) (1894) I.L.R., 21 Calc., 989.
(3) (1906) I.L.R., 28 All., 665.
(4) (1907) I.L.R., 29 All., 143.
(5) (1918) I.L.R., 41 Mad., 316.
(6) (1923) 18 L.W., 802 (P.C.).

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defendant appears and shows cause which would, if the application were filed under the strict terms of Order XXI, rule 40, entitle him to an order preventing his immediate arrest and detention in prison. Unless it can be held that whatever is not provided under Order XXI, rule 40, is prohibited, I think section 151 of the Code gives ample power to the Court. This, as I said before, has been the practice on the Original Side for several years and being eminently just and reasonable, I think it ought to be followed.

My attention has been drawn to the observations of Sir WALTER SCHWABE, C.J., in *Syed Aga Jan* v. *Abdul Majid*, O.S.A. No. 16 of 1923. This was an appeal against an order of mine which stayed execution of a decree for Rs. 4,000 against the person of the judgment-debtor till execution against the properties was taken out and they were sold. The judgment-creditor stated that the immovable properties were worth nothing. The learned CHIEF JUSTICE observed:

> "I can find no power in the Judge to make such an order. It is for the judgment-creditor to elect his remedies in execution subject, of course, to such rules, as there may be, governing a particular case; but our attention has been called to no rule at all which would justify such an order as this."

There is unfortunately no reference to any of the provisions of the Civil Procedure Code nor was the longstanding practice on the Original Side brought to the notice of the Court. I do not think I am bound by this unreported decision. Section 3 of the Law Reports Act XVIII of 1875 was, I think, enacted to meet such cases.

I direct that execution against the persons of the sureties be stayed for one month, from 21st March, the decree-holder being allowed to proceed against the properties.

D.A.R.