

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Cornish.

1929,
December 3.

C. MEENAMBAL AMMAL (PLAINTIFF-APPLICANT),
APPELLANT,

v.

ABURUBAMMAL (RESPONDENT), RESPONDENT.*

Executing Court—Duty of, to construe decree—Consent decree against Hindu widow—Charge created on husband's immovable property—Necessity binding on husband's estate not established in suit—Whether charge to subsist till debt satisfied or for life-time of widow—Determination of by executing Court.

An executing Court, though it cannot question the validity of a decree, is bound to construe it, if necessary.

Where by a consent decree against a Hindu widow a charge is created on her husband's immovable property and, though necessity binding the husband's estate was not established in the suit, an application is made for execution after the widow's death, the executing Court must determine whether the charge is to subsist until the debt is satisfied or only for the life-time of the widow.

ON APPEAL from the judgment of BEASLEY, J. (now Chief Justice), dated 28th March 1929 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Execution Application No. 148 of 1928 in Civil Suit No. 758 of 1924.

K. S. Krishnaswami Ayyangar (N. C. Vijiaraghavachari with him) for appellant.

K. Ramanatha Shenai for respondent.

* Original Side Appeal No. 57 of 1929.

JUDGMENT.

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REILLY, J.—This appeal is against an order made by the learned Chief Justice as Mr. Justice BEASLEY in execution proceedings. In November 1921 one Thayammal, who was the widow of Munuswami Mudali, with her brother Kanniappa Mudali jointly executed two promissory notes in favour of Aburubammal, who is the respondent before us. Kanniappa Mudali became an insolvent, and Aburubammal brought a suit against Thayammal on the notes. That suit was compromised in April 1925; and on the basis of the compromise a consent decree was made, under which Thayammal had to pay Rs. 1,750 in instalments and the whole amount was made a charge upon a house in Madras called Ganesa Vilas. In December 1925 Thayammal surrendered her interest in that property and in her husband's estate to his reversioners; and they a month or so later sold the house to Meenambal, who is the appellant before us. In June 1926 Thayammal died; and the execution petition with which we are concerned was put in on the 30th March 1928. At one stage it was asserted by Aburubammal that this house, Ganesa Vilas, was the absolute property of Thayammal; but it has been admitted before us that Thayammal got it from her husband, whose property it was. How after being her husband's property it became her absolute property there is no evidence, and it has not been explained to us. Before BEASLEY, J. the whole case proceeded on the assumption that Thayammal had only a widow's interest in this house; and in the circumstances we also must proceed on that assumption. BEASLEY, J. eventually made an order that Aburubammal was permitted to execute the decree against the assets of Thayammal in Meenambal's hands and that the house should be sold in execution

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of the decree. It is against that order that Meenambal appeals.

It has been admitted before us that Meenambal has had nothing to do with any assets of Thayammal other than this house; and it is clear that Meenambal cannot be the legal representative of Thayammal except as the person owning or possessing the house. A large part of the judgment of BEASLEY, J. is taken up with the consideration of the question whether by surrendering her widow's interest to her husband's reversioners Thayammal could defeat the charge made by the consent decree on this house. I am inclined to agree with BEASLEY, J. that Thayammal's surrender could not have that effect, though I do not think it is necessary for the disposal of this case to express any final opinion on that.

But Mr. Ramanatha Shenai, who appears for Aburubammal, has taken a new point before us. He has drawn our attention to a decision of PHILLIPS and ODGERS, JJ. in *Vijayaraghavachariar v. Ramanujachariar*(1), according to which, having made this alienation by way of a charge on the house, Thayammal had put it out of her power to make any surrender to the reversioners at all. In that decision the learned Judges follow the decision in *Sakharam Bala v. Thama*(2). If that view is correct, then, as Mr. Ramanatha Shenai contends, the surrender made by Thayammal was invalid, and on the strength of that surrender the reversioners could not convey a good title to Meenambal. But that difficulty, I think, could be answered for Meenambal by calling in aid section 43 of the Transfer of Property Act. Mr. Ramanatha Shenai has contended that a transfer or attempted transfer of their expectancy by reversioners

(1) (1928) 55 M.L.J., 859.

(2) (1927) I.L.R., 51 Bom., 1019.

cannot be validated under the provisions of that section and has quoted *Ramasami Naik v. Ramasami Chetti*(1). But that was an entirely different case. In that case certain defendants, who were in the line of succession to a Zamindari, purported to mortgage their expectancy, and the learned Judges held, no doubt rightly, that that was prohibited by section 6 (a) of the Transfer of Property Act. But here the reversioners did not purport to transfer any expectancy to Meenambal. They professed to be the owners of this house on the ground that the reversion had fallen in by the surrender, and they professed to sell their present right in the house to Meenambal. If the true view is that the surrender was invalid, they had not a present right in the house. But, when Thayammal died, the reversion did fall in apart from the surrender, and Meenambal, if the conditions of section 43 of the Act are fulfilled, could call upon them to make good the transfer which they erroneously professed they were able to make at the time of their sale.

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But that is really a by-path in this case. Anyhow it is admitted that Meenambal is in possession of the house, and the real question is whether the charge, which was created by the decree, is one which persists after Thayammal's death. If Thayammal had only a widow's estate—and on that assumption we must deal with the case—the charge would not persist beyond her death, unless it was made for legal necessity. BEASLEY, J. in his judgment mentions that Meenambal did raise this objection, that the charge could not extend beyond Thayammal's death; but he says the question was not argued before him. But, if that contention was raised for Meenambal, no argument,

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so far as I can see, at that stage would be necessary. If Thayammal had nothing more than a widow's estate in this house, all that Meenambal need do was to raise that contention and then wait for the decree-holder to attack the position by showing that the charge was created for necessity legally sufficient to give it effect on the husband's estate after Thayammal's death, or at least to show that she took the charge in good faith that it was of that nature after making reasonable inquiries. The burden was obviously upon Aburubammal. Mr. Ramanatha Shenai admits that that is the well-known rule on the matter and that the burden would be upon his client if this was a suit. But he contends that the whole position is different because these are execution proceedings and that Meenambal cannot question the nature of the charge in execution proceedings. His argument is first that the Court in execution proceedings cannot question the validity of the decree. That is not a proposition which anybody had disputed before us or is likely to dispute. But he goes further and says that this is of the nature of a mortgage-decree for sale, and he contends that no one can be heard to say in execution that this property is not to be sold in satisfaction of the charge. He quotes in support of that position *Kumaretta Servaigaran v. Sabapathy Chettiar*(1), *Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc. Devasthanams*(2) and *Sanwal Das v. Bismillah Begam*(3). Now it is quite true that, if there is a mortgage-decree for sale in a suit in which the validity and character of the mortgage have been established or admitted, no one can come in as a claimant under rule 58 of Order XXI of the Code or as an objector under section 47 of the Code and say

(1) (1905) I.L.R., 30 Mad., 26.

(2) (1909) I.L.R., 32 Mad., 429.

(3) (1897) I.L.R., 19 All., 480.

that the property mortgaged and ordered to be sold cannot be sold because someone has a right to it. In such a case the mortgaged property must be sold in accordance with the decree, that is the mortgagor's and mortgagee's interests in the property, whatever they may be. But here to my mind we have something different from a mortgage-decree for sale. This decree is the instrument which created the charge, though no doubt the charge can be enforced in execution. An executing Court, though it cannot question the validity of a decree, is bound to construe the decree, if necessary. Here we have a charge on this house. What does that charge mean? Is it a charge on the house which is to subsist indefinitely until the debt is satisfied, or is it a charge on Thayammal's interest in the house as a widow subsisting only for her life-time? That is a question of the utmost importance and to my mind a question which the executing Court in such a case as this must decide, if required to do so. We must remember that this was a consent decree, made on the basis of a compromise. The charge is a charge created as part of Thayammal's contract, though it is clothed in decretal language and so can be enforced in execution proceedings. But it is obvious that, although the Court was the agency through which this charge was created, Thayammal could give the Court no authority to create a charge of more extended validity than she herself could create. As the nature of the charge actually created is disputed, it must be determined before the decree can be executed.

That appears to me to be one answer to Mr. Ramana Shenaï's contention that these matters cannot be agitated in execution. A second answer is that Aburubammal has brought Meenambal into this matter as Thayammal's legal representative; Meenambal denies

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that she is Thayammal's legal representative; then the question whether she is so or not has to be decided in execution proceedings. And how can it be decided without going into the question of the effect of the charge? Meenambal can only be legal representative in this case either if Thayammal had an absolute right to this property, which we must leave out of account, or if Thayammal created a charge on her husband's property validly so that it persisted beyond her death. In the latter case strictly Thayammal would have been acting, when she created the charge, as representing her husband's estate, and Meenambal, being in possession of the property on which the charge has been created, would be the legal representative of Thayammal in that capacity. The dispute whether Meenambal was the proper legal representative first came before the Master, and he refused to go into these questions, whether the property was Thayammal's absolute property, whether Thayammal had only a widow's interest in it, and whether she, having a widow's interest, had created a valid charge. On his refusal, the matter was taken before the Judge and came before KUMARASWAMI SASTRI, J. He found that the Master was wrong and remarked that this was not, as the Master thought, a question of going behind the decree, saying in the course of this judgment "The question for decision is the character of a party, which in turn depends on the title to the property, the possession of which will make the person liable to be proceeded against in execution." With that view I entirely agree.

There is a third difficulty in Mr. Ramanatha Shenai's way. As I have said, KUMARASWAMI SASTRI, J., coming to that conclusion, sent the matter back to the Master for the determination of these questions. The Master found that under the rules of the Court he could not

deal with it and referred it to the Judge. It then came before BEASLEY, J. Now there was no appeal against KUMARASWAMI SASTRI, J.'s order that these questions should be decided in execution. And, though there appears to have been an elaborate hearing before BEASLEY, J., there is nothing to show that any objection was taken for Aburubammal to the determination of these questions in the execution proceedings. In my opinion it is not open to Aburubammal now to say that this is a matter which cannot be dealt with in execution.

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The position then appears to me to be this, that the decree-holder as alienee from Thayammal, who had only a widow's interest in the property, has not proved that this alienation, the charge made in the decree, was made for any necessity which could legally extend its validity beyond Thayammal's life or that Aburubammal took this alienation in good faith after making the necessary inquiries. On the facts before us on the contrary it appears probable that the debts for which this charge was created were not debts which could bind the husband's estate as they were contracted by Thayammal and her own brother. However the burden is on the alienee, and the alienee has not discharged it.

There is only one other matter which I need mention. In one part of his judgment BEASLEY, J., has expressed the opinion that at any rate Aburubammal is entitled to recover the rents and profits of this house up to the date of Thayammal's death. In regard to that I must with respect differ from him. The charge, so long as it is valid, gives a right to recover the debt by sale of the house; but it could give no right to participate in the rents or profits.

In my opinion this appeal must be allowed and the execution petition dismissed with costs throughout.

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CORNISH, J.—I entirely agree. I think that much of the argument addressed to us by the learned Counsel for the respondent, the execution petitioner, was not really open to him in this appeal. When this matter came before KUMARASWAMI SASTRI, J., the learned Judge clearly laid down that the objection raised by the appellant (who was the respondent in the execution proceedings) to the notice of execution was not an attempt to go behind the decree against Thayammal, but was intended to show that the decree was not executable against her as Thayammal's legal representative. The appellant's objection was not an objection to the decree, which, so far as she was concerned, was a perfectly valid decree against Thayammal, but her objection was to being treated as Thayammal's legal representative, because she happened to be in possession of the property in which Thayammal, during her life-time, had a Hindu widow's estate. I think the petitioner must have appreciated this position, because in her counter-affidavit she alleged that the property was the absolute property of Thayammal. These were the rival cases put forward by the two parties, and KUMARASWAMI SASTRI, J., in his judgment expressed the opinion that this question must be determined in execution under section 47 of the Civil Procedure Code and that each party was entitled to prove the case which she set up in her affidavit. There was no appeal from this judgment, and when the case was referred by the Master into Court for determination by the Judge, the argument appears to have proceeded on the lines indicated by KUMARASWAMI SASTRI, J., in his judgment. BEASLEY, J., went very closely into the question whether the surrender of her estate, which Thayammal was alleged to have made in favour of the reversioners, from whom the appellant derived title to the property, was a valid surrender, and

the learned Judge came to the conclusion that it was not. He did not, however, find that the property in respect of which the surrender is supposed to have been made was, as alleged by the petitioner, the absolute property of Thayammal. On the contrary, it is clear from the judgment that he was of opinion that it was property in which Thayammal had a Hindu widow's estate, for at the conclusion of his judgment he held that "the defendant, having taken the property with full notice of the charge created upon it and not having proved that the debt was not for necessity, the onus of proving this being upon the defendant, cannot be heard to say that the decree is not to be executed against her". In my view, the question whether Thayammal could or did terminate her widow's estate by a surrender is not very material. Her estate was terminated by her death a few months later, and it appears to me that, if the appellant is a legal representative within the definition of section 2 (11) of the Civil Procedure Code, it does not matter whether the title under which she purported to be in possession was a good title or a bad one. Now, the decree here is not a decree for sale of property under Order XXXIV, Civil Procedure Code, so as to come within the rule referred to in *Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc., Devasthanams*(1). It was perfectly open, therefore, to the appellant to object that the decree against Thayammal could not be executed against her unless it was shown that she was Thayammal's legal representative, either by being in possession of property which was Thayammal's property, or, at least, by being in possession of property over which Thayammal had created an encumbrance which continued to be binding on the

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(1) (1909) I.L.R., 32 Mad., 429 at 440.

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property after Thayammal's death. I think that the appellant would have been entitled to succeed on the first point, because the petitioner failed to substantiate her allegation that the property in question was the absolute property of Thayammal. At the hearing, however, this point does not appear to have been argued.

It is necessary, therefore, to consider whether the appellant can be deemed to represent the estate of the deceased Thayammal by reason of being in possession of the property which Thayammal purported to charge, and which property BEASLEY, J., has found was taken by the appellant with full knowledge of the charge. But here the petitioner, being the alienee of Thayammal, that is, the person in whose favour the charge was created by the consent decree, is met with the obligation of discharging the onus of proof which lies on the alienee of property from a Hindu widow. It has been held by a Full Bench in *Tirupatiraju v. Venkayya*(1) that the interposition of a consent decree does not make any difference to the onus of proof. The alienee must still show that the alienation upon which he relies is one that is binding on the estate. The onus, therefore, was clearly upon the petitioner to show that the charge bound the estate after Thayammal's death; but she has not attempted to discharge the onus. On this ground, I am of opinion that the execution petition should have been dismissed.

B.C.S.

(1) (1921) I.L.R., 45 Mad., 504.
