

APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Ramesam, Mr. Justice Reilly, Mr. Justice Anantakrishna Ayyar, and Mr. Justice Sundaram Chetti.

ARUNACHALAM, MINOR BY MOTHER AND GUARDIAN
PERIAMMAI (PETITIONER), APPELLANT,

1931,
March 9.

v.

P. K. A. C. T. VEERAPPA CHETTIAR, THROUGH HIS
AUTHORIZED AGENT S. RAMASWAMI AIYAR
(RESPONDENT), RESPONDENT.*

*Code of Civil Procedure (Act V of 1908), Sch. I, O. IX,
r. 13—If applicable to execution proceedings under O. XXI
which fall within sec. 47 of the Code.*

Order IX, rule 13, Schedule I of the Code of Civil Procedure (Act V of 1908) does not apply even to such execution proceedings under Order XXI of the Code as also fall within section 47 of the Code.

APPEAL against the order of the Court of the Temporary Subordinate Judge of Devakottai, dated 6th March 1929, in Execution Application No. 72 of 1929 in Execution Petition No. 117 of 1927 in Original Suit No. 36 of 1923 on the file of the Court of the Additional Subordinate Judge of Sivaganga.

This appeal coming on for hearing, the Court (ANANTAKRISHNA AYYAR and CORNISH JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

The plaintiff obtained a decree for money against the sixth defendant, the father of the appellant before us. The sixth defendant died, and his minor son—the appellant, before us—was brought on record as the legal representative of the deceased. The decree-holder applied by Execution Application

* Appeal against Order No. 274 of 1929.

ARUNA-
CHALAM
v.
VEERAPPA
CHETTIAR.

No. 17 of 1929 on 7th January 1929 for attachment of certain immovable properties; and notice to the appellant, the minor son, was ordered on 8th January 1929, and the hearing of the petition was adjourned to 29th January 1929. The appellant not appearing on 29th January 1929, the learned Subordinate Judge passed orders that day ordering attachment of the immovable properties as prayed for by the decree-holder. Subsequently the appellant applied on 2nd February 1929, under Order IX, rule 13, Schedule I and section 151 of the Code of Civil Procedure, to set aside the order passed on 29th January 1929 after excusing his non-appearance on 29th January 1929, to hear his objections to the attachment of the properties, and to cancel the order of attachment, alleging that his guardian *ad litem* had instructed a Vakil to appear for him on the 29th and to oppose the decree-holder's application, but that his Vakil was late in appearing before the Court by "a minute," and that orders were passed by the learned Subordinate Judge "a minute before the said Vakil came to Court." The decree-holder contended that the petition was not maintainable under any of the provisions of the Code. The learned Subordinate Judge dismissed the application holding that Order IX, Code of Civil Procedure, was inapplicable to execution proceedings, and observed as follows:—"It appears to me that under the law, as it stands, the objections of the respondent must prevail. This petition cannot therefore be granted." On this appeal, preferred against the decision of the learned Subordinate Judge, it was contended by the learned Advocate for the appellant, that the recent decision of a Full Bench of this Court in *Alagasundaram Pillai v. Pichuvier*(1) is authority for the proposition that Order IX, Code of Civil Procedure, applied to such proceedings under Order XXI as fall within section 47 of the Code; and that the proceedings now in question being proceedings under Order XXI falling also within section 47 of the Code, the decision of the Full Bench is directly applicable, and that the appeal must be allowed and the petition remanded to the lower Court for fresh disposal. On the other hand, the learned Advocate for the respondent, decree-holder, contended that the Full Bench had not to decide the general question whether Order IX, Code of Civil Procedure, applies to execution proceedings under Order XXI, Code of

(1) (1929) I.L.R. 52 Mad. 899 (F.B.).

Civil Procedure, falling within section 47 of the Code of Civil Procedure, and that the questions which the Full Bench had to decide were only the two questions specifically mentioned in the Order of Reference. It was also pointed out that there are several decisions of this Court where learned Judges have held that Order IX, Code of Civil Procedure, does not apply to execution proceedings under Order XXI, Code of Civil Procedure, and that it could not be said that the Full Bench has considered that question and overruled those decisions, more especially as the points referred to the Full Bench did not necessitate the same. On the other hand, the learned Advocate for the appellant drew our attention to the wordings of the answer of the Full Bench to the first question, viz., "Order IX does not apply to such proceedings under Order XXI, rules 97 or 100, Code of Civil Procedure, as do not also fall within section 47 of the Code." We were referred to the decisions in *Subbiah Naicker v. Ramanathan Chettiar*(1), *Chidambaram Chetti v. Theivanai Ammal*(2), *Kali Shettathi v. Shama Rau*(3), *Kajuluri Swami v. Sooryanarayana Razu*(4), *Kaliakkal v. Palani Kbandan*(5), *Narayanan Chettiar v. Muthu Chettiar*(6), and *Vemareddi Ramaraghava Reddi v. Rajah of Venkatagiri*(7), among others. We have not thought it necessary to refer in detail to the various other decisions that were cited to us in support of the contentions raised by the respective parties, as most of them have been referred to, either in *Subbiah Naicker v. Ramanathan Chettiar*(1), or *Kaliakkal v. Palani Kbandan*(5). The question relates to a matter of practice of frequent occurrence, and, as there should not be any doubt on such an important matter, we think that the following question should be referred to the decision of a Full Bench:—"Whether Order IX, rule 13, Schedule I, Code of Civil Procedure, applies to such execution proceedings under Order XXI as also fall within section 47 of the Code."

ON THIS REFERENCE.—

T. M. Krishnaswami Ayyar (with him S. Subrahmaniam Ayyar) for appellant.

(1) (1914) I.L.R. 37 Mad. 462.

(2) (1923) I.L.R. 46 Mad. 768 (F.B.).

(3) (1916) 5 L.W. 124.

(4) (1924) 47 M.L.J. 269.

(5) (1925) 50 M.L.J. 200.

(6) (1926) 51 M.L.J. 219.

(7) (1926) 52 M.L.J. 123.

ARGUNA-
CHALAM
v.
VEERAPPA
CHETTIAR.

Order IX of the Code of Civil Procedure consists of two parts. Rules 1 to 12 deal with the appearance of parties and the consequences of their non-appearance. If the plaintiff appears and the defendant does not appear after service of summons on him, an *ex parte* decree can be passed. Order IX, rule 13 begins with the words "in any case" and not with the words "in any suit." Section 115 of the Code also uses the word "case." The Privy Council in *Balakrishna Udayar v. Vasudeva Ayyar*(1) construe the word "case". If the Court finds that there is a decree and that it was passed *ex parte*, jurisdiction of the Court can be invoked under Order IX, rule 13.

[REILLY J.—Does the word "defendant" in Order IX, rule 13 include "judgment-debtor" ?]

The appellant is the legal representative of a defendant and as such possesses his characteristics.

[RAMESAM J.—Your client was added as a legal representative after the decree was passed. Can he become a defendant simply because a creditor chose to add your client as a defendant instead of as a judgment-debtor ?]

According to section 146 of the Code the appellant steps into the shoes of the defendant whose legal representative he is.

[SUNDARAM CHETTI J.—We have to consider the cumulative effect of the following words in Order IX, rule 13, viz., "defendant", "summons", and "suit." You have got to go so far as to say that "defendant" includes "judgment-debtor", "summons" includes "notice", and "suit" includes "execution proceedings."]

Execution proceedings are proceedings in the suit. Order IX, rule 13 uses the words "in any case." Section 141 of the Code enables the appellant to proceed under Order IX, rule 13; see *Subbiah Naicker v. Ramanathan Chettiar*(2) and *Krishna Chandra Pal v. Protap Chandra Pal*(3). In *Kaliakkal v. Palani Koundan*(4) pointed attention has not been drawn to the distinction between "decrees" and "orders", and the distinction between rule 13 and the other rules of Order IX of the Code. *Narayana Chettiar v. Muthu Chettiar*(5) and *Kali Shettathi v. Shama Rau*(6) are cases of dismissal for default.

(1) (1917) I.L.R. 40 Mad. 793 (P.C.). (2) (1914) I.L.R. 37 Mad. 462.

(3) (1906) 3 C.L.J. 278, 279. (4) (1925) 50 M.L.J. 200.

(5) (1926) I.L.R. 50 Mad. 67. (6) (1918) 5 L.W. 124.

[ANANTAKRISHNA AYYAR J.—Except relying on certain words in rule 9 and rule 13, can you point out any principle by which cases under rule 13 can be made to stand on a different footing to cases under rule 9?]

ARUNA
CHALAM
v.
VEERAPPA
CHETTIAR.

If execution proceedings are dismissed for default, the decree-holder can file another execution petition. It is merely an order and not a decree adjudging rights as under Order IX, rule 13. The observations in *Alagasundaram Pillai v. Pichuvier*(1) support the above submissions.

[Reference was made to cases referred to in *Subbiah Naicker v. Ramanathan Chettiar*(2).]

N. Srinivasa Ayyangar for respondent.—A suit has got a definite meaning in the Code. The three words, i.e., "suit", "defendant", and "summons" exclude execution proceedings. A suit begins with a plaint and any proceeding which is not begun by the filing of a plaint is not a suit. "Execution proceedings" may be proceedings in "suits" but they cannot become "suits." Section 144 of the Code clearly draws a distinction between "suits" and "applications." Order XXI, rule 11 of the Code shows what the nature of an execution application is. The definition of a decree is given in section 2 of the Code.

[BEASLEY C.J.—We do not want to hear you further.]

Our. adv. vult.

OPINION.

BEASLEY C.J.—The plaintiff obtained a decree for money against the sixth defendant. The sixth defendant died and his minor son was brought on record as his legal representative as eighth defendant. The decree-holder applied by Execution Application No. 17 of 1929 for attachment of certain immovable properties in the hands of the eighth defendant and notice was ordered on him. When the petition came on for hearing on the 29th January 1929, in the absence of the eighth defendant who did not appear, the learned Subordinate Judge ordered attachment of the immovable properties as prayed for by the decree-holder.

BEASLEY C.J.

ABUNA-
CHALAM
v.
VEERAPPA
CHETTIAR.
BEASLEY C.J.

Subsequently the eighth defendant applied on the 2nd February 1929 under Order IX, rule 13 of the Code of Civil Procedure to set aside that order on the ground that his non-appearance on the 29th January was due to the late appearance of his Vakil. He alleged that his Vakil had only been a minute late in appearing before the Court and that orders were passed by the learned Subordinate Judge a minute before the said Vakil came to Court. The decree-holder contended that the petition was not maintainable under any of the provisions of the Code. The learned Subordinate Judge dismissed the eighth defendant's application holding that Order IX of the Code was inapplicable to execution proceedings. From that order of the learned Subordinate Judge an appeal was preferred to the High Court. That appeal was considered by a Bench and the following question has been referred by that Bench to the decision of this Full Bench, namely, "Whether Order IX, rule 13, schedule I, Code of Civil Procedure, applies to such execution proceedings under Order XXI as also fall within section 47 of the Code." In the order of reference certain cases have been referred to, the most important of which are *Subbiah Naicker v. Ramanathan Chettiar*(1) and *Kaliakkal v. Palani Koundan*(2). These two decisions are directly in conflict. In the former case it was held that Order IX, rule 13, Code of Civil Procedure, applies to *ex parte* orders in execution and unless they are set aside by application under Order IX, rule 13, or by appeal, they cannot be questioned in the further stages of execution proceedings. On page 475 it is stated as follows:—

"It is contended by the appellant's learned Vakil, Mr. L. A. Govindaraghava Ayyar, that Order IX, rule 13, Civil

(1) (1914) I.L.R. 37 Mad. 462.

(2) (1925) 50 M.L.J. 200.

Procedure Code, does not apply to *ex parte* orders passed in execution but only to *ex parte* decrees in suits. We think that that argument cannot be accepted. Orders in execution which come under section 47, Civil Procedure Code, are decrees as defined in section 2 of the Code and hence *ex parte* orders passed in execution are *ex parte* decrees and Order IX, rule 13, provides generally for the setting aside of *ex parte* decrees and not only for the setting aside of those classes of *ex parte* decrees which are not also orders passed under section 47 in execution proceedings. We are fortified in this view by the decision in *Krishna Chandra Pal v. Protap Chandra Pal*(1).”

ARUNA-
CHALAM
v.
VEERAPPA
CHETTIAR,
—
BEASLEY C.J.

The last-mentioned decision is the only decision upon this point which is in agreement with the decision in *Subbiah Naicker v. Ramanathan Chettiar*(2). In *Kaliakkal v. Palani Koundan*(3) DEVADOSS and WALLER J.J. took the opposite view. Before us it was contended that the *ex parte* order passed against the eighth defendant attaching his property was a decree within the provisions of section 47 of the Code, and that, since it is a decree, and since Order IX provides for the setting aside of *ex parte* decrees, the eighth defendant's petition was maintainable. We are invited to interpret Order IX, rule 13, as applying to all *ex parte* decrees whether in suits or in execution proceedings. On the other side it is contended that Order IX does not apply to execution proceedings at all and that the whole scheme of the Order is to provide for procedure in suits. In the rules of that Order the words “summons”, “defendant”, and “suit” are used, all of which are inappropriate to execution proceedings, and in *Vemareddi Ramaraghava Reddi v. Rajah of Venkatagiri*(4) it was held that cases of dismissal for default of an execution petition are not within Order IX at all. It is quite true that in a Full Bench decision of this Court, namely, *Alagasundaram*

(1) (1906) 3 O.L.J. 276.

(2) (1914) I.L.R. 37 Mad. 462.

(3) (1925) 50 M.L.J. 200.

(4) (1923) 52 M.L.J. 123.

ARUNA-
CHALAM
v.
VERARAPPA
CHETTIAR.

Pillai v. Pichuvier(1), in which was raised the question of the power of this Court to set aside an order of dismissal for default, it is stated on page 909:

BRASLEY C.J.

“ . . . it is not contested that Order IX does not apply to proceedings in execution except such as involve the determination of any question under section 47, in which case the orders thereon would amount to decrees . . . ”,

and further on,

“ the orders passed in the proceedings would be decrees and Order IX would apply.”

It may be observed that these observations are *obiter* and unnecessary for the decision of the questions referred; and it is quite clear that this question was not at all argued before that Full Bench although such a position may have been stated by way of an example. It is beyond dispute that such an *ex parte* order as was passed in these execution proceedings is a decree within the provisions of section 47, but it does not follow that the provisions of Order IX, rule 13 apply to such a decree. If Order IX, rule 13 applies only to suits, then the fact that such an *ex parte* order is a decree within the provisions of section 47 is of no real assistance to the defendant. Sub-section 2 of that section enables the Court to treat a proceeding under the section as a suit or a suit as a proceeding. The use of the word “treat” is an indication to us that the proceedings under that section are not suits. Moreover when section 2 (2) of the Code which defines “decree” is referred to, it will be seen that it shall be “deemed” to include the determination of any question within section 47. Here again the use of the word “deemed” is inconsistent with something that is actual or real. It is quite clear to us that Order IX does not apply to anything but suits and has no application to execution.

proceedings, and that such an *ex parte* order whilst it is a decree is not a decree in a suit. That the provisions of Order IX were not meant to apply even to appeals is evident from the fact that the Legislature has made similar rules for governing cases of non-appearance of parties in appeals, viz., rules 11, 17, 18, 19 and 21 of Order XLI. It follows therefore that the answer to the question referred to us must be in the negative. Although the facts of this case do not disclose that the eighth defendant has suffered any real hardship, we are of the opinion that many cases may occur in execution proceedings where to prevent a judgment-debtor or a decree-holder having an application or petition restored under Order IX, rule 13 may be a great hardship and immediate steps will be taken to frame a new rule making Order IX applicable to such proceedings in execution.

ARUNA-
CHALAM
v.
VEEBAPPA
CHETTIAR.
BRASLEY C.J.

RAMESAM J.—I have no alteration or addition to make.

REILLY J.—I agree.

ANANTAKRISHNA AYYAR J.—I agree.

SUNDARAM CHETTI J.—I agree.

G.B.
