

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Bardswell.

ERAMULLAN KUNHI MOIDIN AND ANOTHER
(APPELLANTS), APPELLANTS,

1933,
February 8.

v.

KUNHI KOMAN NAIR AND ANOTHER (RESPONDENTS),
RESPONDENTS.*

Security bond—Enforcement of—Mode of—Temporary injunction in favour of plaintiff pending disposal of suit—Security bond executed by plaintiff to Court as condition of, for amount exceeding Rs. 1,000 undertaking, in event of dismissal of suit eventually, to make good loss caused to defendants by reason of injunction—Enforcement of—Code of Civil Procedure (Act V of 1908), ss. 47, 95, 145 and 151—Applicability and effect of—Suit to enforce bond—Necessity.

Pending a suit for a declaration of title to certain immovable properties and for a permanent injunction restraining, *inter alia*, the appellants, who were in possession of the properties, from cutting or removing trees on them or from interfering in any way with the plaintiff's management of the same, a temporary injunction was granted to the plaintiff restraining the appellants from cutting and removing the trees on the suit properties on condition of his giving security to the extent of Rs. 15,000. A registered security bond was executed by means of which the plaintiff gave an undertaking to the Court to make good to the appellants whatever loss was sustained by them on account of the injunction order in case the suit was eventually decided against him and further agreed that, in case he did not make good the loss, the properties mentioned in the security bond were to be liable for the amount of the loss suffered by the appellants and he also made himself personally liable. The suit was eventually dismissed with costs and the

* Appeal against Appellate Order No. 34 of 1926 and Civil Revision
Petition No. 264 of 1926.

KUNHI
MOLDIN
v.
KOMAN NAIR

question arose as to the mode in which the appellants were entitled to enforce the security bond.

Held (1), that, as the security bond did not purport to bind the plaintiff to any individual officer or person but merely bound the plaintiff to the Court, the appellants were not entitled to sue upon the security bond ;

(2) that an application under section 95 of the Code of Civil Procedure was incompetent as the security bond was for a larger amount than Rs. 1,000 ;

(3) that section 145 of the Code of Civil Procedure was inapplicable as the appellants and the plaintiff were parties to the suit ; and

(4) that, on the assumption that section 47 of the Code of Civil Procedure was inapplicable to the case, the appellants having no remedy either under that section or under section 145 and no remedy by suit, the case came within section 151 of the Code of Civil Procedure and the claim could properly be dealt with under that section.

APPEAL against, and PETITION under section 115 of the Code of Civil Procedure and section 107 of the Government of India Act praying the High Court to revise the order of the District Court of South Kanara, dated 7th day of September 1925, in Appeal Suit No. 24 of 1924 (Original Petition No. 5 of 1922, Sub-Court, South Kanara).

D. A. Krishna Variar for appellants.

B. Sitarama Rao for respondents.

Our. adv. vult.

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—The suit out of which this matter arises, namely, Original Suit No. 32 of 1920 in the Court of the Subordinate Judge of South Kanara, was a suit instituted by the Karnavan of a tavazhi seeking a declaration that the suit scheduled properties were the joint family properties of the tavazhi and not the private properties of the second defendant. There was

also a claim for a permanent injunction restraining defendants 1 and 2 and 30 and 31 or their men from cutting or removing trees on the plaintiff's properties or from interfering in any way with the plaintiff's management of them. The first defendant in the suit had leased the properties to the second defendant who sub-leased them to defendants 30 and 31, the appellants here, who were thus in possession of the properties, cutting and removing the trees on them. Pending the disposal of the suit, the plaintiff applied for a temporary injunction against defendants 1 and 2 and the appellants. The plaintiff, in view of the fact that damages were likely to be suffered by the appellants if the temporary injunction were granted and the suit should not succeed, offered to give security to the extent of Rs. 15,000 as a condition for the granting of the temporary injunction; and a registered security bond was executed by means of which the plaintiff gave an undertaking to the Court to make good to the appellants whatever loss was sustained by them on account of the injunction order in case the suit was eventually decided against him and further agreed that, in case he did not make good the loss, the properties mentioned in the security bond were to be liable for the amount of the loss suffered by the appellants and he also made himself personally liable. The security bond having been executed and put into Court, the temporary injunction was granted. As against some of the defendants, who were members of the tavazhi, the suit was compromised. As against the appellants, the suit was dismissed with costs. Then the appellants in execution proceedings (Original Petition No. 5 of 1922) claimed an assessment of the damages suffered by them by reason of the temporary injunction and a payment to them by the plaintiff of the sum so assessed or so much

KUNHI
MOIDIN
v.
KOMAN NAIR.
—
BEASLEY C.J.

KUNHI
MOIDIN
v.
KOMAN NAIR.
BEASLEY C.J.

of it as was covered by the security bond and in default a sale of the properties given as security in the security bond. The Subordinate Judge was of the opinion that the appellants were entitled to put in their claim under section 145 of the Code of Civil Procedure. The first respondent appealed to the District Judge who held that the appellants here were not entitled in execution proceedings to enforce the security bond on the ground that there had been no decree for the payment of the damages nor any executable order with regard to them. He held that section 145, Civil Procedure Code, only applied to execution against persons who had become liable as sureties and who are not parties to the suit. He held further that section 47 was not applicable because there had been no decree or executable order and that the matter did not relate to the execution, discharge or satisfaction of the decree. He further held that section 151, Civil Procedure Code, was of no help to the appellants. It was contended on behalf of the respondents that the appellants' only remedy was by way of suit.

The question before us is whether the appellants are entitled to enforce the security bond in execution either under section 145 or section 47, Civil Procedure Code, or, failing a remedy if those sections are not applicable, then under section 151, Civil Procedure Code. For the respondents it is contended that the appellants' remedy is by way of a suit or that an application should have been made under section 95, Civil Procedure Code, to the Court to award compensation to the appellants, and in support of the latter contention *Varajlal v. Kastur*(1) was referred to. In that case, the respondent had obtained a decree against one Vanmalai and attached a house in execution. The appellant intervened and

(1) (1886) I.L.R. 22 Bom. 42.

applied that the house, if sold, should be sold subject to a mortgage which he held upon the house. His application was dismissed and he thereupon brought a suit for a declaration that the house was not liable to be attached in execution of the respondent's decree. The suit was dismissed by the lower Court and the appellant appealed. Pending the hearing of the appeal, he applied for and obtained under section 492 of the Code of Civil Procedure (1882) an injunction restraining the sale until the result of the appeal on his giving security for interest at six per cent on Rs. 2,000, the acknowledged value of the house. The appeal was heard in due course and was dismissed with costs and thereupon the respondent applied to recover the interest for which security was ordered to be given by the District Court. It was held that he was not entitled to recover it as a Court of execution cannot award interest when the decree is silent and that his remedy was under section 497, Civil Procedure Code (1882) the equivalent of section 95 of the present Code, and that that remedy was obtainable on application not to the Court of execution but to the Court which issued the injunction. The short answer, it seems to me, to this contention is that section 95, Civil Procedure Code, only deals with cases of compensation not exceeding Rs. 1,000 and cannot be applied to cases where a security bond for a larger amount than Rs. 1,000 has been given. It was faintly argued nevertheless by Mr. Sitarama Rao that the section is applicable because it shows that the Court had no power to make any order as a condition for the granting of a temporary injunction for the giving of security to a greater extent than Rs. 1,000. In my view, such a contention as that cannot be sustained as the power of a Court to order security in such cases obviously cannot be limited by section 95 of the Code of Civil Procedure.

KUNHI
MOIDIN
v.
KOMAN NAIR.
—
BEASLEY C.J.

KUNHI
MOIDIN
v.
KOWAN NAIR.
—
BEASLEY C.J.

As regards the other contention that the appellants' remedy is by suit, there is one obvious difficulty and it is that the security bond was given to the Court. The appellants therefore were unable to sue upon the bond unless it had been assigned to them. By whom was the security bond to be assigned? If the bond had been executed in favour of the Amin or some officer of the Court, then that person could either have sued upon it or, under orders of the Court, assigned it to the appellants to sue upon. But that is not the case here as the security bond does not purport to bind the plaintiff to any individual officer or person but merely binds the plaintiff to the Court and, as was pointed out in *Raj Raghobar Singh v. Jai Indra Bahadur Singh*(1), the Court is not a juridical person and cannot be sued and it cannot take property and, as it cannot take property, it cannot assign it. The security bond in question here is as follows:—

“I am the plaintiff in the above suit. As per order on R.I.A. No. 241 of 1920 besides issuing an injunction restraining defendants 1, 2, 30 and 31 from entering on the suit properties and from felling the trees standing thereon and from removing therefrom the trees already felled, the Court has ordered me to furnish security for Rs. 15,000. I offer as security my arwar right in the properties mentioned in the schedule annexed hereto and give the following undertaking to the Court. If the suit goes against me, I shall be bound to pay defendants 1, 2, 30 and 31 the amount of damages which may be assessed by the Court resulting on account of the order on R.I.A. No. 241 of 1920. In case of my default to pay the amount of damages as stated above, I bind myself and my heirs and representatives to pay the same on my personal liability as well as on the responsibility of my properties mentioned below when ordered by the Court.”

It is quite clear that the undertaking was given to the Court and I am unable to agree that the appellants

(1) (1919) I.L.R. 42 All. 158, 167 (P.C.).

could have sued upon the security bond. It remains to be seen what was the appellants' remedy. The procedure provided by sections 145 and 47, Civil Procedure Code, was resorted to. It is, I think, clear that section 145, Civil Procedure Code, does not apply to such a case as this as the appellants and the respondents were parties to the suit; and *Raj Raghobar Singh v. Jai Indra Bahadur Singh*(1) is authority for the position that, although the case does not come within the terms of section 145, Civil Procedure Code, the Court has inherent power to enforce its bond without recourse to a suit. Therefore, even assuming that the respondents' contention is correct that section 47, Civil Procedure Code, does not provide for such a case as this, the appellants having no remedy under either of those sections and no remedy by suit, it is a case which brings into play section 151, Civil Procedure Code, and, in my view, this is a claim which can properly be dealt with under that section. That being so, the judgment of the lower appellate Court was erroneous upon this point and its decree must be set aside and that of the Subordinate Judge restored with costs here and in the lower appellate Court. The petition is restored to the file of the first Court for further enquiry.

BARDSWELL J.—I agree.

A.S.V.

KUNHI
MOIDIN
v.
KOMAN NAIR.
—
BEASLEY C.J.

(1) (1919) I.L.R. 42 All. 158 (P.C.).