

## APPELLATE CIVIL.

*Before Mr. Justice Sundaram Chetti and Mr. Justice  
Pakenham Walsh.*

LAKSHMANAN CHETTIAR, MINOR BY HIS MOTHER AND  
NEXT FRIEND LAKSHMI ACHI, AND ANOTHER (PETITIONERS  
2 AND 3), APPELLANTS,

1933,  
July 27.

*v.*

R. M. C. T. C. T. CHIDAMBARAM CHETTIAR AND NINE  
OTHERS (RESPONDENTS 1 TO 3, 5, 6, 10, 11 AND  
13 TO 15), RESPONDENTS.\*

*Court Fees Act (VII of 1870), sec. 11—Additional court-fee on  
excess amount decreed—Payment of—Direction in final  
decree for—Necessity—Liability for additional court-fee—  
Judgment-debtors if under—Question of—Jurisdiction of  
executing Court to decide—Final decree—Provision in, not  
amounting to determination of question.*

In view of the express provision in section 11 of the Court Fees Act, which casts a duty on the executing Court to collect the deficit court-fee when it finds that execution is sought for the recovery of an amount over and above what was claimed in the plaint, no direction for the payment of the additional court-fee for the excess sum decreed need be given at all in the final decree, and any such direction, if given in the final decree, should be deemed to be a mere surplusage.

The executing Court, which directs the payment of the additional court-fee under section 11 of the Court Fees Act, is also competent to determine whether that amount should be borne by the decree-holder himself or can be recovered by him from the judgment-debtors who are liable to pay the amount on which the extra court-fee was paid. The payment of the additional court-fee which is necessitated by section 11 of the Court Fees Act would be the payment of costs necessary for realising the fruits of the decree by execution and may well nigh be deemed to be costs relating to execution regarding which the executing Court has jurisdiction to pass any order.

\* Appeal against Order No. 202 of 1930.

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Where the final decree in a suit for dissolution of a partnership and for accounts provided that "on payment of the additional court-fee the plaintiff do recover the excess amount decreed", *held* that there was no express or implied direction in the decree that the plaintiff should alone bear the costs of the additional court-fee without any right to recover the sum from the defendants.

APPEAL against the order of the Court of the Subordinate Judge of Devakottah, dated 1st November 1929 and made in Execution Petition No. 23 of 1929 (Original Suit No. 209 of 1911, on the file of the Court of the Additional Subordinate Judge of Ramnad).

*M. Patanjali Sastri* for appellants.

*V. Ramaswami Ayyar* for respondents.

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The JUDGMENT of the Court was delivered by SUNDARAM CHETTI J.—The appellants are the legal representatives of the deceased decree-holder. The decree in this case arises out of a suit for dissolution of a partnership and for accounts and other incidental reliefs. In the final decree that was passed in this suit a decree was given in favour of the plaintiff for a sum of Rs. 4,284-12-11 against defendants 1 to 3 in excess of the amount claimed in the plaint for which court-fee was already paid. According to the provisions of section 11 of the Court Fees Act, the decree for the excess amount shall not be executed until the additional court-fee is actually paid. This is a mandatory provision which the executing Court is to carry out when the decree-holder applies for the recovery of such excess amount by way of execution of the decree. In the final decree that was passed in this suit there is a direction that "on payment of the additional court-fee the plaintiff do recover the sum of

Rs. 4,284-12-11, the excess amount decreed". The legal representatives of the deceased decree-holder when applying for execution in order to recover this excess amount paid the additional court-fee of Rs. 359-11-0 before seeking to execute the decree for that amount. The question arising for consideration is whether in a case of this kind it is competent to the executing Court to determine whether the excess court-fee so paid is recoverable or not from defendants 1 to 3. It is urged strenuously on behalf of the respondents that in the absence of a specific direction in the final decree as to which, if any, of the defendants, are liable to pay this excess court-fee the executing Court is not competent to give any direction as to the recovery of this amount as costs of execution or costs incidental or relating to execution. In the first place, we have the authority of the decision of this High Court in *Perianan Chetti v. Nagappa Mudaliar*(1) wherein the learned Judges have stated that any direction for the payment of the additional court-fee for the excess sum decreed, if given in the final decree, should be deemed to be a mere surplusage. It is clear from the opinion expressed in this decision that in view of the mandatory provision of section 11 of the Court Fees Act no such direction need be given at all in the final decree. We are in agreement with that view having regard to the express provision in the aforesaid section of the Court Fees Act, which casts a duty on the executing Court to collect the deficit court-fee when it finds that execution is sought for the recovery of an amount over and above what was claimed in the

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(1) (1906) I.L.R. 30 Mad. 32.

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plaint. That being so, no argument can be reasonably based on the supposed omission in the final decree as to the ultimate liability for the payment of this excess court-fee. This is not therefore a case in which we can hold that there is an express or implied direction in the decree itself that the plaintiff should alone bear the costs of the additional court-fee without any right to recover the sum from the defendants.

Then, the next question arising for consideration is whether the executing Court which directs the payment of the additional court-fee under section 11 of the Court Fees Act is not also competent to determine whether this amount should be borne by the decree-holder himself or can be recovered by him from the judgment-debtors who are liable to pay the amount on which this extra court-fee was paid. It is argued by Mr. Ramaswami Ayyar for the respondents that unless this sum can be taken to be strictly costs of execution the executing Court is not competent to pass any order for the recovery of the additional court-fee from the defendants. There is no doubt that costs subsequently incurred by the decree-holder for the purpose of executing the decree have to be provided for in the order of the executing Court. Such costs will be tacked on to the decree amount and made recoverable by the very same process of execution. The additional court-fee, the payment of which is made the condition precedent for the recovery of the excess amount by execution of the decree, can very well be deemed to be so intimately connected with the costs of execution as to warrant us to infer that it is within the competence of the executing Court to give any reasonable

direction regarding it. Though this additional court-fee may in one sense be deemed to be part of the stamp duty to be paid on the plaint itself, still the payment of that sum in the course of execution of the decree which is necessitated by section 11 of the Court Fees Act would be the payment of costs necessary for realising the fruits of the decree by execution. The costs so incurred by the decree-holder by reason of the payment of the additional court-fee may well nigh be deemed to be costs relating to execution and therefore the executing Court has jurisdiction to pass any order regarding it. In the present case, nothing has been shown to us to justify the non-observance of the usual rule that costs should follow the event. There is no reason why the decree-holder should lose the costs incurred by him by way of paying the additional court-fee when the defendants who are bound to pay that sum have necessitated his resorting to the executing Court for the recovery of the sum. We find ourselves unable to agree with the view of the learned Subordinate Judge and hold that the petitioners are entitled to recover this sum of Rs. 359-11-0 from defendants 1 to 3 in the course of execution proceedings. The order of the lower Court on the aforesaid point is set aside and the execution petition will be remanded for disposal according to law in the light of the above observations. The appellants' costs in this appeal will be paid by the third respondent.

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