

APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Ramesam and Mr. Justice King.

TAVVALA VEERASWAMI (PLAINTIFF—DECREE-HOLDER),
PETITIONER,

1934,
December 18.

v.

PULIM RAMANNA AND THREE OTHERS (DEPENDANTS—
JUDGMENT-DEBTORS AND SURETY), RESPONDENTS.*

Suit—Dismissal for default—Effect of, on security bond containing recital that “if the suit is dismissed the security bond should get cancelled”—Subsequent restoration of suit—Effect of.

R executed a security bond in favour of V in the following terms:—“If the suit is to be decreed in favour of the plaintiff (V) in accordance with the plaint he can recover the decree amount from me (R) personally and from my properties and if the suit is to be dismissed the security bond should get cancelled. On this condition this bond is executed.” The suit was dismissed for default but was afterwards restored to the file and a decree in favour of V was passed. It was contended that, on the dismissal of the suit for default, the security bond was cancelled.

Held, that the security bond, in such a case, was restored with the restoration of the suit.

Balaraju Chettiar v. Masilamani Pillai, (1929) I.L.R. 53 Mad. 334 (F.B.), distinguished. *Saranatha Aiyangar v. Muthiah Mooppanar*, (1933) 65 M.L.J. 844, approved.

Jia Bai v. Joharmull, A.I.R. 1932 Cal. 858, followed.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the District Munsif of Rajahmundry, dated 1st November 1930, and made in Execution

* Civil Revision Petition No. 746 of 1931.

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of 1929.

Ch. Raghava Rao for petitioner.

T. Satyanarayana for fourth respondent.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—This civil revision petition arises out of execution proceedings. The petitioner in those proceedings was the transferee of a promissory note executed by the first and second respondents in favour of the third respondent. The petitioner filed a suit on the promissory note and obtained a decree and had obtained before judgment an attachment of some money that lay in the Rajahmundry Sub-Court to the credit of the first respondent. The fourth respondent gave security and thereupon the attachment of the money was raised. Subsequently the suit was dismissed for default but was afterwards restored to the file and a decree in favour of the petitioner was passed. The petitioner applied to execute the decree against the surety but the latter contended that on the dismissal of the suit the security bond given by him became cancelled in accordance with the provisions of the security bond and also the law. The District Munsif upheld this contention relying upon the Full Bench decision of this High Court in *Balaraju Chettiar v. Masilamani Pillai*(1) which decides that upon the dismissal of a suit the attachment before judgment ceases under Order XXXVIII, rule 9, of the Civil Procedure Code, even though the Court did not pass an order withdrawing it.

(1) (1929) I.L.R. 53 Mad. 334 (F.B.).

It must be observed, however, that in that case the Full Bench dealt only with the case where the suit had been dismissed and on appeal was decreed and did not deal with a case like the present one where after dismissal for default the suit was restored to the file and eventually decreed in the trial Court; and any observations of the Full Bench upon the latter point are merely *obiter*; and in fact the Full Bench did not express a decided opinion upon this point, although it is contended that certain observations of PAKENHAM WALSH J. appear to express a view contrary to the contention of the decree-holder here and in the Court below. What PAKENHAM WALSH J. stated was as follows:

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“As regards the argument that, in the case of a suit dismissed for default and restored in the course of the same day, it would work hardship to hold that the attachment before judgment ceased to have force, it is difficult to see how that can be a hardship which the law commands. There is much that might be said on the other side as to the consequences of holding that an attachment continues in force after a suit is dismissed. As was pointed out by MAHMOOD J. in *Ram Chand v. Pitam Mal* (1), such an attachment will subsist for ever whether there is or not an appeal until it is expressly withdrawn. As stated above the reference before us does not deal with a suit dismissed for default and restored to file but with one where the decree dismissing the suit is reversed on appeal. To say that on a suit being decreed in appeal all the interlocutory orders passed in the course of the suit are at once revived appears to be going too far and might lead to serious difficulties.” (Page 346.)

Here the point to be considered is whether the restoration of the suit to the file makes the security bond still available to the decree-holder. In *Namagiri Ammal v. Muthu Velappa Goundan*(2)

(1) (1888) I.L.R. 10 All. 506.

(2) (1928) 56 M.L.J. 70.

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PHILLIPS J. was of the view that, when an order dismissing a suit for default is set aside on an application made for the purpose, the suit remains as it was on the day that it was dismissed and all proceedings taken up to that date must be deemed to be in force when the dismissal is set aside and all interlocutory orders will be revived on the setting aside of the dismissal and that similarly an order for attachment of property will also be revived. But the Bench in that case, PHILLIPS and DEVADOSS JJ., held that, where a suit is dismissed in the lower Court and the dismissal is set aside in appeal, the attachment before judgment will be deemed to have continued throughout. This view was of course negatived in *Balaraju Chettiar v. Masilamani Pillai*(1). In a later case, namely, *Saranatha Aiyangar v. Muthiah Mooppannar*(2), our learned brother, RAMESAM J., sitting alone held that, in the case of a suit dismissed for default and soon afterwards restored to file, in the absence of anything expressly appearing against the view that interlocutory applications were restored, the suit and all incidental matters were restored to file. In that case, our learned brother correctly takes the view that *Balaraju Chettiar v. Masilamani Pillai*(1), upon which the District Munsif relied, does not govern the present case and that the question is not whether the ancillary orders fall with the suit when it is dismissed but whether when the suit is restored they are also restored. I entirely agree with our learned brother's view upon this question. It does not seem to me reasonable that the plaintiff in a suit who has got an attachment before judgment

(1) (1929) I.L.R. 53 Mad. 334 (F.B.).

(2) (1933) 65 M.L.J. 844.

should have again, after the restoration of the suit after its dismissal for default, to apply to the Court for a fresh attachment and that he having done so the defendant should have to apply to raise the attachment by producing a surety or sureties. The common-sense view of the matter is that all ancillary orders should be restored on the restoration of the suit without any further orders. Upon this question there is direct authority of the Calcutta High Court in *Jia Bai v. Joharmull*(1). It may possibly be contended that the decision was based on the wording of the bond because RANKIN C.J. says on page 860 :

“The suggestion was that because the suit had at one time been dismissed for default and was then restored, the bond was of no effect. The learned Judge has very properly held that the bond has reference to the ultimate issue of the suit.”

But the bond in that case was of the usual kind as it created an obligation on the part of the surety to satisfy the claim under the decree that might be passed in the suit and stated that if it should be dismissed the obligation was to be void. I can find no difference between the wording of the bond here and the bond in that case. Looking at the bond in the present case, it is obvious that it has reference to the ultimate issue of the suit in the trial Court. It reads as follows :

“If the suit is to be decreed in favour of the plaintiff in accordance with the plaint he can recover the decree amount from me personally and from my properties and if the suit is to be dismissed the security bond should get cancelled. On this condition this bond is executed.”

Nevertheless it was contended before us that the latter condition shows that it was intended that

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(1) A.I.R. 1932 Cal. 858.

VEERASWAMI when the suit was dismissed for any cause, even
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 RAMANNA. for default, the security bond was to be cancelled.
 BEASLEY C.J. This contention completely ignores the earlier
 part of the clause which makes the meaning
 perfectly clear. In my opinion, therefore, the
 District Munsif was wrong in thinking that the
 Full Bench decision in *Bataraju Chettiar v.*
Masilamani Pillai(1) governs this case. It does
 not, and I am quite satisfied that the security
 bond in such a case is restored with the restora-
 tion of the suit. The order of the District
 Munsif dismissing the petition before him must
 therefore be set aside and the petition restored to
 file for disposal according to law. The civil
 revision petition is allowed with costs here and
 in the lower Court.

RAMESAM J.—I agree.

KING J.—I agree.

G.R.

(1) (1929) I.L.R. 53 Mad. 334 (F.B.).
