APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Cornish.

1934, August 8.

SINGANAMALA VENKATASWAMI (PETITIONER), APPELLANT,

v.

PESE VENKATARAMANA RAO AND FOUR OTHERS (RESPONDENTS AND SECOND RESPONDENT'S LEGAL REPRESENTATIVES), RESPONDENTS.*

Execution of decree—Sale in, of a decree in favour of the judgment-debtor against a third party—Permissibility—Law in Madras—Madras Civil Rules of Practice, r. 178—*Effect of—R.* 178, ultra vires *if—Ss.* 122, 51, 2 (16) *and* 60 *of Code of Civil Procedure (Act V of* 1908)—*Applicability and effect of—Objection to such sale by judgment-debtor in decree sought to be sold—Maintainability—No objection taken by holder of that decree.*

In view of rule 178 of the Madras Civil Rules of Practice, in Madras a preliminary decree for partition attached in execution of a money decree cannot be sold in execution of the latter decree. Sections 122, 51 and 2 (16) of the Code of Civil Procedure read together show that the High Court can prescribe by rules, conditions and limitations subject to which the Court may order execution of the decree in the way specified in section 51. The result is that, though "decrees" as coming within the expression "all other saleable property" in section 60 of the Code can be sold, the High Court has power to make a rule, if it desires to do so, stating that no decree shall be ordered to be sold in execution of another decree; and that is what has been done by the Madras High Court in rule 178. That rule cannot be held to be *ultra vires* as being inconsistent with the provisions of the Code of Civil Procedure in so far as it is applicable to decrees other than those falling under clause 1 of rule 53.

* Appeal against Order No. 456 of 1931.

VENKATA-SWAMI *v.* VENKATA-RAMANA RAO.

Obiter dictum of THIRUVENKATACHARIAR J. to the contrary in *Immidisetti Dhanaraju* v. *Motilal Daga,* (1929) 29 L. W. 823, dissented from.

The objection to the saleability of an attached decree in view of rule 178 of the Madras Civil Rules of Practice can before the sale be taken by the judgment-debtor in that decree although such an objection is not taken by the decree-holder of that decree.

Subbaraya Rowthu v. *Kuppusawmy Aiyangar,* (1909) I.L.R. 34 Mad. 442, distinguished.

APPEAL against the order of the District Court of Anantapur, dated the 5th day of February 1931 and made in Execution Petition No. 36 of 1930 (Original Suit No. 20 of 1925 on the file of the Court of the Subordinate Judge of Anantapur).

K. Srinivasa Rao for appellant.

B. Somayya for respondents.

Cur. adv. vult.

MADHAVAN NAIR J.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The petitioner in Execution Petition No. 36 of 1930 on the file of the District Judge of Anantapur is the appellant. The appeal raises an important question of law, namely, whether, in execution of a money decree, a preliminary decree for partition obtained by the judgment-debtor can be validly sold.

The facts are simple and may be briefly stated. The appellant obtained a money decree in Original Suit No. 357 of 1918 on the file of the District Munsif's Court, Bellary, against the first respondent herein. The latter had obtained a preliminary decree for partition against the other respondents in Original Suit No. 14 of 1923 (that is, Original Suit No. 20 of 1925 of the Sub-Court, Anantapur). In execution of the

appellant's money decree this preliminary decree for partition was attached and thereafter his decree was transmitted to the District Court of Anantapur to enable him to execute the preliminary decree for partition. The first respondent, that is the decree-holder in the partition suit, does not raise any objection ; but respondents 4 and 5, who are the contesting respondents, object to the execution on the ground that according to the law of procedure followed in Madras a preliminary decree attached in execution of a money decree cannot be sold in execution of the latter decree. The appellant contends that even if this be the state of the law, which he says is not correct, inasmuch as the first respondent, the decree-holder in the partition suit, has no objection to the execution of the decree, it is not open to the judgment-debtors in the suit, namely, the fourth and fifth respondents, to raise any objection.

In support of his first contention that the preliminary decree can be sold, the appellant relies on Order XXI, rule 53, clause 4, Order XXI, rule 64, and section 60 of the Code of Civil Procedure. Order XXI, rule 53, provides two ways of executing decrees, by attachment of other decrees passed in favour of the judgment-debtor by other Courts or by the same Court. If the attached decree is a money decree—which is not the case here—then by the combined operation of Order XXI, rule 53, clauses 1 and 2, the decree may be executed by realising the net proceeds in satisfaction of the execution creditor's decree ; if the attached decree is not one for money, then Order XXI, rule 53, clause 4, applies. This sub-clause

VENKATA-SWAMI v. VENKATA-RAMANA RAO. — MADHAVAN NAIR J.

provides for the attachment of the decree. Order XXI, rule 64, says :

"Any Court executing a decree may order that any property attached by it and liable to sale . . . shall be sold."

Section 60, dealing with attachment, mentioning certain specific kinds of property liable to attachment and sale in execution of a decree, includes in the list "all other saleable property, movable or immovable, belonging to the judgment-debtor, etc." and ends with the proviso that certain properties mentioned in the various clauses to the proviso shall not be sold. A decree of a Court is not one of the properties which is exempted in the proviso. The appellant contends that reading these provisions of law together a preliminary decree for partition can be attached under Order XXI, rule 53, and that, though "decrees" are not expressly mentioned in section 60 as property liable to attachment and sale, they nevertheless fall within the expression "all other saleable property" which occurs in that section and can therefore be sold by force of that section and Order XXI, rule 64, which deals with sale generally of attached decrees. This argument is supported by the decisions in *Sudarsan Poddar* v. *Manindrachandra Pal*(1) and *Gopal Nanashet* v. *Joharimal; and Dada Balshet* v. *Joharimal*(2). This statement of the law is not seriously contested by the respondents' learned Counsel ; but what he argues is this, that, having regard to rule 178 of the Madras Civil Rules of Practice, in Madras a decree cannot be brought within the expression "all other saleable property"

(1) (1930) I.L.R. 58 Calc. 934. (2) (1891) I.L.R. 16 Bom. 522.

occurring in section 60, Civil Procedure Code, and cannot therefore be sold. Rule 178 says: "No decree shall be ordered to be sold in execution of another decree." The respondents' argument is that, though the provisions of the Civil Procedure Code do not prohibit the sale of an attached decree like the partition decree in this case, rule 178 specifically provides that such decrees shall not be sold and that effect should be given to that provision contained in the rule. The appellant's learned Counsel argues that, since the provisions contained in the Civil Procedure Code do not prohibit the sale of attached decrees, rule 178 of the Civil Rules of Practice which prohibits their sale is *ultra vires* if it is to be applied to decrees other than those falling under clause 1 of rule 53 and should not be given effect to. On this part of the case the question therefore reduces itself to this: "Is rule 178 of the Civil Rules of Practice *ultra vires* and inconsistent with the provisions of the Code of Civil Procedure as argued by the appellant's learned Counsel?"

This rule has been in existence for a long time and was apparently enacted under one of the Codes which were in force before the present Code was enacted. However, under section 157 of the present Code:

> "Rules made under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed, shall, so far as they are consistent with this Code, have the same force and effect as if they had been made under this Code and by the authority empowered thereby in such behalf."

So if the rule is consistent with the present Code it will have the same force and effect as if it had been made under the present Code. Power

VENKATA-SWAMI *v.* VENKATA-RAMANA RAO.

MADHAVAN NAIR J.

of the High Courts to make rules is contained in section 122, Civil Procedure Code, which says :—

"High Courts established under the Indian High Courts Act, 1861, (or the Government of India Act, 1915), . . . may, from time to time, after previous publication, make rules regulating their own procedure and the procedure of Civil Courts subject to their superintendence, and may by such rules annul, alter, or add to all or any of the rules in the First Schedule."

These rules, according to section 128, Civil Procedure Code, must not be inconsistent with the provisions in the body of the Code. The rule in question relates to procedure in execution. Section 51 of the present Code, which is new, specifies the various methods of executing a decree. So far as it is relevant for our purpose it says :

"*Subject to such conditions and limitations as may be prescribed,* the Court may, on the application of the decree-holder, order execution of the decree . . . (*b*) by attachment and sale or by sale without attachment of any property."

(The italics are ours). Under clause 16 of section 2, Civil Procedure Code, "prescribed" means "prescribed by rules". It follows from sections 122, 51 and 2 (16) read together, that the High Court can prescribe by rules, conditions and limitations subject to which the Court may order execution of the decree in the way specified in section 51. The result in our opinion is that, though "decrees" as coming within the expression "all other saleable property" in section 60, Civil Procedure Code, can be sold, the High Court has power to make a rule, if it desires to do so, stating that no decree shall be ordered to be sold in execution of another decree ; and that is what has been done by the Madras High Court in rule 178. In our opinion, but for section 51, Civil Procedure Code, rule 178 would be *ultra vires* if it is to be

applied to decrees other than those falling under clause 1 of rule 53. The decision in *Immidisetti Dhanaraju* v. *Motilal Daga*(1), relied on by the appellant in this connection, contains an *obiter dictum* of THIRUVENKATACHARIAR J. that the rule in question is *ultra vires*. In discussing the question the learned Judge does not refer to section 51 of the Civil Procedure Code which, as we have already stated, is a new section. Before leaving this point we may also mention that our attention was drawn by the respondents' Counsel to a decision by REILLY J., sitting on the Original Side, in Civil Suit No. 510 of 1926 in which he held that, having regard to Order 19, rule 34, of the Original Side Rules which also contains a provision similar to that contained in rule 174 of the Mofussil Rules of Practice, a preliminary decree in a partition suit cannot be sold in execution of a money decree. This decision, though very relevant, may be held inapplicable on the ground that, while rules made under section 122, Civil Procedure Code, must not be inconsistent with the provisions in the body of the Code, section 129, which confers power on a Chartered High Court to make rules to regulate its own procedure in the exercise of its Original Civil Jurisdiction, does not contain any such qualification, but only says that the rules must not be inconsistent with the Letters Patent establishing it. Even so, we have no doubt, for the reasons already mentioned, that rule 178 of the Civil Rules of Practice cannot be held to be *ultra vires* as being inconsistent with the provisions of the Code of Civil Procedure, in so far as it

(1) (1929) 29 L.W. 823.

VENKATA-SWAMI v. VENKATA-RAMANA RAO.

MADHAVAN NAIR J.

is applicable to decrees other than those falling under clause 1 of rule 53.

The next argument of the appellant is that, in view of the fact that the first respondent (decree-holder of the preliminary decree for partition) did not object to the sale of the decree, it is not open to the judgment-debtors in that decree to take the objection. This argument is based on *Subbaraya Rowthu* v. *Kuppusawmy Aiyangar*(1). In that case ABDUR RAHIM J., while dealing with the question whether the sale of a mortgage decree which was treated as a money decree under section 273 of the old Civil Procedure Code corresponding to Order XXI, rule 53, of the present Code, would make the sale of the decree altogether invalid and without jurisdiction, observed as follows :—

> "I think that it would be extending the application of section 273 beyond all reasonable limits if we were to hold that it has the effect of rendering the sale of a decree for money held in execution altogether invalid and without jurisdiction. On the other hand it seems to be unreasonable that where no objection is raised to such a sale by the holder of the decree or his creditor, who in this case has in fact brought about the sale, *it should be open to the judgment-debtor under that decree to raise any objection.*"

It is the latter observation which we have italicised that is relied upon by the appellant; but it is clear from the circumstances of the case that the objection which was held to be unreasonable was taken by the judgment-debtor after the sale was over and not before the sale, as in the present case. In the context the question that was considered by the learned Judge was not whether the attached decree could be sold but whether, the sale having taken place, the irregularity of the

(1) (1909) I.L.R. 34 Mad. 442.

procedure made the sale altogether invalid and without jurisdiction. In the present case the sale of the attached decree has not taken place and we see no reason why before the sale the judgment-debtor should not be allowed to take objection to its saleability in view of rule 178 of the Civil Rules of Practice. Apparently such a rule does not seem to exist in Calcutta or in Bombay.

For the above reasons we confirm the lower Court's order and dismiss this appeal with costs of the fourth and fifth respondents.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Pandrang Row.

RAJAGOPAL DOSS AND ANOTHER (RESPONDENTS), APPELLANTS,

1934, August 21.

v.

A. KUPPUSWAMI MUDALIAR (PETITIONER), RESPONDENT.*

Madras City Tenants' Protection Act (III of 1922), sec. 9—Sale contemplated in—Tenants-defendants in different suits—Order making them jointly liable for payment of value of entire land and making them liable to forfeit their right to purchase in default of payment by any one of them of his portion—Valid order under sec. 9 if.

The sale contemplated in section 9 of the Madras City Tenants' Protection Act (III of 1922) is of the land in the occupation of the tenant from which he is sought to be ejected. An order making the tenants—defendants in different suits jointly liable for the payment of the value of the *entire* land

* Appeals against Orders Nos. 273 to 283 of 1933.