

ANANGA
BHIMA DEO
v.
MADANO
MOHONO DEO.
BURN J.

them was that they were withdrawn and were accordingly dismissed without any execution having really taken place. It is, we think, unfortunate perhaps that the decree-holder should be met with a plea of an apparently technical kind like this when he seeks to execute his decree. But there is no doubt that a technical point, if it is a good one, is the best of all points; and in the present case, as we are satisfied that the presentation of these execution petitions by the decree-holder's pleader was a mere nullity, we hold that our learned brother's judgment was correct and that these appeals must be dismissed. But, in view of the fact that the appellant was successful in both the Courts below, we make no order as to costs in these Letters Patent Appeals.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice K. S. Menon.

1936,
August 5.

GOPISETTI SANYASI RAO DORA (PETITIONER, DEFENDANT-
JUDGMENT-DEBTOR), APPELLANT,

v.

GOPISETTI SURYANARAYANAMMA (RESPONDENT,
PLAINTIFF-DECREE-HOLDER), RESPONDENT.*

Maintenance—Decree for, imposing personal liability and creating charge on properties—Sale of charged properties in execution and purchase thereof by decree-holder subject to charge—Personal liability of judgment-debtor for subsequent arrears—Effect on.

In a suit for maintenance, a compromise decree was passed which imposed a personal liability on the judgment-debtor and

* Appeal Against Order No. 356 of 1934.

also laid a charge on certain of his properties. The judgment-debtor not having paid the maintenance, the charged properties were brought to sale and were purchased by the decree-holder subject to her own maintenance charge. When the judgment-debtor again fell into arrears in payment of the maintenance, the decree-holder again applied for realization of the arrears by arrest of the judgment-debtor and by sale of his other properties, and the Court directed execution to proceed against him.

SANYASI RAO
v.
SURYA-
NARAYANAMMA.

Held, that the personal liability of the judgment-debtor under the decree had not been extinguished.

Quære: Whether the charge on the properties had been extinguished.

Balamani Ammal v. Rama Aiyar, (1924) 48 M.L.J. 273, and *Sami Aiyar v. Ramaswami Chettiar*, (1922) 44 M.L.J. 171, distinguished.

APPEAL against the order of the Court of the Subordinate Judge of Berhampur dated 19th February 1934 and made in Execution Application No. 420 of 1933 in Execution Petition No. 100 of 1933 in Original Suit No. 20 of 1921.

B. Jagannadha Das for appellant.

K. Subba Rao for respondent.

The JUDGMENT of the Court was delivered by BURN J.—This is an appeal from the order of the learned Subordinate Judge of Berhampur in Execution Application No. 420 of 1933 in Execution Petition No. 100 of 1933 in Original Suit No. 20 of 1921. The appellant is the judgment-debtor, and the respondent the decree-holder, in Original Suit No. 20 of 1921 in which the respondent obtained a decree for maintenance at the rate of Rs. 50 per mensem. In the decree certain properties were charged with the payment of maintenance to the respondent. There were other properties charged with the payment of maintenance to the respondent's daughter, but with those we are not

SANYASI RAO
 v.
 SURYA-
 NARAYANAMMA.
 ———
 BURN J.

now concerned. The judgment-debtor not having paid the maintenance, the decree-holder brought the charged property to sale and purchased it herself, the purchase being said to be subject to her own maintenance charge. The judgment-debtor having again fallen into arrears in payment of the maintenance, the decree-holder again applied in Execution Petition No. 100 of 1933 for realization of the arrears by arrest of the defendant and by sale of his other properties. The judgment-debtor contended that he was not liable to be arrested and that his other properties were not liable for the maintenance. The learned Subordinate Judge found in favour of the decree-holder and directed execution to proceed. Hence this appeal.

The learned Subordinate Judge is undoubtedly right in saying that the decree, which was a compromise decree, contains a provision imposing personal liability upon the appellant as well as laying a charge upon the lands forming item No. 2 in the plaint A Schedule. The learned Subordinate Judge has held that the mere fact that the decree-holder purchased the charged property does not involve the extinction of her claim against the defendant personally. Mr. Jagannadha Das for the appellant has attempted to persuade us that the learned Subordinate Judge is wrong. Mr. Jagannadha Das contends that, when the decree-holder purchased the charged property in execution of her decree for maintenance, her claim against the judgment-debtor personally became merged in her claim by virtue of the charge upon the property, and since the charge upon the property must be deemed to have been extinguished, therefore her claim against the judgment-debtor

personally also must have been extinguished. There is no authority in support of this contention, but Mr. Jagannadha Das discussed cases of mortgage as being to some extent analogous. He cited the case reported as *Balamani Ammal v. Rama Aiyar*(1) and illustration No. i on page 558 of the second edition of Mulla's Transfer of Property Act. The illustration is based upon the decision quoted. We are not satisfied that the analogy of a mortgage is sufficiently close to warrant the application of the principles derived from mortgage cases to this one. This decree for maintenance is not a decree for a single sum of money once for all. It is a decree that the decree-holder shall from time to time become entitled to a payment of Rs. 50 per mensem. Under the decree payment was to be made once in six months. It is difficult to see how a liability, which has not come into existence, and cannot come into existence until some time in the future, can be deemed to have been extinguished by reason of the purchase of the property by the decree-holder. There is no question here of capitalising the whole of the future value of the lady's annuity of Rs. 50 per mensem and saying that the sale of the charged property has brought in an amount equal to that. Moreover, we cannot say that the case cited, *Balamani Ammal v. Rama Aiyar*(1), really helps the analogy which Mr. Jagannadha Das wishes us to consider. In that case, it was expressly pleaded by the plaintiff that his mortgage had become extinguished, or, in other words, that the *debt* due to

SANYASI RAO
v.
SURYA-
NARAYANAMMA.
—
BURN J.

(1) (1924) 48 M.L.J. 273.

SANYASI RAO
v.
SURYA-
NARAYANAMMA.
—
BURN J.

the mortgagee from the mortgagor had been discharged. If that were so, there could of course be no liability on the mortgagor after the mortgagee had acquired the mortgage security. But there is nothing to prevent a mortgagee from purchasing the mortgaged property in execution of his decree on the mortgage without surrendering his claim against the mortgagor personally. It happens every day that the mortgagee gets permission to bid in the sale of the mortgaged property held in execution of his decree, and, if the sale of the mortgaged property does not produce an amount sufficient to discharge the claim under the mortgage, the mortgagee is at liberty, where the stipulations in the bond are appropriate, to apply for a personal decree against the mortgagor for the balance. In the present case, Mr. Jagannadha Das admits that, if a third party had purchased this property at the Court-auction subject to the maintenance charge in favour of the respondent, the judgment-debtor's personal liability would not have been in any way reduced. We cannot say that it is in any way reduced merely because the purchaser was the decree-holder herself, particularly since the purchase was made subject to the maintenance charge. We are unable to say that the judgment-debtor's liability under the decree is extinguished merely by the fact that the charged property has been purchased by the decree-holder. It is not necessary for us to say whether the charge on the property has been extinguished but we think it is quite clear that, even if it has, the personal liability of the judgment-debtor under the decree has not been extinguished. We do not think there is much

assistance to be gained from the decision in *Sami Aiyar v. Ramaswami Chettiar*(1). That was a case of a surety's liability for a debt being merged on the extinction of the debt itself. Here, as we have pointed out, the debt is not extinguished, and we do not see how the judgment-debtor's liability for the debt can be deemed to have been extinguished. The decision of the learned Subordinate Judge appears to us to be correct and this appeal is dismissed with costs.

SANYASI RAO
v.
SURYA-
NARAYANAMMA.

V.V.C.

APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Lakshmana Rao.

T. V. A. K. T. ANNAMALAI CHETTIAR (RESPONDENT),
APPELLANT,

1936,
September 16.

v.

T. T. K. K. KUMARAPPAN SRIRANGA CHARIAR
(APPELLANT), RESPONDENT. *

Executing Court—Jurisdiction—Sale of property directed by decree—Disputed questions of fact which, if proved, would take away executing Court's jurisdiction to order—Jurisdiction of executing Court to go into.

When there is a final decree for sale of mortgaged property, it is not permissible for the executing Court to enquire into a plea raised by the judgment-debtor that the property is not liable to be sold on the ground that it is a temple service inam and therefore inalienable, where the allegation of the judgment-debtor that the property is inalienable temple service inam is denied by the decree-holder.

The executing Court has no power to go into disputed questions of fact which, if proved, would take away its jurisdiction to order sale.

(1) (1922) 44 M.L.J. 171.

* Letters Patent Appeals Nos. 35 and 37 of 1935.