

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Stodart.*

1935,
November 27.

T. S. SANKARA AYYAR (RESPONDENT), APPELLANT,

v.

MUHAMMAD GANNI ROWTHER AND TWO OTHERS
(PETITIONERS), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXXIX, r. 1—
Execution of decree—Sale of property in—Injunction
restraining—Grant of, on application by party to decree—
Permissibility—Decree under execution not appealed
against—Appeal in another suit raising issue of liability of
property for sale—Pendency of—Injunction sought for on
ground of.*

In a mortgage suit by the appellant against the respondents and in a partition suit by the latter against the former a common issue was raised as to whether the mortgage sued upon by the appellant was binding on the shares of the respondents. The decision on that issue in the partition suit was agreed by the parties to be taken as the decision on the issue in the mortgage suit. In the partition suit the mortgage was declared binding on the shares of the respondents and a decree by consent was accordingly passed in the mortgage suit against their shares. There was no appeal against the decree in the mortgage suit but an appeal was presented to the High Court against the decree in the partition suit. The respondents applied to the High Court, under Order XXXIX, rule 1, of the Code of Civil Procedure, for an injunction restraining the appellant from bringing the property of the respondents to sale in execution of the decree in the mortgage suit pending the appeal in the partition suit.

Held that the injunction applied for could not be granted.

When a decree has been passed against a party who is himself seeking to obtain an injunction, the Court has no jurisdiction whatever, merely because an appeal is pending in another suit,

* Letters Patent Appeal No. 84 of 1935.

to grant an injunction on the ground that the property is in danger of being wrongfully sold in execution. Whilst the decree remains unreversed, it is a good decree and all steps in execution of it are perfectly legal.

Varadacharyulu v. Narasimhacharyulu, (1925) 23 L.W. 85, *Ayyamperumal v. Muthuswami*, A.I.R. 1927 Mad. 687, and *Karuppayya v. Ponnusami*, (1932) I.L.R. 56 Mad. 563, approved.

Abdullah Khan v. Banke Lal, (1910) I.L.R. 33 All. 79 (F.B.), and *Sri Sri Radha Gobinda Deb Thakur v. Girija Prasanna Mookherjee*, (1931) 35 C.W.N. 912, distinguished.

APPEAL under Clause 15 of the Letters Patent against the order of K. S. MENON J. dated 20th August 1935 and made in Civil Miscellaneous Petition No. 2960 of 1935 for issue of an injunction restraining the respondent therein from bringing the properties to sale in Original Suit No. 31 of 1932 on the file of the Court of the Subordinate Judge of Kumbakonam, pursuant to the declaration granted in his favour in Original Suit No. 59 of 1931 on the file of the said Court of the Subordinate Judge of Kumbakonam, pending Appeal No. 10 of 1935 preferred to the High Court against the decree of the said Court in Original Suit No. 59 of 1931.

Government Pleader (K. S. Krishnaswami Ayyangar) and *S. Ramachandra Ayyar* for appellant.

C. S. Venkatachariar for *D. Ramaswami Ayyangar* for respondents.

JUDGMENT.

BEASLEY C.J.—This is a Letters Patent Appeal from an order made by K. S. MENON J. restraining the appellant here from bringing the property of the respondents to sale in execution of the decree which he had obtained in Original Suit No. 31 of

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1932 in the Subordinate Judge's Court, Kumbakonam. That was a mortgage suit and the appellant was the plaintiff in it. One Abdul Karim, the brother of the three respondents in this appeal, executed a mortgage in favour of the appellant for Rs. 10,000 on 1st October 1928. Abdul Karim died leaving the respondents his three brothers and they were made defendants 4 to 6 in the suit. The mother of the respondents filed a suit for partition (Original Suit No. 59 of 1931) in the same Court and on her death the three respondents were transposed as the plaintiffs and the appellant was added as the eleventh defendant as it was alleged in the suit that the mortgage by Abdul Karim in the appellant's favour was not binding on the shares of the three respondents. That defence was also raised by the three respondents in the mortgage suit, so that, both in the partition suit and in the mortgage suit there was that common issue and it was agreed between all the parties that the decision on that issue in the partition suit should be taken as the decision on the issue in the mortgage suit, that is to say, if it was declared in the partition suit that the mortgage was binding on the shares of the three brothers (respondents) then a decree to that effect binding their shares should be passed in the mortgage suit. In the partition suit the mortgage was declared binding on the shares of the three brothers. In the result a decree by consent was passed in the mortgage suit, but for the sale of the share of Abdul Karim only. Subsequently the appellant applied to have the decree amended in order to make it clear that the

decree was against the shares of the three defendants; and the amendment was made. The position, therefore, is that in Original Suit No. 31 of 1932 there is a mortgage decree in favour of the appellant under which the mortgage is binding upon the shares of the respondents. An appeal (Appeal Suit No. 10 of 1935) has been presented against the decree in the partition suit; and pending it, the application, the order on which is the subject of the appeal before us, was made and, as before stated, our learned brother granted the application. The application was of course under Order XXXIX, rule 1, Civil Procedure Code, and K. S. MENON J. says that, in effect, the application is to stay the operation of the decree in the mortgage suit pending the appeal in the partition suit. That of course is the effect; but it is quite clear that, having regard to the fact that the decree in the mortgage suit was not appealed against, no application under Order XLI, rule 5, Civil Procedure Code, for a stay of execution will lie. That rule only applies to staying of execution in suits which are themselves under appeal and cannot apply to a decree in a suit which is not under appeal. The ground put forward in support of the petition is that the decree in the partition suit is under appeal and that it is expedient that execution of the decree in the mortgage suit should meanwhile be stopped by injunction. An injunction can only be granted under Order XXXIX, rule 1, upon certain grounds, namely, where it appears that any property in dispute in the suit is in danger of being wasted, damaged or alienated by any party to the suit—that certainly is not suggested here—or wrongfully sold in

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execution of a decree or the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors. Clearly the latter condition is not relied upon in this case. Therefore the only reason which was before our learned brother was that the property was in danger of being wrongfully sold in execution of the decree. How was it about to be wrongfully sold in execution of the decree? There was a decree before our learned brother and all the parties before him were parties to that decree. This is not a case where the property of somebody not a party to the decree is in danger of being sold and that person comes forward with a claim that it is his property and cannot be sold. Admittedly, the property in question is the property of one of the parties to the decree, namely, the three brothers. The fact that there is an appeal against the decree in the partition suit cannot possibly affect the question. The decree in the mortgage suit, until it has been shown in appeal to be a wrong decree, is a good decree; and the decree-holder is entitled to take all steps which he is entitled to take. This matter has been dealt with in a judgment of PHILLIPS J. in *Varadacharyulu v. Narasimhacharyulu*(1). There was a petition to revise the order of the District Court refusing to grant an injunction restraining the execution of a decree obtained by the defendant against the plaintiff's father. The Subordinate Judge held that he had no jurisdiction to grant such an injunction and the District Judge upheld his order. PHILLIPS J. says :

(1) (1925) 23 L.W. 85.

“ It is now contended that such an injunction will come under Order XXXIX either rule 1 or rule 2. It certainly cannot come within the language of rule 1 for there is no suggestion that the property of which delivery is to be given is in danger of being wasted, damaged or alienated. It is then argued that rule 2 would be applicable and that this is an injunction to restrain the defendant from committing other injury of any kind. The alleged injury is the execution of a decree lawfully obtained. In order to hold that that does constitute an injury, it is necessary to hold that that decree is illegal, for, if the decree is legal, the defendant has every right to execute it and in doing so he cannot be said to commit any injury.”

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Those observations apply directly to this case. PHILLIPS J. then deals with the contention that under section 94 of the Code of Civil Procedure the Court would be justified, in order to prevent the ends of justice from being defeated, in granting an injunction. He holds that it is not open to the Court to grant an injunction under section 94, Civil Procedure Code. A further contention was put forward before him that the Court could under its inherent powers under section 151, Civil Procedure Code, grant such an injunction and that was also negatived. This case is directly in point and has been followed by CURGENVEN J. in *Ayyamperumal v. Muthuswami*(1) and also by BARDSWELL J. in *Karuppayya v. Ponnusami*(2), where the observations of CURGENVEN J. in *Govindarajulu Naidu v. Imperial Bank of India, Vellore*(3) were explained by him. K. S. MENON J. refers to the decision of the Allahabad High Court in *Abdullah Khan v. Banke Lal*(4) and the decision in *Sri Sri Radha*

(1) A.I.R. 1927 Mad. 687.

(3) (1931) 35 L.W. 168.

(2) (1932) I.L.R. 56 Mad. 563.

(4) (1910) I.L.R. 33 All. 79 (F.B.).

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Gobinda Deb Thakur v. Girija Prasanna Mookherjee(1), but the observation to be made with regard to both those cases is that there the Court was dealing with a petition by a person who was not a party to the suit at all. Although there are some observations which are *obiter* in *Abdullah Khan v. Banke Lal*(2) and which may be taken as expressing the opinion that even when an application is made by one of the parties to a decree an injunction can be granted, on closer examination it would appear that that view is limited to cases where it is alleged that the decree has been obtained by fraud. These observations are merely *obiter*. I very strongly take the view that, when a decree has been passed against a party who is himself seeking to obtain an injunction, the Court has no jurisdiction whatever, merely because an appeal is pending in another suit, to grant an injunction on the ground that the property is in danger of being wrongfully sold in execution. If the other view were correct, then the appellant would have a greater remedy in such cases, i.e., an injunction, than he has in the suit under appeal. Whilst the decree remains unreversed, it is a good decree and all steps in execution of it are perfectly legal. For these reasons, I am quite unable to agree with the order granting this injunction. I think that it was made under a misapprehension of the cases to which reference is made in the judgment. The order under appeal must, therefore, be set aside and the injunction dissolved and this appeal allowed with costs here and before K. S. MENON J. With

(1) (1931) 35 C.W.N. 912.

(2) (1910) I.L.R. 33 All. 79 (F.B.).

regard to Appeal Suit No. 10 of 1935, the appeal in the partition suit, it is most desirable that it should be disposed of as quickly as possible and there must therefore be a direction that it be heard during the first week of February peremptorily.

STODART J.—I agree with my Lord the CHIEF JUSTICE.

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Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

BAVA C. VAITHILINGA MUDALIAR (SECOND
 RESPONDENT), APPELLANT,

1936,
 March 25.

v.

THE BOARD OF CONTROL, SRI THYAGARAJASWAMI
 DEVASTHANAM, TIRUVARUR, BY THE PRESENT
 PRESIDENT K. MANATHURAINATHA DESIKAR, AND ANOTHER
 (PETITIONER AND FIRST RESPONDENT), RESPONDENTS.*

*Scheme suit—Decree in—Provision in scheme part of—Execut-
 able, if—Removal of trustee in event of his committing
 breach of trust or failing to perform his duties—Power
 of—Reservation to Court as part of a scheme of—Per-
 missibility—Remedy in such a case.*

A provision in a scheme decree is inexecutable, whether the provision is directory or declaratory.

The preponderance of judicial opinion in the Madras High Court is against the view to the contrary held in *Vythilinga Pandara Sannadhi v. The Board of Control, Sri Thiagarajaswami Devasthanam, Tiruvarur*, (1931) 61 M.L.J. 904.

Per CORNISH J.—There cannot be reserved to the Court as part of a scheme for a charitable trust a power to remove a

* Appeal Against Order No. 160 of 1931.