Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Mitra.

1904
May 16.

COVENTRY
v.
TULSHI PERSHAD NARAYAN SINGH.*

Decree—Execution—Mortgage—Mitakshara family—Civil Procedure Code (Act XIV of 1882) s. 248, notice under—Order for substitution of the heirs of the deceased judgment-debtor—Sale proclamation—Order of sale—Postponement—Estoppel—Res judicata.

Held, that a legal representative of a deceased judgment-debtor, who was the managing member of a family governed by the Mitakshara system of Hindu Law, having allowed execution to proceed actively for nearly a year without the slightest objection, having twice successfully obtained stay of sale from Court on the plea that he would satisfy the decree, if time were allowed, and having approbated the execution proceedings by paying the decree-holder a part of the debt and thus inducing him to consent to time being granted for payment of the balance, cannot be permitted by the ordinary principle of estoppel to say that the decree is incapable of execution against him.

Sadasiva Pillai v. *Ramalinga Pillai*(1) referred to.

Held further, on the principle of *res judicata* that the orders of the Court directing the issue of processes of attachment and sale proclamation were binding on the said legal representative, and that he was precluded from questioning the validity of the said orders.

Mungul Pershad Dichit v. *Grija Kant Lahiri* (2), *Lakshmanan Chetti* v. *Kuttayan Chetti*(3), *Bhola Nath Dass* v. *Prafulla Nath Kundu Chowdhry*(4), and *Sheoraj Singh* v. *Kameshar Nath* (5).

APPEAL by the decree-holder B. Coventry and others.

The proprietor of the Keota Indigo Concern obtained on the 1st June 1899 a mortgage decree against one Chakouri Singh, who was the managing member of a joint family governed by

* Appeal from Order No. 176 of 1903, against the order of Gobinda Chandra Basak, Subordinate Judge of Muzaffarpur, dated the 16th March 1903.

(1) (1875) L. R. 2 I. A. 219; 15 B. L. R. 383; 24 W. R. 143.
(2) (1881) L. R. 8 I. A. 123. I. L. R. 8 Calc. 51. 11 C. L. R. 113.
(3) (1901) I. L. R. 24 Mad. 669.
(4) (1900) I. L. R. 28 Calc. 122.
(5) (1902) I. L. R. 24 All. 282.

the Mitakshara system of Hindu Law. On the 26th July 1900 Chakouri Singh died leaving behind him the applicants—Tulshi Pershad Narayan Singh and others as his legal representatives. On the 10th July 1901 the decree-holders applied for execution and asked for attachment and sale of family properties on substitution of the names of Tulshi Pershad Narayan Singh and others, the sons of the deceased judgment-debtor as his legal heirs in possession and enjoyment of the properties. Notices under s. 248 of the Civil Procedure Code were issued and duly served upon the said Tulshi Pershad and others to show cause, why the application for execution should not be granted. No cause having been shown, the Court executing the decree, on the 10th August 1901, directed the substitution to be made. On the 24th August 1901 process of attachment was issued, and it being duly served upon the substituted legal representatives of the deceased judgment-debtor, the Court made an order for sale on the 15th March 1902. Tulshi Pershad and others made no objection throughout those proceedings. On the contrary, they applied for time to pay up the decretal amount, and consented to have the properties sold on the 21st April without a fresh sale proclamation. The decree-holders agreed to this, and the sale was accordingly postponed and the execution case was struck off. On the 24th March 1902 the decree-holders again applied for execution. The properties already attached were advertized for sale on the 16th June 1902. Tulshi Pershad and others again put in an application praying that the sale might be adjourned to the general sale day in July without a fresh sale proclamation. The decree-holders consented to an order to that effect on the other side paying to them a certain sum of money in part satisfaction of the decree. The sale was accordingly ordered to take place in July 1902. But before the sale could take place, on the 10th July 1902 Tulshi Pershad and others put in a petition stating that the properties directed to be sold were joint family properties, and that they were in possession of the same, not as heirs of their father, but by right of survivorship, and as such the said properties could not be sold after the death of their father in execution of a decree against him. The learned Subordinate Judge gave effect to this contention, and held that the execution could not proceed against them.

1904

COVENTRY v. TULSHI PERSHAD NARAYAN SINGH.

Babu Bigambur Chatterjee for the appellant. In this case it was not found that the debt incurred by the father was for immoral purposes, but on the contrary there was evidence to show that the father borrowed money for household purposes. The sons were bound to pay their father's debt, and my client could easily have got a decree against the sons. But now as against them a suit would be barred. The respondents did not appear and show cause upon the notice issued under s. 248 of the Civil Procedure Code, on the contrary they waived their objection by paying a portion of the decretal money and getting the sale adjourned twice on the understanding that they would not raise the plea of irregularity in future. They should not be allowed to take the objection now, both on the ground of estoppel, as also upon the principle of *res judicata*. See *Sadasiva Pillai* v. *Ramalinga Pillai*(1), *Ramkirpal* v. *Rupkuari*(2), *Mungul Pershad Dichit* v. *Grija Kant Lahiri*(3), *Sher Singh* v. *Daya Ram*(4), *Norendra Nath Pahari* v. *Bhupendra Narain Roy*(5), *Lakshmanan Chetti* v. *Kuttayan Chetti*(6).

Babu Umakali Mookerjee (*Moulvi Mustapha Khan* with him) for the respondents. The respondents need not have objected to the notice issued under s. 248 of the Civil Procedure Code, because they were the representatives of their father. The order of the 10th August 1901 directing substitution to be made was a proper order, and it did not affect the position of the respondents, as they said that the decree was a good decree, but it could only be executed against the property of their father during his life time. The properties in the hands of the respondents were not liable. The order of attachment was passed without any notice, and it did not determine any question between the parties. It was not a decree and therefore the respondents could not appeal against that order. The interest of the father in a Mitakshara family in the joint ancestral properties is not assets in the hands

(1) (1875) L. R. 2 I. A. 219; 15 B. L. R. 383; 24 W. R. 143.
(2) (1883) I. L. R. 6 All. 269; L. R. 11 I. A. 37.
(3) (1881) L. R. 8 I. A. 123; I. L. R. 8 Calc. 51, 59. 11 C. L. R. 113.
(4) (1891) I. L. R. 13 All. 564.
(5) (1895) I. L. R. 23 Calc. 374.
(6) (1901) I. L. R. 24 Mad. 669.

1904

COVENTRY v. TULSHI PERSHAD NARAYAN SINGH.

of the son, when the father dies: See *Juga Lal Chaudhuri* v. *Audh Behari Prosad*(1). That being so, the execution could not proceed against the respondents.

Babu Digambur Chatterjee in reply.

May 16.

MACLEAN C.J. AND MITRA J. The respondents and their father Chhakouri Singh, since deceased, were members of a joint family governed by the Mitakshara system of Hindu Law. Chhakouri Singh, the managing member, became indebted to the proprietors of the Keota Indigo Concern, who obtained on the 1st June 1899 a decree against him for Rs. 7,135 and costs.

Chhakouri Singh died on the 26th July 1900, and the respondents are the survivors as well as his legal representatives. One of the decree-holders is also dead, and the appellants are now entitled to the benefit of the decree.

The first application for execution was made on the 10th July, 1901. The appellants prayed for the substitution of the respondents as judgment-debtors in place of their deceased father as his legal heirs in possession and enjoyment of the family properties. They also asked for the levying of execution by attachment and sale of the family properties specified at the foot of the application. Notices under section 248, Civil Procedure Code, were issued and duly served on the respondents to shew cause why the application for execution should not be granted. No cause was shewn, and on the 10th August 1901, the Court executing the decree directed that the respondents should be substituted in place of the original judgment-debtor. On the 24th August 1901, the Court directed the issue of the process of attachment of the properties specified in the application for execution, and, after the process of attachment had been duly served, made an order for sale on the 15th March 1902. The respondents made no objection throughout these proceedings. On the contrary, they applied on that day for time to enable them to pay up the amount of the decree, and they consented to have the properties sold on the 21st April without a fresh sale proclamation. The

(1) (1900) 5 C. W. N. 223.

1904

COVENTRY v. TULSHI PERSHAD NARAYAN SINGH.

decree-holders agreed to this, and the sale was accordingly postponed, and the execution case was struck off.

On the 24th March, 1902, the decree-holders again applied for execution. The properties already attached were advertised for sale on the 16th June, 1902. On that day the respondents again came in with a petition asking that the sale might be adjourned to the general sale day in July without a fresh sale proclamation. The decree-holders consented to an order to that effect on the respondent's paying to them Rs. 1,000 in part satisfaction of the decree. The sale was accordingly ordered to take place in July.

Before, however, the sale could take place, the respondents on the 10th July 1902, put in a petition of objection in which they said that the properties attached and directed to be sold were joint family properties, that they were in possession by right of survivorship and not as heirs of their father, and that such properties could not be sold after the death of the father in execution of a decree against him. The Subordinate Judge has given effect to the contention raised by the respondents, and has held that the execution cannot proceed against them. The decree-holders have appealed.

It is not suggested by the respondents that the debt covered by the decree in execution was contracted by their father for immoral purposes. They are therefore bound to pay their father's debt, and it is not denied that the appellants are entitled to recover the amount from the respondents by a suit subject to rules of limitation, if not by execution of the decree already obtained. The liability being undeniable, the question is simply one as to the mode of recovery. The Court executing the decree had jurisdiction to entertain a suit for the recovery of the amount, and give the appellants in such suit the same relief as they seek by the present execution. That Court has general jurisdiction over the subject matter of the litigation.

The respondents had waived their right, if any, to oppose the levying of the debt by execution, and upon the ordinary principles of estoppel they cannot now be permitted to say that the decree is incapable of execution against them. They allowed the execution to proceed actively for nearly a year without the

slightest objection, and successfully asked the Court twice to stay impending sales on the plea that they would satisfy the decree, if time were allowed. They approbated the proceedings by paying to the decree-holders a part of the debt and thus inducing them to consent to time being granted for payment of the balance. The principle laid down by the Judicial Committee in *Sadasiva Pillai* v. *Ramalinga Pillai*(1) is applicable to the present case.

In *Sadasiva Pillai* v. *Ramalinga Pillai*(1) the appellant had obtained a decree for land with mesne profits thereof up to the date of suit. He, however, petitioned in execution proceedings for subsequent mesne profits with interest thereon and for interest on the amount of mesne profits already decreed. The respondent opposed the application, but not on the ground that the decree did not direct payment of subsequent mesne profits. The Court executing the decree ascertained the amount payable to the appellant as subsequent mesne profits, but did not allow interest. Both parties appealed, and it was for the first time in appeal that the respondent took the objection that the Court could not on the decree direct recovery of subsequent mesne profits. It was not and could not be denied that such mesne profits could be recovered by suit. During the course of the proceedings in the suit itself the respondent's father had executed security bonds undertaking to pay subsequent mesne profits. After the death of his father, the respondent substituted himself for his father as defendant in the suit and assumed the position of the defendant with his rights and liabilities. The Judicial Committee held that the appellant was entitled to realise by execution subsequent mesne profits because:—"Upon the ordinary principles of estoppel the respondent cannot now be heard to say that the mesne profits in question are not payable under the decree." Their Lordships further observed:—"The Court here had a general jurisdiction over the subject matter though the exercise of that jurisdiction by the particular proceeding may have been irregular." The respondents cannot, therefore, be allowed to resist the execution on the plea raised by them.

If the respondents had successfully objected to the orders of the 24th August 1901 and the 15th March 1902, the appellants

(1) (1875) L. R. 2 I. A. 219; 15 B. L. R. 383; 24 W. R. 193.

1904

COVENTRY v. TULSHI PERSHAD NARAYAN SINGH.

could at once have brought a suit for the decretal amount against them. They are now possibly barred from this course by the Statute of Limitation, and are thus gravely prejudiced by the respondent's action in not challenging those orders at the time they were made.

There is another way of looking at the case. The respondents are precluded from questioning the validity of the orders of the Court directing the issue of the processes of attachment and sale proclamation. These orders are binding on them on the principle of *res judicata*. In *Mungul Pershad Dichit* v. *Grija Kant Lahiri*(1) an order made for attachment of the properties of the judgment-debtor after the service of the notice to shew cause, why the decree should not be executed against him, was held to operate as a bar as *res judicata* to the judgment-debtors pleading afterwards that the decree had been barred by limitation at the date of the order. This view has been followed in *Lakshmanan Chetti* v. *Kuttayan Chetti*(2), *Bholanath Dass* v. *Prafulla Nath Kundu Chowdhry*(3) and *Sheoraj Singh* v. *Kameshhar Nath*(4).

We therefore decree the appeal and set aside the order appealed against and direct the Lower Court to proceed with the execution. The costs of this appeal will be borne by the respondents.

Appeal allowed.

S. C. G.

(1) (1881) L. R. 8 I. A. 123; I. L. R. 8 Calc. 51; 11 C. L. R. 113.
(2) (1901) I. L. R. 24 Mad. 669.
(3) (1900) I. L. R. 28 Calc. 122.
(4) (1902) I. L. R. 24 All. 282.