
(1937) 11 MAD CK 0034
In the Madras High Court

G. Meenakshisundaram Aiyar

APPELLANT

Vs

Swaminatha Aiyar

RESPONDENT

Date of Decision : 11-11-1937

Acts Referred:

Registration Act, 1908 — Section 17, 49

Citation : AIR 1938 Mad 456 : (1938) ILR (Mad) 451 : (1938) 48 LW 448 : (1938) 2 MLJ 404

Hon'ble Judges : Pandrang Row, J;Abdur Rahman, J

Bench : Full Bench

Judgement

Pandrang Row, J.—In this appeal the only question for determination is, as stated by Wadsworth, J., whether it is permissible to plead in

bar of execution of the final decree in a mortgage suit an unregistered agreement alleged to have been executed by the decree-holder after the

passing of the preliminary decree and before the final decree whereby the decree-holder agreed not to execute the decree against two out of four

items of the hypotheca which were in the enjoyment and possession of the appellant. The learned Judge appears to have thought that the

agreement was drafted with a view to avoid the application of Sections 17 and 49 of the Registration Act and of Order 21, Rule 2 of the Code of

Civil Procedure. This view does not seem to be correct, because if, as contended by the appellant, it is an agreement relating to the execution of

the final decree arrived at before the final decree was passed, none of these provisions of law would come into operation or affect the agreement in

question and there would have been no need to attempt an)" evasion of such provisions. The general principle was laid down so long ago as 1916

in Chidambaram Chettiar v. Krishna Vathiyar (1916) 32 M.L.J. 13 : ILR 40 Mad.

233, which itself recognised the general rule followed for many previous years. This Full Bench decision was again considered comparatively recently in 1935 in *Adapa Papamma and Another Vs. Darbha Venkayya and Others*, and the judgment of the Full Bench in that case, which was delivered by me, stated that the Full Bench ruling in *Chidambaram Chettiar v. Krishna Vathiyar* (1916) 32 M.L.J. 13 : ILR 40 Mad. 233 covers agreements which relate to the execution of the decree but not agreements which attack the decree itself. In other words, it has been made clear by this Full Bench decision that any agreement which merely relates to the execution of the decree and does not attack the decree itself can be pleaded in bar of execution of the decree. The simple question therefore for decision in this appeal is whether the agreement in this case whereby after the preliminary decree but before the final decree the decree-holder agreed in writing to exclude two items of the hypotheca from execution and to take out execution only as against the remaining two items is an agreement which, relates to the execution of the decree or is an agreement which attacks the decree itself. There is nothing in the agreement to show that it was intended to attack the decree sought to be executed, for it cannot be said that it was intended to attack the final decree which had not yet been passed. There is no doubt that where there is a decree against more than one defendant, an agreement prior to the decree whereby the plaintiff agreed not to execute the decree against one of the defendants can be pleaded in bar of execution of the decree as against him. The present case is more or less similar, for the decree in this case is one for sale and some items otherwise liable to be sold in execution were agreed to be released from such liability to be sold in execution. I do not see how in view of the general rule prevailing in this Presidency an agreement of the kind pleaded in this case can be said to be one which cannot be pleaded. This is not a case in which any money has been paid outside Court when the preliminary decree directs that the money should be paid into Court, in which case it may be said that the payment pleaded is one which is contrary to the preliminary decree. To my mind the point seems to be fairly clear, namely, that the agreement that is pleaded in this case is one that can be pleaded and is not one which the appellant is debarred from pleading in bar of execution of

the decree against the items agreed to be released.

2. The appeal must therefore be allowed with costs. It follows therefore that the order of the first Court allowing execution to proceed without

determining the truth of the agreement pleaded must be set aside as well as all proceedings in execution taken thereafter. The first Court must now

restore execution petition No. 137 of 1930 to its original number on the file and dispose of it according to law after determining, in particular,

whether the agreement pleaded by the appellant is true. The appellant is entitled to have his costs in all the Courts from the respondent decree-

holder.

Abdur Rahman, J.

3. Whatever may be my personal view in the matter, I agree that in view of the Full Bench decisions of this Court it is impossible to come to any

other conclusion.