

(1898) 10 MAD CK 0004
In the Madras High Court

Groves and Others

APPELLANT

Vs

The Administrator - General of Madras

RESPONDENT

Date of Decision : 19-10-1898

Acts Referred:

Citation : (1899) ILR (Mad) 119 : (1898) 8 MLJ 288

Hon'ble Judges : Boddam, J

Bench : Division Bench

Judgement

Boddam, J.—This is an appeal from an order of the Acting Subordinate Judge of Nilgiris on a petition presented on the 6th July, 1896, by

the Acting Administrator-General of Madras u/s 244, Civil Procedure Code, to set aside a sale in execution which took place on the 8th July

1895.

2. The facts are as follows: One Harvey owed Rs. 70,000 to Richard Woolley, and in March 1893 he executed a power of attorney to Richard

Woolley authorising him to dispose of his coffee estates and pay himself. In April 1893, however, Harvey took P.W. Woolley, a son of Richard

Woolley, into partnership with him. In October, 1894, Richard Woolley agreed with Harvey and P.W. Woolley not to exercise his rights under the

power of attorney until 1st June 1896 but in the meanwhile they were to pay him 10 per cent, interest instead of 8 per cent, per annum. In

November, 1894 one Groves, who had commenced an action for a debt of Rs. 17,342 against Richard Woolley (C. S. No. 74 of 1894), applied

for and obtained an attachment order (Exhibit B) before judgment of Harvey's debt, prohibitory orders (Exhibits A, and H) being issued to Harvey

and Richard Woolley on the 27th November, 1894. On the 22nd January 1895,

Groves got judgment and on the 26th February, 1895, applied for execution of his decree by sale of the debt and the sale was ordered for the 18th March 1895. In the meanwhile R.G. Carbry and W. Johnson had obtained a decree against R. Woolley in O. S. No. 13 of 1894 in the District Court of Coimbatore for Rs. 8,059. Their decree was transferred for execution to the Subordinate Judge's Court of Ootacamund and the same debt was attached. The sale ordered for the 18th March was stayed pending the hearing of a petition by R. Woolley to the High Court, but this having been dismissed it was on the 3rd May, 1895, ordered to proceed and on the 4th May 1895 sale proclamation was issued for the 20th May 1895.

3. On. the 11th May 1895 Richard Woolley, the defendant, died in England leaving a will and codicil whereby he appointed three executors one of whom was P.W. Woolley, his son.

4. On the 20th May 1895, P.W. Woolley presented a petition u/s 234 of the CPC stating that his father was dead, that the executors would soon

apply for probate and asking that the sale should be postponed in order that the executors may be joined. His petition was dismissed. On the same

day Messrs. Carbry and Johnson applied for execution of their decree by sale of the same debt. Whether or not any order was made on this

petition is by no means clear, nor is it in any way material for the sale had already been ordered in O. S. No. 74 of 1894 to take place on this 20th

May. The sale commenced and was conducted from the 20th to the 23rd but no bidders came forward and it was consequently adjourned. On the

7th June, 1895, a fresh proclamation was issued fixing the sale for the 8th July 1895, the property to be sold being described as ""a debt of Rs.

70,000 "" due by H.F. Harvey to the judgment-debtor and secured by an "" irrevocable power of attorney and mortgage of certain estates in

Wynaad."" In the meanwhile P.W. Woolley and his sister applied for probate of their father's will and an arrangement was made to transfer the

administration to the Administrator-General of Madras after grant of probate. Prior to the sale taking place the decree-holders in the two suits

entered into an agreement with Harvey and P.W. Woolley to bid at the sale and after purchase to assign the same to Harvey and P.W. Woolley

for the same amount for which they might purchase it. At the sale the decree-

holders were the only bidders and purchased the debt for Rs.

30,682-8-0 and this amount was credited to the two decrees and they assigned their interest (in accordance with their previous agreement) to

Harvey and P.W. Woolley after having got the Court to issue notices u/s 301 of the CPC to Harvey and the Administrator-General to whom the

administration of the estate of Richard Woolley had been transferred on the 9th September, 1895.

5. Now it is apparent on this state of facts that the debt of Rs. 70,000 due from Harvey to the estate of Richard Woolley has been sold to Harvey

and his partner P.W. Woolley for Rs. 30,682 and that the estate of Richard Woolley has lost the balance amounting to nearly Rs. 40,000, the

purchasers (the persons benefited) being the debtor and P.W. Woolley his partner to whom probate was originally granted and the estate of R.

Woolley losing more than half the debt.

6. It is also apparent that the Subordinate Judge has made a mistake in the facts upon which his judgment is based. He states that R. Woolley died

prior to the order for sale. This is not so. The order for sale, as is apparent from Exhibit L, was made on the 26th February, 1895, and though the

sale was stayed by the High Court it was on the 3rd May, 1895, ordered to proceed and the sale proclamation was issued on the 4th May, 1895

for the sale on the 20th May, whereas Richard Woolley did not die till the 11th May 1895 and though the sale on the 20th May 1895 proved

abortive and was adjourned till July 1895 no fresh order for sale was made after the 3rd May which was prior to his death.

7. It was argued before us that the sale was void inasmuch as at the time of the sale the person to whom the debt was due, the judgment-creditor,

was dead and there can be no sale of a dead man's rights, that at the time of the sale the property that was of the dead man was vested in his

executors and as they were not brought on the record or made parties no interest which was vested in them at the time of the sale was sold.

8. On the other hand, it was argued that the effect of selling the debt without the executors being joined was merely an irregularity in publishing or

conducting the sale and the only remedy was u/s 298, Civil Procedure Code, by action.

9. If the argument of the petitioner is well-founded, it is clear that this is not a

mere irregularity in publishing or conducting the sale and Section 298 does not apply.

10. The difficulty in deciding the question lies in adverse decisions which have been come to upon the question. There are cases decided in each of the other High Courts which practically decide the question adversely to the petitioner's contention (though all the cases do not turn upon Section 298), whereas the Madras High Court has practically decided the question the other way.

11. The Subordinate Judge in his judgment says "" In regard to the property sold it is not disputed that it was a simple debt due to the deceased judgment-debtor and secured by an irrevocable power of attorney and that it was sold as a mere debt."" If that is so the only thing that was sold was the right of a dead man to be paid a debt. In Ramaswamy Ayyangar v. Bagirathi Ammal, I.L.R., 6 M., 180 it was held that where a judgment-debtor died after his land had been attached and the judgment-creditor brought the land to sale without making the representatives of the deceased parties to the proceedings the sale was illegal and ought to be set aside. Again, in Krishnayya v. Unnissa Begam, I.L.R., 15 M., 399 where a decree-holder attached land of the judgment-debtor in execution of his decree and a sale proclamation was made and the sale proceeded though the execution-debtor died before the sale, his representatives not having been brought on to the record, it was held that the sale was void and must be set aside. This case is absolutely on all fours with the present case and would decide the question; but the Full Bench case in Sheo Prasad v. Hira Lal, I.L.R., 12 A., 440 was not cited or referred to and as that case decides exactly the contrary, though it does not bind us, we have to determine which is right.

12. For myself (and I say it with all respect to the Judges who constituted the Court), I think the reasons given for the decision of the Allahabad High Court are wrong. The fact that property attached is in the custody of the law does not vest the property in the Court. The attachment does not effect the legal devolution of the property; it only gives at the best the custody of the property, without affecting the right to the property, to the Court. Where the property is a mere chattel which passes by delivery possession of the property may be sufficient to pass the property, but where

the possession of the property may be rightfully in one person though the title to the property is in another, this does not apply.

13. In the present case the only thing sold was the right of a dead man which passes no property, as the dead man had no right at the time of the sale, the rights of the dead man being at the time of the sale in his legal representatives and their rights were not sold or in any way affected because they were not on the record.

14. Section 234 of the CPC says if a judgment-debtor dies before a decree has been fully executed, the holder of the decree may apply to the

Court which passed it to execute the same against the legal representatives. The Allahabad High Court hold that this does not apply to cases where

the judgment-debtor dies after attachment but before sale. I cannot understand why. Take the present case. It cannot be said that the decree had

been fully executed until the sale took place, and if the decree has not been fully executed the section applies. If an execution-creditor does not

choose to avail himself of this section, he must take the consequences. In the present case if the sale had been postponed, as in fact it was, the first

sale having proved abortive, until probate was taken out and the executors P.W. Woolley and his sister had been joined, it is more than probable

that the attachments would have been satisfied and no sale would have been necessary, the result being that the executors or the Administrator-

General acting for them would have had an opportunity of recovering something for the benefit of the estate of E. Woolley, deceased.

15. In *Narayana Kothan v. Kalianasundaram Pillai*, L.L.B., 19 M., 219 the judgment of Subrahmanian "Aiyar, J., rather supports this view though

the case is under a different section and the judgment-debtor did not die but was declared insane before the sale. Now let me consider what will

be the effect if the sale is declared void. The assignees of the purchasers knowing the facts before the sale agreed to buy what was sold for the

price bid by the actual purchasers who were the judgment-debtors and they have paid the judgment-debtors' debts in order to acquire whatever

they bought. If they so bought they cannot recover anything from the judgment-debtors, though the actual debtor to the estate may become liable

to the Administrator-General for the balance of the debt.

16. On the merits, therefore, as well as on the law, I have come to the

conclusion that the sale should be set aside.

17. Davies, J.--I entirely agree with my learned colleague that the legal representatives of the deceased should in such cases be placed on the

record before sale and that in this case the sale was vitiated by the omission; for if P.W. Woolley had been brought in as the executor of his

father's estate, he would not have been able to enter into the arrangement that he did as P.W. Woolley, the debtor to his father's estate, by which

he endeavoured to reduce his own liability to his father's estate by some Rs. 40,000.

18. The appeal is therefore dismissed with costs.