

(1949) 01 MAD CK 0017
In the Madras High Court

M.V.P. Paramanandaswami alias Pichumuthu Pillai	APPELLANT
Vs	
A.K. Shanmugham Pillai	RESPONDENT

Date of Decision : 19-01-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 51

Citation : (1949) 62 LW 220 : (1949) 1 MLJ 318

Hon'ble Judges : Subba Rao, J

Bench : Division Bench

Judgement

Subba Rao, J.—This is an appeal against the order of the lower Court directing the arrest of the appellant in execution of the decree in O.S.

No. 72 of 1946, on the file of the Court of the Subordinate Judge of Tinnevely. The respondent obtained a decree in the above suit against the

appellant for a sum of about Rs. 5,800. In execution of the decree the properties of the judgment-debtor were attached. His sons filed a claim

petition. It was dismissed. The sons then filed O.S. No. 22 of 1947 for setting aside the order on the claim petition and for a declaration that the

properties belonged to them. In that suit on 24th July, 1947, a consent order was passed to the effect that on the plaintiffs depositing into Court a

sum of Rs. 300 the suit properties should not be sold till the disposal of the suit. On 18th December, 1947, the decree-holder filed another E.P.

No. 138 of 1947 for the arrest of the judgment-debtor. On 17th February, 1948, one month's time was granted to the judgment-debtor for

paying the decree amount by alienating the attached properties. It appears that the judgment-debtor did not pay the amount within the time

granted. Subsequently the learned Subordinate Judge passed an order dated 17th March, 1948, directing the arrest of the judgment-debtor. The

main reason given by the learned Judge for the arrest was that in his view the appellant was in possession of sufficient means to satisfy the decree.

2. The judgment-debtor has preferred an appeal against that order.

3. The learned Counsel for the appellant contended that the executing Court had no jurisdiction to direct his arrest as the conditions laid down u/s

51, CPC had not been complied with. The relevant provisions of Section 51 reads as follows:

Provided that where the decree is for the payment of money execution by detention in prison shall not be ordered unless, after giving the judgment-

debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing is satisfied-

(A) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of decree or some substantial part thereof

and refuses or neglects or has refused or neglected to pay the same.

It is conceded that apart from the properties which are the subject-matter of O.S. No. 22 of 1947 the appellant does neither own nor is in

possession of other immovable properties. So far as the subject-matter of the suit is concerned, as we have already stated, there was a consent

order in and by which the properties could not be sold pending the disposal of that suit. The learned Counsel for the respondent argues that in spite

of the consent order the appellant could alienate the properties by private treaty. Though theoretically he might do so, it is impossible to expect that

any person would buy those properties. In the circumstances we hold that the judgment-debtor is not shown to have the means to pay the amount

of the decree and refused or neglected to pay the same.

4. The learned Counsel for the respondent argues that the appellant is estopped from raising the plea that he has not sufficient means to pay the

amount of the decree. He relied upon a consent order passed in E.P. No. 138 of 1947. Under that order one month's time was given to the

decree-holder for alienating the attached properties. The argument is that as he has taken time from the Court for the purposes of alienating the

properties and discharging the decree debt he must be deemed to have impliedly admitted that otherwise he would be liable to be arrested. In

support of this argument the learned advocate relied upon an unreported judgment in R. Srinivasa Ayyar v. Nagore Darga S.A. No. 6220 of

1937. The facts of that case are different, and in our view they have no application to the case before us. In that case two months time was granted to the judgment-debtor for the payment of the amount on an affidavit filed by him to the effect that he would pay the amount of the decree if two months time was granted. He did not pay the amount. Then execution was taken to bring the properties to sale. It was held that the judgment-debtor having agreed to pay the amount and thereby accepted the executability of the decree, he was precluded from contending that the decree was not executable. The learned advocate also relied upon another judgment reported in *Bartlam v. Evans* (1936) 1 K.B. 202. In that case there was an ex parte decree. The judgment-debtor took time to pay the amount; within the time so taken he applied for setting aside the ex parte decree. The learned Judge held, applying the principle of approbation and reprobation that the judgment-debtor could not ask for setting aside the ex parte decree. The principle is very clearly stated at page 213 of that judgment: In answer to the appeal of the defendant he stayed his hand, and in my opinion it is not possible for the defendant, having obtained this advantage on the basis that he did not dispute the validity of the judgment, now to come forward and ask the Court to set it aside upon the plea that he has a defence on the merits or that there are facts entitling him to defend. Scott, L.J., at page 217 states this principle in a different manner, but to the same effect: Another way of looking at the question is to treat it as an instance of the rule that a party cannot both approbate and reprobate, and to hold accordingly that a defendant cannot accept a judgment as final and binding and thereafter seek to set it aside as not binding. But in this case the said principle has no application. It is impossible to say that when a month's time was taken for payment of the amount the judgment-debtor either expressly or impliedly admitted that he was liable to be arrested in case the amount was not paid. In the cases cited before us, when time was taken for payment of the money it was obvious that the judgment-debtor who took time admitted that he was liable to pay the amount under the decree and thereby admitted that there was an executable and valid decree. We therefore cannot accept the argument of the learned Counsel for the respondent on this point either.

5. In the result the appeal is allowed. In the circumstances there will be no order for costs.