
(1934) 08 MAD CK 0066
In the Madras High Court

(Singanamala) Venkataswamy

APPELLANT

Vs

(Pese) Venkataramana Rao and Others

RESPONDENT

Date of Decision : 08-08-1934

Acts Referred:

Citation : AIR 1934 Mad 692(1) : (1935) ILR (Mad) 285 : 152 Ind. Cas. 789 : (1934) 40 LW 599

Hon'ble Judges : Madhavan Nair, J

Bench : Division Bench

Judgement

Madhavan Nair, J.—The petitioner in E.P. No. 36 of 1930 on the file of the District Judge of Anantapur, is the appellant. The appeal raises an important question of law, namely, whether in execution of a money decree, a preliminary decree for partition obtained by the judgment-debtor can be validly sold. The facts are simple and may be briefly stated. The appellant obtained a money decree in O.S. No. 357 of 1918 on the file of the District Munsif's Court, Bellary, against respondent 1 herein. The latter had obtained a preliminary decree for partition against the other respondents in O.S. No. 14 of 1923 (that is O.S. No. 20 of 1925 of the Sub-Court, Anantapur). In execution of the appellant's money decree this preliminary decree for partition was attached and thereafter his decree was transmitted to the District Court of Anantapur to enable him to execute the preliminary decree for partition. Respondent 1, that is, the decree-holder in the partition suit, does not raise any objection; but respondents 4 and 5, who are the contesting respondents, object to the execution on the ground that according to the law of procedure followed in Madras, a preliminary decree attached in execution of a money decree cannot be sold in execution of the latter decree. The appellant contends that even if this be the state of the law, which he says is not correct, inasmuch as respondent 1, the decree-holder in the partition suit, has no objection to the execution of the decree, it is not open to the judgment-debtors in the suit, namely, respondents 4 and 5, to raise any objection.

2. In support of his first contention that the preliminary decree can be sold, the

appellant relies on Order 21, Rule 53, Clause 4, Order 21, Rule 64 and Section 60, Civil P.C. Order 21, Rule 53, provides two ways of executing decrees: by attachment of other decrees passed in favour of the judgment-debtor by other Courts or by the same Court. If the, attached decree is a money decree-which is not, the case here - then by the combined operation of Order 21, Rule 53, Clauses 1 and 2, the decree may be executed by realising the net proceeds in satisfaction of the execution of creditor's decree; if the attached decree is not one for money, then Order 21, Rule 53, Clause 4 applies. This sub-clause provides" for the attachment of the decree. Order 21, Rule 64 says:

Any Court executing a decree may order that...any property attached by it and liable to sale shall be sold,

3. Section 60, dealing with attachment, mentioning certain specific kinds of property liable to attachment and sale in execution of a decree, includes in the list "all other saleable property, moveable or immovable, belonging to the judgment-debtor etc." and ends with the proviso that certain properties mentioned in the various clauses to the proviso shall not be sold. A decree of a Court is not one of the properties which is exempted in the proviso. The appellant contends that reading these provisions of law together, a preliminary decree for partition can be attached under Order 21, Rule 53 and that though "decrees" are not expressly mentioned in Section 60 as property liable to attachment and sale they nevertheless fall within the expression "all other saleable property" which occurs in that section and can therefore be sold by force of that section and Order 21, Rule 64 which deals with sale generally of attached decrees. This argument is supported by the decisions in *Sudarsan Poddar v. Manindra Chandra Pal* 1932 Cal. 80 and *Gopal Nanashet v. Joharmal* (1882) 16 Bom. 522. This statement of the law is not seriously contested by the respondent's learned Counsel; but what he argues is this, that having regard to Rule 178 of the Madras Civil Rules of Practice in Madras, a decree cannot be brought within the expression "all other saleable property" occurring in Section 60, Civil P.C., cannot therefore be sold. Rule 178 says:

No decree shall be ordered to be sold in execution of another decree.

4. The respondent's argument is that though the provisions of the CPC do not prohibit the sale of; an attached decree like the partition decree in this case, Rule 178 specifically provides that such decrees shall not be sold and that effect should be given to that provision contained in the rule. The appellant's learned Counsel argues that since the provisions contained in the CPC do not prohibit the sale of attached decrees, Rule 178 of the Civil Rules of Practice which prohibits their sale is ultra vires if it is to be applied to decrees other than those falling under Clause 1, Rule 53 and should not be given effect to. On this part of the case the question therefore reduces it. self to this: Is Rule 178 of the Civil Rules of Practice ultra vires and inconsistent with the provisions of the CPC as argued by the appellant's learned Counsel? This rule has been in existence for a long time and was apparently enacted under one of the Codes which was in force

before the present Code was enacted. However u/s 157 of the Present Code, rules made under Act 8 of 1859 or under any CPC or any Act amending the same or under any other enactment hereby repealed, shall, so far as they are consistent with this Code, have the same force and effect as if they had been made under this Code and by the authority empowered thereby in such behalf.

5. So if the rule is consistent with the present Code it will have the same force and effect as if it had been made under the present Code. Power of the High Courts to make rules is contained in Section 122, Civil P.C. which says that:

The High Courts" established under the High Courts Act, 1861, (or the Government of India Act, 1915), etc., may, from time to time after previous publication, make rules regulating their own procedure and the procedure of Civil Courts subject to their superintendence, and may by such rules annul, alter, or add to all or any of the rules in the first schedule.

6. These rules, according to Section 128, Civil P.C. must not be inconsistent with the provisions in the body of the Code. The rule in question relates to procedure in execution. Section 51 of the present Code, which is new, specifies the various methods of executing a decree. So far as it is relevant for our purpose it says, subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree (b) by attachment and sale or by sale without attachment of any property.

7. Under Clause 16, of Section 2, Civil P.C. "prescribed" means "prescribed by rules". It follows from Sections 122, 51 and Section 2(16) read together, that the High Court can prescribe by rules, conditions and limitations subject to which the Court may order execution of the decree in the way specified in Section 51. The result in our opinion is that though "decrees" as coming within the expression "all other saleable property" in Section 60, Civil P.C. can be sold, the High Court has power to make a rule, if it desires to do so, stating that no decree shall be ordered to be sold in execution of another decree; and that is what has been done by the Madras High Court in Rule 178. In our opinion, but for Section 51 Civil P.C. Rule 178 would be ultra vires if it is to be applied to decrees other than those falling under Clause 1 of Rule. 53. The decision in *Immedi Setti v. Motilal Daga* 1929 Mad. 641 relied on by the appellant in this connexion contains an obiter dictum of Thiruvengkatachariar, J., that the rule in question is ultra vires. In discussing the question the learned Judge does not refer to Section 51, Civil P.C. which, as we have already stated, is a new section. Before leaving this point we may also mention that our attention was drawn by the respondent's counsel to a decision by Reilly, J., sitting on the Original Side in C.S. No. 510 of 1926 in which he held that having regard to Order 19, Rule 34 of the Original Side Rules which also contains a provision similar to that contained in Rule 174 of the Mofussil Rules of Practice, a preliminary decree in a partition suit cannot be sold in execution of a money decree. This decision, though very relevant, may be held inapplicable on the ground that while rules made u/s 122, Civil P.C. must not be

inconsistent with the provisions in the body of the Code. Section 129 which confers power on a chartered High Court to make rules to regulate its own procedure in the exercise of its Original Civil Jurisdiction, does not contain any such qualification, but only says that the rules must not be inconsistent with the Letters Patent establishing it. Even so, we have no doubt, for the reasons already mentioned, that Rule 178, of the Civil Rules of Practice cannot be held to be ultra vires as being inconsistent with the provisions of the CPC in so far as it is applicable to decrees other than those falling under Clause 1 of Rule 53.

8. The next argument of the appellant is that in view of the fact that respondent 1 decree-holder of the preliminary decree for partition did not object to the sale of the decree it is not open to the judgment-debtors in that decree to take the objection. This argument is based on Subbaraya Rowther v. Kuppuswami Iyengar (1911) 34 Mad, 442. In that case Abdur Rahim, J., while dealing with the question whether the sale of a mortgage decree which was treated as a money decree, u/s 273 of the old Civil P.C., corresponding to Order 21, Rule 53, of the present Code, would make the sale of the decree altogether invalid and without jurisdiction, observed as follows:

I think that it would be extending the application of Section 273 beyond all reasonable limits if we were to hold that it has the effect of rendering the sale of a decree for money held in execution altogether invalid and without jurisdiction. On the other hand it seems to be unreasonable that where no objection is raised to such sale by the holder of the decree or his creditor who, in this case, has in fact brought about the sale, it should be open to the judgment-debtor under that decree to raise any objection.

9. It is the latter observation which we have italicised that is relied upon by appellant; but it is clear from the circumstances of the case that the objection which was held to be unreasonable was taken by the judgment-debtor after the sale was over and not before the sale, as in the present case. In the context the question that was considered by the learned Judge was not whether the attached decree could be sold but the Bale having taken place, the irregularity of the procedure made the sale altogether invalid and without jurisdiction. In the present case the sale of the attached decree has not taken place and we see no reason why before the sale the judgment-debtor should not be allowed to take objection to its salability in view of R 178 of the Civil Rules of Practice. Apparently such a rule does not seem to exist in Calcutta or in Bombay. For the above reasons we confirm the lower Court's order and dismiss this appeal with costs of respondents 4 and 5.