

(1926) 10 MAD CK 0046
In the Madras High Court

Thushtu Balakrishna Chettiar and Others	APPELLANT
Vs	
V. Krishnamurthi Iyer and Others	RESPONDENT

Date of Decision : 13-10-1926

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92

Citation : 100 Ind. Cas. 841

Hon'ble Judges : Odgers, J;Curgenven, J

Bench : Division Bench

Judgement

Odgers, J.—The facts are set out in the judgment of my learned brother which I have had the advantage of reading and I, therefore, need not repeat them here.

2. The first point taken in this appeal against the judgment of the Subordinate Judge of Tanjore is that the decree is merely declaratory and, therefore, not executable in that no act is to be done [of Syama Charan Das Vs. Satya Prosad Choudhury, .] The decree says "that this Court doth order and direct that the 1st defendant shall be liable to make good to the temple Rs. 2,774 and odd and that failing recovery thereof from him, defendants Nos. 6 and 7 be liable to make good the deficiency and also Rs. 338 and the 7th defendant liable to make good to the temple Rs. 60." It is to be observed that the words "order and direct" appear in the decree but some argument has ranged round the words shall be liable to make good." The suit was a suit u/s 92, Civil Procedure Code, and prayed inter alia that the defendants be directed to render accounts of their management of the plaint temple for the last 12 years and for their removal as trustees. The plaintiff clearly charged the defendants with non-maintenance of accounts, improper use of the money and mis-appropriation of the temple funds. In *Saminatha Pillai v. Sundaresa Pillai* 62 Ind. Cas. 911 : 14 L.W. 238 : 29 M.L.T. 267 a Full Bench of this Court held that if the relief is claimed as to amount of misappropriation but the amount is not ascertained and would have to be determined by enquiry in the suit, this brings the case within the mischief of Section 92(d), Civil Procedure Code. In *Nathumal v. Kishori Lal Singh* 28 Ind.

Cas. 886 a decision of the Allahabad High Court, the learned Judges held that the provisions of Section 92 are wide enough to entitle the Court to direct an account against a trustee and to make an order on him to pay the amount found to be due on the taking of those accounts. So it seems to me there is ample authority for saying that a decree passed u/s 92 may order the defendant to pay the amount as may be found due from him. I said that some argument had been addressed to us on the words "shall be liable to make good." There is authority for saying that, if the decree is ambiguous, the judgment may be consulted and the decree construed in the light of the plaint and judgment [of. Upadhyayulu Yegnanarayana v. Kottalanka Makayya 31 Ind. Cas. 478 : (1915) M.W.N. 914 followed in Rangachariar v. Souri Bhattachariar 33 Ind. Cas. 561 both decisions of this Court.] The judgment finds that a certain sum has to be accounted for by the 1st defendant and the learned Subordinate Judge directs that the 1st defendant shall make good to the temple Rs. 2,774 and odd and defendants Nos. 6 and 7 shall make good to the temple, etc. Why the drafting clerk in drawing up the decree introduced the words "be liable to" one cannot guess. But in any case it seems to me the intention is clear enough that the defendants found liable shall pay the various sums to the temple for which they are found responsible. It seems to me, therefore, that this first point must fail.

3. The second contention is that this security bond as to which execution proceedings have been taken and which is really the subject of the appeal ought not to have been accepted by the Court and that it is in fact ultra vires. The argument is that this taking of security must be governed by Order XLI, Rules 5 and 6 in that the decree was under appeal at the time the security was offered and accepted. An argument of this sort comes with the worst possible grace from the appellant who has himself offered security in order to stay execution proceedings instituted against the 1st defendant. Rules 5 and 6 of Order XLI lay down that an appeal shall not operate as a stay of proceedings and further Rules 5(2) and 6 appear to be inapplicable because the appeal time here had expired and there is no question here of any order for sale. Order XLI, Rules 6(1) does not in terms apply, nor need we consider Rules 5(3) and (4). The argument further overlooks the provisions of Order XX, Rule 11(2) which provides for a matter of consent of this sort. The Privy Council in Sadasiva Pillai v. Ramalinga Pillai 2 I.A. 219 : 24 W.R. 193 : 15 B.L.R. 383 : 3 Sar. P.C.J. 519 : 3 Suth. P.C.J. 190 a case similar to this, said that they were not clear that the contention that only the Appellate Court was competent to grant a stay was well-founded. They did not discuss this in detail as the point had not been taken in appeal. Lakshmana v. Sukiya Bai 7 M. 400 : 2 Ind. Dec. 862 appears to me to be quite clear. The case in Sadasiva Pillai v. Ramalinga Pillai 2 I.A. 219 : 24 W.R. 193 : 15 B.L.R. 383 : 3 Sar. P.C.J. 519 : 3 Suth. P.C.J. 190 referred above was followed and the order proceeded on a condition assented to by the decree-holder which the Court approved of and sanctioned. It may also be noticed in connection with the fourth point to be hereafter mentioned that in this case extra interest was also agreed to be paid [of. also Sheo Golam Lall v. Beni-prosad 5 C. 27 : 4 Ind.

Jur. 409 : 4 C.L.R. 29 : 2 Shome L.R. 182 : 2 Ind. Dec. 629 which points out that the Privy Council in Sadasiva Pillai v. Ramalinga Pillai 2 I.A. 219 : 24 W.R. 193 : 15 B.L.R. 383 : 3 Sar. P.C.J. 519 : 3 Suth. P.C.J. 190 allowed execution for mesne profits not specifically included in the decree but in respect of which the defendant had entered into an agreement to account on condition of execution being stayed.] A recent case of our own High Court P.M. Subramania Pillai Vs. Corera and Others, held on a similar agreement that the judgment-debtor was estopped. The case of Satya Shankar Ghosal v. Maharaj Narain Choudhri 17 Ind. Cas. 728 : 35 A. 119 : 11 A.L.J. 83 quoted by the learned Vakil for the appellant seems to be inapplicable as it refers to a Court having executed a decree and then after such execution having restored the property to the person ejected by it, I am of opinion that this matter of contract falls under Order XX, Rule 11(2) and that the appellant cannot be heard to say that the matter is ultra vires.

4. The third point is as to the liability incurred under the security bond. The material portion of it is as follows:

As an undertaking has been given to furnish security for a sum of Rs. 2,774-8-2 and interest thereon at 6 per cent. per annum without prejudice to the right of the 1st defendant objecting as aforesaid and as execution proceedings are going to be stayed on security being furnished for the aforesaid amount, in the event of the High Court Appeals Nos. 85 of 1921 and 118 of 1922 [P.N. Malkajigunda and Others Vs. Ramaswami Chettiar and Others, .] preferred by the 1st defendant against the preliminary decree and final decree in the above suit being decided against the 1st defendant and the 1st defendant directed to pay the amount, I have agreed to pay on behalf of the 1st defendant a sum to the extent of Rs 2,800 with interest at 6 per cent. per annum for and towards the amount to be so decreed and have furnished the under-mentioned property as security. Myself and my representatives are hereby bound to pay the aforesaid amount on the liability of the said property.

5. It seems to me that on the words in italics there can be no question that the liability is personal and that the appellant undertook personally to pay and did not simply furnish security by offering his property. If this is so, Section 145, Civil Procedure Code, clearly applies and, even if one is wrong as to this, *Beti Mahalakshmi Bai v. Badan Singh* 74 Ind. Cas. 927 : 45 A. 649 : 21 A.L.J. 604 : AIR 1924 All. 105 is an authority for the position that a security bond offered and accepted under these circumstances is enforceable u/s 145. It was attempted to be argued that the cases cited on behalf of the respondent were all cases relating to the judgment-debtor himself and that Section 145 applies to the intervention of a third party only. Section 145 says "any person" and I have not heard anything to convince me that there is any difference in law whether a security is furnished by the judgment-debtor himself or whether he obtains the services of some one else to furnish security for him.

6. The fourth point is as to interest. The point was never raised in any of the lower Court's and that is really sufficient for us to refuse to deal with it. I have

already referred to P.M. Subramania Pillai Vs. Corera and Others, and reference may also be made to Subramania Chettiar v. Rajeswara Sethupathi 43 Ind. Cas. 187 : 41 M. 327 : 6 L.W. 762 : (1917) M.W.N. 872 : 1917 34 M.L.J. 84 and Lakshmana v. Sukiya Bai 7 M. 400 : 2 Ind. Dec. 862. A point was attempted to be made here that the sum of Rs. 2,800 mentioned in the security bond was intended to cover the principal and all interest. This, to my mind, is clearly untenable. Having regard to the authorities cited, it seems to me to be perfectly clear that, if a surety offers security which is accepted and undertakes to pay additional interest on condition that execution is stayed, the decree-holder is entitled to insist that that contract shall be carried out on the principle laid down in the Privy Council case in Sadasiva Pillai v. Ramalinga Pillai 2 I.A. 219 : 24 W.R. 193 : 15 B.L.R. 383 : 3 Sar. P.C.J. 519 : 3 Suth. P.C.J. 190.

7. I am of opinion for all these reasons that the appeal fails and must be dismissed with costs of the 1st respondent.

Curgenven, J.

8. This appeal is against an order enforcing a security bond executed by the appellant in the following circumstances. The 2nd and 3rd respondents filed a suit (O.S. No. 33 of 1921 on the file of the Additional Sub-Court of Tanjore) against certain temple trustees, praying for their removal, for accounts, and for the preparation of a scheme. There was a preliminary decree on 9th February, 1921, and a final decree was passed on 21st November, 1921, which among other things made some of the defendants liable for certain sums of money and appointed a Receiver On 15th March, 1921, the trustees appealed to the High Court against the preliminary decree and while this appeal was pending the respondents sought to execute the final decree. Thereupon at the instance of the 1st defendant, whom this decree made liable in a sum of Rs. 2,774-8-2 the appellant executed the security bond now in question, and execution was postponed. Now the Receiver has obtained the order under appeal (E.P. No. 91 of 1925) directing the security to deposit the amount for which he has made himself liable.

9. The order is contested on four grounds, and the first ground is that the decree is merely declaratory and not executable. It is said in the first place that Section 92 of the CPC under which the suit was brought, does not provide for recovery of money but for the rendering of accounts. confining ourselves to the relevant terms of the section, it authorises the institution of a suit" to obtain a decree... (d) directing accounts and inquiries...(h) granting such further or other relief as the nature of the case may require."

10. We have not been referred to any authority for the position that a decree for the payment of money is outside the scope of the section. On the other hand, the view is expressed in Nathu Mal v. Kishori Lal Singh 28 Ind. Cas. 886 that the provisions of Section 92 "are quite wide enough to entitle the Court to direct an account against a trustee and to make an order upon him to pay the amount

found to be due upon the taking of those accounts." It is claimed that this is exactly what the Court has done here. In a Madras case, *Swaminatha Pillai v. Sundaresa Pillai* 62 Ind. Cas. 911 : 14 L.W. 238 : 29 M.L.T. 267 the question was not expressly discussed but the suit was one by the general trustee of a temple to recover money due from a subordinate trustee, and it was held to fall within Section 92, a conclusion which assumed, I think, that the section could give the plaintiff, what he asked for. It appears to me that Clause(h) is quite wide enough to cover relief of this character and that very strong reasons should be required before driving a plaintiff to a separate suit for money found due upon an account taken in a suit under the section. It remains to be seen whether the decree in this suit does, in fact, order payment. The words used are that the Court "doth order and direct that the 1st defendant shall be liable to make good to the temple Rs. 2,774-8-2." To adopt the test employed in *Syama Charan Das Vs. Satya Prosad Choudhury*, and elsewhere, is this a decree which merely declares the rights of parties or does it direct any act to be done? On the one hand, it "orders and directs;" and does not merely "declare," but, on the other hand, by the use of the phrase "shall be liable" it leaves uncertain whether the intention was to direct payment or merely to establish liability. It is, therefore, in my view, ambiguous and there is ample authority for the principle that in such circumstances it is permissible to construe the decree in the light of the pleadings and of the judgment [see *Upadhayayulu Yegnana-rayana v. Kottalanka Makkayya* 31 Ind. Cas. 478 : (1915) M.W.N. 914 and *Rangachariar v. Souri Battachariar* 33 Ind. Cas. 561.] The plaint asks for a direction to the defendants to render accounts of their management of the plaint temple for the past 12 years and concludes with the general prayer "for such further or other relief as the Court may deem fit to grant under the circumstances of the case." The issues included, as No. 10 "to what relief plaintiffs are entitled?" Turning to the final judgment of 21st November, 1921, we find that the material passage of the decretal portion runs as follows:--"The result is that I direct that the 1st defendant shall make good to the temple Rs. 2,774 8-2." This is a perfectly clear direction to pay that sum, and I can only infer that if the learned Judge who wrote those words had taken care to ensure the unambiguous expression of his intention in the decree, it would have in terms directed payment accordingly in the light of the judgment. I decide that the decree is executable and not merely declaratory.

11. The second point taken is that the Subordinate Judge was not competent to stay execution at that juncture and, therefore, that the security bond, which was given in consideration of the stay, is unenforceable. The argument proceeds upon the supposition that the Court must be deemed to have acted either under Rule 5(2) or under Rule 6(2) of Order XLI, because it is said the Code contains no other provision under which it could act. It may be conceded that neither of these rules gave a jurisdiction to stay, since, as regards the former the appeal time had expired, and as regards the latter, no sale had been ordered. Nevertheless, I think that the course taken was clearly permissible. Rule 5(1) of

Order XLI provides that an appeal shall not operate as a stay of execution, so that where a decree is under appeal a Court may proceed with its execution, and may in the course of execution do all such things as may be legal, just as it might do if no appeal had been preferred. Rules 5(2) and 6(2) of Order XLI, so far from interfering with these powers, confer certain additional powers upon the executing Court. The question thus is whether in the ordinary course of execution the Court could have deferred execution upon the security furnished by the appellant, and the answer to this is, undoubtedly, "yes". In the first place it was a consent arrangement and even if the Code made no provision for such a course, it is hardly open to the appellant, who consented to bear his share in it, to dispute his liability under it. The Code, however, does expressly make such a provision for Rule 11(2) of Order XX, enables a Court after the passing of a decree, and with the consent of the decree-holder, to order payment of the amount decreed to be postponed upon such terms as to the taking of security as it thinks fit. That was what was done here and the objection, therefore, fails.

12. The third point is that the bond did not create a personal liability enforceable in execution u/s 145, Civil Procedure Code, and that in so far as the appellant's property was hypothecated under it, the decree-holder's only remedy is by separate suit. Upon the question of fact, I am quite clear that the bond does make the appellant personally liable. A translation made here of the material passage runs thus:

As an undertaking has been given to furnish security for a sum of Rs. 2,774-8-2 and the interest thereon at 6 per cent. per annum without prejudice to the rights of the 1st defendant objecting as aforesaid and as execution proceedings are going to be stayed on security being furnished for the aforesaid amount in the event of the High Court Appeals Nos. 85 of 1921 and 111 of 1922 [Peria Nathamai Malkajigunda v. Tippa Ramaswami Chettiar 78 Ind. Cas. 950 : AIR 1925 Mad. 212] preferred by the 1st defendant against the preliminary decree and final decree in the above suit being decided against the 1st defendant and the 1st defendant directed to pay the amount, I have agreed to pay on behalf of the 1st defendant a sum to the extent of Rs. 2,800 with interest at 6 per cent. per annum for and towards the amount to be so decreed and have furnished the under-mentioned property as security. Myself and my representatives are hereby bound to pay the aforesaid amount on the liability of the said property.

13. This, undoubtedly, comprises a personal covenant to pay as well an agreement to hold liable the property given as security. Accordingly the decree-holder may proceed in execution against the surety, u/s 145 of the Civil Procedure Code, to the extent of his liability, as if he was a judgment-debtor. The question has then been raised as to the position of the hypothecated property, whether it can be proceeded against at all in execution and, if so, whether it may be sold as though under a mortgage-decree for sale. On the first point, neither principle nor authority has been shown for the entire exclusion of this property from execution process so long as the surety remains the owner of it. We have

been referred to two cases, *Chandrabati v. Babu Ram* 27 Ind. Cas. 365 : 19 C.W.N. 178 and *Amir v. Mahadeo Prasad* 38 Ind. Cas. 33 : 39 A. 225 : 15 A.L.J. 76 where it was held that such property cannot be summarily sold as mortgaged property, but that, if it is to be brought to sale in execution the decree holder must give up his mortgage rights. Those cases proceeded upon a consideration of the terms of Section 145 Civil Procedure Code. But the whole question of the enforce of a bond of this character has since been considered by the Judicial Committee in *Raj Raghubar Singh v. Jai Indra Bahadur Singh* 55 Ind. Cas. 550 : 42 A. 158 : 22 O.C. 212 : 6 O.L.J. 682 : 38 M.L.J. 302 : 18 A.L.J. 263 : 22 Bom. L.R. 521 : 46 I.A. 228 : 13 L.W. 82. The bond with which their Lordships dealt with was found to be an instrument of charge only, and not a bond imposing any personal liability, so that Section 145 had no application. Nevertheless, they held that the charge could be enforced by bringing the property to sale in execution. It is important to note this point of similarity between that case and this, that the bond was not executed to any juridical person. In the case before the Privy Council no person at all was mentioned. Here the bond is to the Tanjore Sub-Court, and as their Lordships observe: "The Court is not a juridical person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign. It remains, therefore, that here is an unquestioned liability and there must be some mode of enforcing it, and that the only mode of enforcing it must be by the Court making an order in the suit upon all application to which the sureties are parties, that the property charged be sold unless before a day named sureties find the money." These are in effect the terms of the Subordinate Judge's order now under appeal, and there are no grounds, therefore, for setting it aside.

14. The fourth and the last point relates to interest. The bond undertakes to pay on behalf of the 1st defendant a sum to the extent of Rs. 2,800 (which is I think a round equivalent for the Rs. 2,774-8-2 mentioned earlier in the instrument) with interest at 6 per cent, per annum. The objection made is that u/s 145, Civil Procedure Code, the surety's liability is limited by the amount of the decree, which does not provide for interest. I do not think that this is a conclusive answer to the claim. Execution of the decree against the 1st defendant was deferred upon the surety undertaking to pay the amount with interest, that is to say, the decree-holder withdrew his claim to immediate payment upon these terms, and the surety cannot now be heard to say that his bond so far as it relates to interest cannot be enforced against him. Quite apart from Section 145, the case cited above is authority for such enforcement in execution. I may also refer to another Privy Council judgment *Sadasive Pillai v. Ramalinga Pillai* 2 I.A. 219 : 24 W.R. 193 : 15 B.L.R. 383 : 3 Sar. P.C.J. 519 : 3 Suth. P.C.J. 190 where a judgment-debtor executed a bond undertaking to pay subsequent mesne profits not comprised in the decree. It was held that he was estopped from saying that these profits were not payable under the decree and the principle of estoppel applies equally, in my view, to a surety. The same principle was applied in *Sheo Golam Lall v. Beniprosad* 5 C. 27 : 4 Ind. Jur. 409 : 4 C.L.R. 29 : 2 Shome L.R.

182 : 2 Ind. Dec. 629 and P.M. Subramania Pillai Vs. Corera and Others, . On the authority of Sadasiva Pillai v. Ramalinga Pillai 2 I.A. 219 : 24 W.R. 193 : 15 B.L.R. 383 : 3 Sar. P.C.J. 519 : 3 Suth. P.C.J. 190. I consider, therefore, that execution may issue for the amount of interest for which the bond makes the appellant liable.

15. Thus the appeal fails upon all the points raised, and is dismissed with costs of the 1st respondent.