
(1926) 10 MAD CK 0024
In the Madras High Court

Thushtu Balakrishna Chettiar (dead) and Others APPELLANT
Vs
V. Krishnamurthi Aiyar and Others RESPONDENT

Date of Decision : 13-10-1926

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92

Citation : AIR 1927 Mad 416 : (1927) 52 MLJ 182

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

Bench : Full 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 Cf. Syatna Charan v. Satya Prasad (1922) 36 CLJ 101. 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 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.

3. 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 misappropriation of the temple funds. In *Saminatha Pillai v. Sundaresa Pillai* (1920) 14

LW 238 (FB) 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 *Nathu Mal*

v. Kishori Lal Singh (1925) 28 IC 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 cf.

Upadhyayulu Yegnanarayana, v. Kota Lanka Makayya (1915) MWN 914. followed in *Rangachariar v. Souri Battachariar* (1916) 33 IC 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 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.

4. 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 41, 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 41 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 41, Rule 6(1) does not in terms apply, nor need we consider Rule 5(3) and (4). The argument further overlooks the provisions of Order 20, Rule 11(2) which provides for a matter of consent of this sort. The Privy Council in *Sadasiva Pillai v. Ramalinga Pillai* (1875) LR 21 A 219 . 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* appears to me to be quite clear. The case in *Sadasiva Pillai v. Ramalinga Pillai* 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. Cf also *Sheo Golam Lall v. Beni Prosad* which points out that the Privy Council in *Sadasiva Pillai v. Ramalinga Pillai* 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, *Subramania Pillai v. Corera* (1924) 48 MLJ 121. held on a similar agreement that the judgment-debtor was estopped. The case *Satya Shankar Ghoshal v. Maharaj Narain Sheopuri* ILR (1912) A 119. 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 20, R. 11(2) and that the appellant cannot be heard to say that the matter is ultra vires.

5. 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 High Court Appeals Nos. 85 of 1921 and 118 of 1922 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 undermentioned property as security. Myself and my representatives are hereby bound to pay the aforesaid amount on the liability of the said property.

6. 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* 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.

7. The fourth point is as to interest. The point was never raised in any of the Lower Courts and that is really sufficient for us to refuse to deal with it. I have already referred to *Subramania Pillai v. Corera* (1924) 48 MLJ 121. and reference may also be made to *Subramanian Chettiar v. Rajah of Ramnad and Lakshmana v. Sukuja Bai* ILR (1884)M 400.

8. 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. Rama-Ting a Pillai*.

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

Curgenven, J.

10. 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 respondent 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 surety to deposit the amount for which he has made himself liable.

11. 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, Code of Civil Procedure, under which the suit was brought, does not provide for the 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.

12. 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* 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 to be due upon

the taking of those accounts.

13. It is claimed that this is exactly what the Court has done here. In a Madras case, *Saminatha Pillai v. Sundaresa Pillai* 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 *Syamacharan Das v. Satya Prasad* 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 us 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 *Upadjiyayulu Yegna-narayana v. Kota Lanka Makayya* and *Rangachariar v. Souri Battachariar*. 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.

14. 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.

15. 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 41, 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 41 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 41, 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 20 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.

16. The third point is that the bond did not create a personal liability enforceable in execution u/s 145, CPC 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 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 High Court Appeals Nos. 85 of 1921 and 118 of 1922 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 undermentioned property as security. Myself and my representatives are hereby bound to pay the aforesaid amount on the liability of the said property.

17. 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, Code of Civil Procedure, to the extent of his liability, as if he were 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,

Musammat Chandrabati v. Madho Prasad and Amir v. Mahadeo Prasad 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, Code of Civil Procedure. But the whole question of the enforceability of a bond of this character

has since been considered by the Judicial Committee in Raj Raghubar Singh v. Jai Indra Bahadur Singh. The bond with which their Lordships dealt

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 Subordinate 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. 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 an application to which the sureties are parties, that the property charged be sold unless before a day

named the sureties find the money.

18. 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.

19. The fourth and 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 Rs. 2,774-2-0 mentioned earlier in the instrument) with interest at Rs. 6 per cent, per annum. The objection made

is that u/s 145, Code of Civil Procedure, 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 *Sadasiva Pillai v. Ramalinga Pillai* 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 Loll v. Beniprosad* ILR(1879)C 27. and *Subramania Pillai v. Corera*. On the authority of *Sadasiva Pillai v.*

Ramalinga Pillai I consider therefore that execution may issue for the amount of interest for which the bond makes the appellant liable.

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