

(1944) 11 MAD CK 0031
In the Madras High Court

T.S. Ramanatha Ayyar and Others

APPELLANT

Vs

S. Abdul Salam Sahib and Others

RESPONDENT

Date of Decision : 09-11-1944

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1945 Mad 179 : (1945) 1 MLJ 67

Hon'ble Judges : Bell, J

Bench : Division Bench

Judgement

Bell, J.—In this appeal, the respondents (decree-holders) filed a suit on a usufructuary mortgage claiming a sum of Rs. 40,000 with interest.

In due course a preliminary decree in the usual form was granted and was followed in April, 1937, by a final decree, which related that as the

money ordered to be paid under the preliminary decree had not been paid the mortgaged property or a sufficient part thereof should be sold in

order to satisfy the decree. It was further ordered that the balance, if any, should be paid to the judgment-debtor or other person entitled to

receive the same. In the execution proceedings which followed, the decree-holder asked for an order that the property should be sold. The

judgment-debtor, however, claimed that the property should be sold only after allowance had been made for compensation due to him for acts of

waste committed by the decree-holder or his legal representatives after the decree had been passed. The estimate for this compensation was some

Rs. 15,000. The learned District Judge made a very short order on the petition before him, and dealing with this question of damage he said :

The judgment-debtors will have to file a separate suit as complicated matters requiring a regular suit with issues, not capable of determination in

summary proceedings, will have to be gone into. The waste complained of and the damage claimed arose, according to the judgment-debtors, after the final decree, and so need not be gone into in this suit.

It is manifest that this order is wrong on the face of it. The question raised by the judgment-debtor against the decree-holder either arose in the

words of Section 47 of the CPC "in relation to the execution... of the decree," or it did not. If it so arose, then it fell to be determined by the

learned District Judge, and whether it was complicated or not, he could not avoid this duty. On the other hand, if he decided that it did not so arise,

then he should have dismissed the application as not being maintainable.

2. Whether or not a claim such as this to compensation for acts of waste is a question arising in execution has been considered in several cases. In

Hari Shridhar Prabhu Desai Vs. Sakharam Padmanna Magdum, and Bai Lalbu Vs. Mohanlal Gokaldas Javeri, , it was held that the Court

executing a decree is entitled in the course of execution proceedings to go into the question whether the party in possession of property has

committed waste by wilfully damaging the property after the date of the decree and before the date of application for execution. The damages

when assessed can be recovered from the party at fault in the same proceedings. These Bombay decisions were cited to, and approved by, a

Bench of this Court in Dhanarajagerji v. Parthasarathy ILR (1932) Mad. 49. In that case the Court held that:

When a decree awards a person a certain property, he is entitled to get it in the state in which it was when that decree was passed. He cannot be

said to get it in that state, if the property, while in the opponent's possession, suffered deterioration by damage done by him subsequent to the

decree. Whether, when the property was delivered, it continued to be in the state in which it was when the decree was passed or in the meantime

underwent deterioration and the decree-holder is entitled to compensation for the loss caused by such deterioration is a matter that should be

considered in execution u/s 47 of the Civil Procedure Code.

3. Substituting the word "judgment-debtor" for "decree-holder" we think the principle is the same and is applicable in the circumstances of this

case.

4. The question is discussed at length by Venkatasubba Rao, J., at page 69 where

he cites with approval the Bombay decisions previously referred to. In the nth edition of Mulla on the CPC on pages 179 et sequitur, numerous examples are given of questions which it has been decided have arisen in execution. Amongst these is the question of waste committed by a judgment-debtor after a decree for possession; see page 181. There, as authorities for the proposition are cited the Bombay cases already referred to and also *Varadaraja Iyer v. Parameswara Iyer* ILR (1932) Mad.

49. In *Gangamma v. Mahabala Bhatta* AIR 1937 Mad. 8795, Varadachariar J.'s attention was drawn to the Bombay decisions and the Madras decision already mentioned. He says that his own inclination is against the view taken in those cases but as the amount in question before him was small he did not find it incumbent on him to dissent from them. In our view the decision in *Dhanarajagerji v. Parthasarathy* ILR (1932) Mad. 49 is clear and the principle is well established that the Court in executing a decree is entitled to go into such matters as waste committed whichever side has happened to be in possession since the date of the decree sought to be executed.

5. We think, therefore, that this was a question which fell to be determined by the District Judge and that the case should be sent back to him for such determination on whatever evidence may be brought before him by the parties.

6. It has been urged on behalf of the respondents that the cases to which reference has been made above can be distinguished from this one on the ground that they were suits in which a decree for possession had specifically been granted. In the present case it is said that the decree is no longer one for possession in that the properties are ordered to be sold, and all that the judgment-debtor can hope for is the handing over to him of some balance of money. We think, however, that this argument is fallacious in that the decree clearly says that only such portion of the property is to be sold as is required to discharge the amount due to the decree-holder. It may of course be necessary to sell all the properties; but there is no evidence at the moment at any rate, that this is inevitable. It might well be that with a change in values some of the properties might fall to be delivered to the judgment-debtor. His contention in that case would be that they have not been returned and cannot be returned to him in the state

in which they were mortgaged originally because of the waste Committed by the decree-holder. The decree-holder, he says in effect, has put it out of his own power by his acts of waste to comply with the terms of the decree itself, namely, that in certain eventualities a balance either of money or of properties has to be handed over to the judgment debtor. We think that the construction suggested by counsel for the respondent is a strained one and that one should look at the substance of the relationship between the decree-holder and the judgment-debtor in each case. In the present case, if the acts of waste can be proved, then whatever be the actual form of the decree, it is necessary that some compensation should be given for the judgment-debtor to be placed in the same position as he was at the time when the decree was passed. We think therefore that the principles which we draw from the Bombay cases and from Hari Shridhar Prabhu Desai Vs. Sakharam Padmanna Magdum, are to be preferred and that the question as we have said, should be considered as one arising in the execution of the decree.

7. The appeal, therefore, is allowed. The costs will follow the result of the determination of the question in the lower Court.