

Seshachalam Chetti Vs. Rajam Chetty

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Court : Chennai

Decided On : Aug-23-1898

Reported in : (1898)8MLJ203

Appellant : Seshachalam Chetti

Respondent : Rajam Chetty

Judgement :

H.H. Shephard, C.J.

1. This is an appeal against an order made in execution of a decree, dated the 6th of January 1885. The petition, in pursuance of which the order is made, dated the 21st January 1897, alleges that a prior application for a warrant of arrest is still in force and asks for the attachment of certain immovable property; I am clearly of opinion that such a petition on the face of it was defective and ought not to have been entertained. Assuming that an application made before the expiration of the 12 years period may, notwithstanding the provision contained in Section 230 of the Civil Procedure Code, be granted after the lapse of 12 years from the date of the decree, I see no reason for holding that a decree-holder can, on account of the pending of a prior application, be allowed, after the lapse of the 12 years, to make another application of a totally different sort. This is what the decree-holder by his petition seeks to do, and accordingly I think his petition should have been dismissed. But a case for avoiding the operation of Section 230 of the Civil Procedure Code, not put forward as it should have been in the petition, was

insisted on in the Court below and has been made the ground for justifying the order against the judgment-debtor. The Judge in effect finds that the decree-holder was prevented by the fraud of the judgment-debtor from executing his decree. Now in order to bring the case within the proviso to Section 230, two things have to be proved. It has to be proved that the judgment-debtor used stratagems designed to prevent the execution of the decree, and that the execution of the decree was by such means prevented. As to the first point, there is a great want of precision in the judgment, and I asked the respondent's vakil in vain to explain by reference to the evidence in what respects the judgment-debtor had been guilty of fraud. The Judge says, that several adjournments were granted, and that for 12 years the judgment-debtor had very cleverly managed to put off payment of the debts. He finds that a journey to the north, spoken of by the witnesses, was undertaken with the view to elude arrest. In support of this the only evidence is that the process-servers were unable to find him. No attempt was made to prove that the debtor was aware of the threatened warrant when he left his house. The witnesses only say they heard he had gone away, and it may well be that he did travel about as a broker. But their evidence is of no importance, because it relates, as the Judge observes, to conduct after the 14th January, and what the respondent has to prove is fraudulent conduct before the 6th of January.

2. There being no evidence of fraud, it is hardly necessary to discuss the second point, viz., whether by reason of the debtor's conduct the execution of the decree has been prevented.

3. It is obviously not enough to prove fraud at some time during the 12 years period, because it is quite consistent with such fraud that the decree-holder may at a later period have had full facility for executing his decree. It must be proved that the non-execution of the decree was brought about by the fraud complained of. In the present case the evidence, such as there is, goes to show that it was as much the decree-holder's as the debtor's fault that no property was realized. Apparently, there was property which could be attached, and the attachment of which was in no way impeded by the debtor. The Judge does not find that execution of the decree was, in fact, prevented, and no evidence was indicated which could have led him to such a finding.

4. I think the respondent on whom the burden of proof lay has failed to prove the case which, as I have mentioned, he now alleged in his petition, and, therefore, I must reverse the order with all costs.

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