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Court : Chennai

Decided On : Oct-21-1895

Reported in : (1896)ILR19Mad140

Judge : Shephard and ;Best, JJ.

Appellant : Narayanan Chetti and ors.

Respondent : Arunachellam Chetti

Judgement :

1. It will be convenient to deal first with the contention on the part of the defendants (appellants in No. 40) that there was no consideration for the undertaking given by them, because the order of this Court, dated the 13th April 1885, was an order which the Court had no power to pass under Section 608 of the Code of Civil Procedure. It is said that such an order could not be made against a respondent in a Privy Council Appeal, who had already been put in possession in execution of the decree appealed against.

2. On the other hand, we are referred to a decision of the Privy Council in *Mussumat Jariut-ool-Butool v. Mussumat Hoseinee Begum* 10 M.I.A. 196 in which this point was considered with reference to the law as it stood under the Bengal Regulation of 1797. In that case it was held that it was competent to the Court to require security for protection of property during an appeal even after the execution of the decree. See also *Sooruj Monee Dayee v. Sudanund Mohapattur*

12 W.R. 296. In the face of these authorities we are unable to hold that the order was an illegal one; and even if it was, it is by no means clear that the undertaking given by the defendants at the request of the judgment-debtor or in consequence of the order was given without consideration. It is then argued on the appellants' behalf that, although the undertaking given by them might in its inception be valid, it was competent to them to withdraw it at any time and release themselves and their property from all liability in the future. In the view we take of the document the provisions of the Contract Act relating to revocation of a surety are inapplicable, because no personal guarantee was given by the appellants. At the request and for the benefit of defendants Nos. 8 and 9 the appellants pledged certain property to secure the claim which Arunachellam might eventually have in respect of the mesne profits of the land which was allowed to remain in the possession of the same defendants. We do not understand on what principle the appellants can claim to withdraw their property from pledge before the event has happened on which the accrual of the claim secured by it depends. No authority was cited for the position that a pledge or mortgage given under such circumstances could be cancelled at the will of the person who has given it. The evidence, moreover, does not go beyond showing that the appellants were desirous of being released from liability. This contention of the appellants must, we think, fail.

3. The questions which next arise relate to the construction of the bond. It is much to be regretted that a document of this importance should be drawn in such a slovenly way. The order of the Subordinate Judge directing that security be given is also open to the charge of ambiguity. The Judge who tried the case treated the document as one imposing a personal liability on the executants. We can find no words to justify that view and Mr. Bhashyam Ayyangar did not attempt to support it. To that extent, therefore, the appeal must be allowed.

4. Then it is contended that the intention was that the executants should be liable for the mesne profits of two years only, and reliance is placed on the reference to two years contained in the order of the 9th May 1885. The real order, as it appears to us, is contained in the last two lines of the document in which no limit of time is fixed. But however that may be, we have to find the terms of the obligation in the document executed by the appellants, and if they meant to limit their liability in

point of time, they ought to have seen that words to that effect were introduced. There is no such limit, but, on the contrary, it is clear that the mesne profits for which security is given are the mesne profits accruing up to the date of the decision of the pending appeal. The other terminus, that is, the point of time from which the mesne profits are to be calculated is not stated in the document. The parties might have agreed to make the executants responsible for the profits accruing since the date when Arunachellam was dispossessed; and for the respondent it is argued that the document should be construed as if an agreement to that effect were expressed in it. In our opinion if it was intended to carry back the liability of the executants to an earlier date than the date of execution, the plaintiff, who was taking the document by way of security, ought to have taken care that express words to that effect were introduced. In the absence of such words we think it must be taken to have been intended that the appellants should be chargeable with the profits which might accrue between the date of the bond and that of the decision by the Privy Council. Subject to the limit of Rs. 15,000 expressed in the document and to certain questions about to be considered, the sum recoverable from the appellants is the amount of the mesne profits which accrued between the two dates above mentioned. The figures are given in our order of the 2nd November 1888, which figures were apparently adopted by both parties at the trial. The above-mentioned two dates cover a period beginning in fasli 1295 and ending with fasli 1297. As to the profits of fasli 1295, it will have to be ascertained how much was received after the 16th February 1886, the date of the bond.

5. As to the profits of fasli 1296, which are said to have been Rs. 6,924-6-4, the appellants claim a deduction in their favour on account of a payment made from the collections towards a sum due by Arunachellam under a decree obtained against him by the Sivaganga Zamindar. The payment was made by the receiver who was then in possession, and the decree obtained by the zamindar related to arrears of poruppu due to him by Arunachellam. It appears to us that as Arunachellam has had the benefit of this payment, and as the amount was subtracted from the profits which the defendants might otherwise have had, the appellants, being in the position of sureties, are entitled to deduct that amount from the profits of fasli 1296. In this view it is immaterial that the 'poruppu' on

account of which the payment was made was not the 'poruppu' of the current fasli. The exact amount of the payment must be ascertained. Another question is raised with regard to a sum of Rs. 2,456-6-3, which has been allowed against the plaintiff-appellant in No. 122. No intelligible reason is given for the allowance and it is admitted that the amount did not arise from the profits of the land.

6. We must request the Subordinate Judge to have an account prepared, on the lines above indicated, after holding such inquiry and taking such evidence as may be necessary, and to submit the same within six weeks from the date of the receipt of this order.

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