Arunachellam Vs. Arunachellam and ors.

Arunachellam Vs. Arunachellam and ors.

SooperKanoon Citation : sooperkanoon.com/788817

Court : Chennai

Decided On : Sep-29-1891

Reported in : (1892)ILR15Mad203

Judge : Muttusami Ayyar and ;Wilkinson, JJ.

Appellant : Arunachellam

Respondent : Arunachellam and ors.

Judgement :

1. This is an appeal from an order made by the Subordinate Judge of Madura with reference to the order of Her Majesty in Council, dated the 29th June 1888. The appellant is the purchaser at the Court sale held in execution of the decree in Original Suit No. 44 of 1879 on the file of the Subordinate Court and Respondents Nos. 1 and 2 are the eighth and tenth minor defendants in that suit. The properties, which the appellant purchased, were put up to sale as belonging to first respondent and to the ninth defendant, the father of the second respondent, and knocked down to the appellant, as the highest bidder, on 28th July 1882. An application was afterwards made, on behalf of the respondents, under Section 311 of the Code of Civil Procedure, to set aside the sale on account of certain irregularities, but the Subordinate Judge disallowed their objection. He then passed an order confirming the sale under Section 312, granted a certificate to the appellant under Section 316, and placed him in possession of the properties purchased under Section 318 on the 15th October 1882. From the order

confirming the sale, Respondents Nos. 1 and 2 appealed to the High Court under Section 588, and, on the 16th October 1883, the High Court considered that the sale was irregular and reversing the order of the Subordinate Judge, made under Section 312, set aside the side. The representatives of the first and second respondents applied to be put back in possession, and, on the 26th February 1885, the Subordinate fudge replaced the properties sold in their possession. Meanwhile, the appellant applied for leave to appeal to the Privy Council, and, on the 13th April 1885, the High Court admitted his appeal and ordered that respondents Nos. 1 and 2, by their guardians, should furnish security for redelivery without waste of the properties sold to the appellant and for mesne profits if its order, setting aside the sale, should be reversed by the Privy Council. Pursuant to that order, security was furnished for Rs. 10,000 and Rs. 5,000 on 2nd November 1885 and 20th February 1886. Meanwhile, several creditors, who had obtained decrees against respondents Nos. 1 and 2, attached the villages, which were put up to sale in July 1882, and, on their application, the Subordinate Judge appointed a receiver. From October 1885 the receiver held the villages on behalf of the decree-holders, and the collections, which he remitted to the Subordinate Court from time to time, were applied in satisfaction of their decrees. On the 27th June 1888, the Judicial Committee heard the appeal from the order of the High Court, and held that that order should be reversed, that the order of the Subordinate Judge should be affirmed, and that the respondents should pay the appellant's costs throughout.

2. On the 29th June 1888, Her Majesty in Council passed an order in accordance with the judgment of the Judicial Committee, and, on the 14th August 1888, the High Court transmitted that order to the Subordinate Court for execution. The appellant then applied to be put back in possession of the villages purchased by him on the ground that he was entitled to restitution and the Subordinate Judge restored possession to him on the 25th August 1888. The appellant then claimed mesne profits from the 26th February 1885, when respondents Nos. 1 and 2 were put back in possession with reference to the order of the High Court to the end of fasli 1297 or 30th June 1888. He sought to recover them in execution proceedings not only from respondents Nos. 1 and 2 by attachment of the sale amount deposited in Court, but also from their sureties by attachment of properties offered

as security. The respondents resisted the application and the several questions raised by them for decision are set forth by the Subordinate Judge in paragraph 25 of his order. The Subordinate Judge held that the appellant was entitled to recover mesne profits from respondents Nos. 1 and 2 by application for restitution and found that the amount payable for such mesne profits was Rs. 17,965. But he was of opinion that the appellant was not entitled to proceed against the sureties, respondents Nos. 3 to 11, summarily or by way of execution and that his remedy against them was by a regular suit. Accordingly, he permitted execution against respondents Nos. 1 and 2 for the amount mentioned above, and dismissed the appellant's application so far as it related to enforcement of liability of the sureties, respondents Nos. 3 to 11. In the view which the Subordinate Judge took of the case, as against the sureties, he did not consider it necessary to determine the fifth and sixth questions mentioned in paragraph 25 as arising upon their contention. To this order, both the appellant and respondents Nos. 1 and 2 object and six questions are argued before us, two for the latter and four for the former, the other questions not being pressed upon us.

3. It is urged for respondents Nos. 1 and 2 that no appeal lies from the order made by the Subordinate Judge. The order in question was made in enforcement of the order of Her Majesty in Council and it can only be made under Section 610 of the Code of Civil Procedure, which renders the rules applicable to execution of original, decrees also applicable to enforcement of that order. Any party aggrieved by an order made in execution of a decree of the Subordinate Judge is entitled to appeal, and the objection is, therefore, one which cannot be supported.

4. The next contention is that the Subordinate Judge has misconstrued the order of Her Majesty in Council, that it did not direct payment of mesne profits, and that such payment was not within its purview. It is also urged that the Subordinate Judge placed the appellant in possession under Section 318 and that there was no appeal to the Privy Council from the order made under that Section. The formal order of Her Majesty in Council declares that the appeal was allowed, that the order of the High Court was reversed, and that the order of the Subordinate Judge was confirmed, and directs the several Courts and all parties concerned to conform to it. The true construction is not simply that the relief awarded in terms by

the order restored should be continued to the appellant from the date of it, but also that every benefit fairly and reasonably consequential upon it should likewise be continued to him. That was the construction put by the Judicial Committee upon a similar order in Rodger v. The Comptoir D Escompte de Paris L.R. 3 P.C. 465 It is true that the order, which the High Court set aside on appeal, and which the Privy Council restored, was the one made by the Subordinate Judge, confirming the sale to the appellant under Section 314 and that it said nothing further than that the sale was confirmed. But Sections 316 and 318 which are peremptory directed what relief or benefit should be conferred upon him when an order confirming the sale was made; and the former ordered the issue of a certificate as a title-deed and the latter, the delivery of the property purchased. The three Sections 314, 316 and 318 are, when read together, related to each other, the first as declaring that the purchaser has a valid title, the second as directing that statutory evidence of such title be furnished to him, and the third as giving effect to the sale by transfer of possession without the intervention of a regular suit. The declaration, therefore, that the order of the Subordinate Judge is restored includes a direction necessary to continue to the appellant the consequential benefit which the appellant had secured under Section 318 when the High Court set aside the order of the Subordinate Judge. This is also apparent from the respondent's action when the High Court set aside the sale under Section 314, and he claimed under that order to dispossess the appellant who had been placed in possession under Section 318, and to be put back in possession though there had been no appeal to the High Court from the order made under that Section. We are of opinion that a benefit by way of restitution is clearly within the purview of the direction embodied in Her Majesty's order in Council. It does not appear that this objection was taken when the High Court transmitted Her Majesty's order for execution to the Subordinate Court.

5. No other objection contained in the memorandum of objections is pressed and we dismiss it with costs.

6. Passing on to the objections taken by the appellant, the first and the main contention is that the Subordinate Judge erred in holding that the sureties could not be proceeded against except by a regular suit in respect of mesne profits to

which he is entitled by way of restitution. The sureties being no parties to the order made by Her Majesty in Council, their liability could only be enforced on general principles by a regular suit in the absence of a special statutory direction on the subject. This is conceded, but our attention is drawn to Section 253 of the Code of Civil Procedure and to the words in Section 610, 'in the manner and according to the rules applicable to the execution of its original decrees,' and it is argued that Section 253 ought to be read as part of Section 610. It might be so if there was no special provision inconsistent with such contention in Section 610 as amended by Act VII of 1888, Section 58. That Section provides that 'in so far as the order awards costs to the respondent, it may be executed against a surety therefor to the extent to which he has rendered himself liable, in the same manner as it may be executed against the appellant.' On comparing it with Section 253, it is apparent that the words, 'in so far as the order awards costs to the respondent' are substituted for the words in Section 253, 'the decree may be executed.' The intention it suggests is to make the rule contained in Section 253 part of Section 610 only so far as the order of Privy Council awards costs to the respondent. On the view that the rule embodied in Section 253 was intended to be included by the words, 'according to the rules, applicable to the execution of its original decrees' there is no necessity for the amendment; nor is it sensible. It is suggested that we may treat it as surplusage or as introduced by way of illustration, but we cannot accede to this suggestion without departing from the recognised rules of interpretation. There is reason to think that the amendment was made with reference to a conflict of opinion on the subject between the different High Courts. In Bans Bahadur Singh v. Mughla Begam I.L.R. 2 All. 604 which was decided in January 1880, the question whether the general words in Section 610 'according to the rules applicable to execution of its original decrees' include the rule contained in Section 253, was considered by the Full Bench of the Allahabad High Court. The majority of the Court held that it did, but two of the learned Judges dissented from that opinion. In that case there were two references and one of them related to a surety-bond which secured the costs of the Privy Council, whilst the other covered the whole decree appealed against including the decretal amount and the costs. The learned Chief Justice, who delivered the judgment of the majority of the Court, observed that the legal question was the same in both

and must be answered in the same way. The answer was that all the rules applicable to execution of original decrees including Section 253 were made part of Section 610, the ground of decision being that sureties were intended to be placed on the same footing with defendants, and that there was no reason why a distinction should be made between persons who became sureties in the Original Court before decree and those who became such in the Appellate Court before the appellate decree. The dissenting Judges, however, held that the liability of a surety rested on his bond and not on the decree, and that Section 253, which introduced a rule of substantive law among the rules of procedure, was limited to the class of sureties mentioned therein, and could not be extended to sureties who became such when an appeal was preferred to the Privy Council, and that the general words in Section 610, 'rules applicable to execution of original decrees,' referred only to rules of procedure and did not include a rule of substantive law embodied in Section 253. In Radha Pershad Singh v. Phuljuri Koer I.L.R. 12 Cal. 404 the same question was considered by a Divisional Bench of the High Court at Calcutta with reference to an application for execution against a surety in respect of costs awarded by the Privy Council, and the learned Judges, who decided that case, concurred in the opinion of the dissenting Judges in the Allahabad case. The effect of similar words used in Section 583 was considered by Divisional Benches of the High Courts at Bombay and at Madras in Venkapa Naik v. Baslingapa I.L.R. 12 Bom. 411 and Thirumalai v. Ramayyar I.L.R. 13 Mad. 1 and the Judges who decided those cases agreed with the majority of the Allahabad High Court. All these decisions had been passed except Thirumalai v. Ramayyar I.L.R. 13 Mad. 1 before the amendment was introduced, and, though Section 610 was amended, Section 583 was not similarly amended. The amendment was apparently made with reference to the conflict of opinion between the High Courts at Allahabad and Calcutta, and the insertion of the words, 'in so far as the order awards costs,' to the respondent becomes significant when it is remembered that the majority of the Judges of the High Court at Allahabad held that the whole order, whether it related to costs or the decretal amount, might be enforced against the surety in execution. It is clear, therefore, that the amendment contemplated a distinction between the order as to costs and the other orders and declared that the surety might be proceeded against in respect of the former, implying thereby that but for the

amendment, Section 253 should not be treated as incorporated with Section 610 by the general words, 'according to the rules applicable to the execution of original decrees.' Having regard to the circumstances in which the amendment was made and to the principles on which the use of a special phrase may be held to evidence no special intention on the part of the Legislature as laid down in Hough v. Windus L.R. 12 Q.B.D. 228 we are of opinion that the order of the Subordinate Judge is right so far as it refused the appellant's application to proceed against the sureties in execution in respect of their liability for mesne profits.

7. The second question argued in support of this appeal relates to interest claimed on mesne profits from the end of the fasli on which they became due to the date of payment. The expression 'mesne profits' is explained in Section 211 as including interest on such profits and the respondents Nos. 1 and 2 are ordered to pay mesne profits to the appellant, on the ground that such payment is consequential on the order of the Privy Council. Again, whenever money paid on account of a decree since reversed on appeal is ordered to be refunded, the refund is ordinarily directed to be made with interest. Jaswant Singh v. Dip Singh I.L.R. 7 All. 432 Ram Sahai v. The Bank of Bengal I.L.R. 8 All. 262 and Rodger v. The Comptoir D'Escompte de Paris L.R. 3 P.C. 465 The case of Hurro Doorga Choudhrani v. Maharani Surut Soondari Debi L.R. 9 IndAp 1 on which the Subordinate Judge relies is not in point, the ground of decision being that interest was disallowed by the decree and that in execution the Court is not at liberty to amend it. Nor is Chaku Modan Isana v. Dullabk Dwarka 9 Bom. H.C.R. 7 in point, for it is only an authority for the proposition that the cases contemplated in Section 211 form an exception to the common law rule about interest and it was decided with reference to Section 196, Act VIII of 1859, which did not define mesne profits as including interest. We think that interest at 6 per cent per annum should be awarded on the mesne profits for each fasli from the end of that fasli to the date of payment and that the order of the Subordinate Judge should be varied accordingly.

8. The third objection argued relates to the order of the Subordinate Judge so far as it debits against the appellant the salary of the receiver and his establishment. The receiver was appointed certainly not for the appellant's benefit, or at his request, but at the instance of the first and second respondents' creditors and for

their benefit. The Subordinate Judge considered that, under Section 211, the defendants should not be charged with anything more than what they had actually received. But for the intervention of the first and second respondents, judgment-creditors, it is clear that the appointment of a receiver would have been unnecessary, and it does not appear just that the appellant, who was dispossessed by the respondents Nos. 1 and 2, should bear a charge consequent on their act and not shown to be necessary in the ordinary course of prudent management. This objection must, we think, also be allowed and the order appealed against amended.

9. The only other objection taken on appeal relates to the difference between the average income for fasli 1297 and the amount claimed by the appellant. The Subordinate Judge disallowed the difference, because it was in excess of the amount actually claimed by the appellant. We must take the agreement on which the Subordinate Judge acted to have been made subject to the rule that no more than what the appellant himself claimed was to be awarded to him. We disallow this objection.

10. The order of the Subordinate Judge will be amended to the extent indicated above and confirmed in other respects. Costs will be paid proportionately by appellant and first and second respondents, but the other respondents are entitled to their costs, as many sets as there are separate pleaders.