Privy Council Appeal No. 49 of 1939

M. L. M. Mahalingam Chettiar, minor, by his next friend, Rao Sahib R. Krishna Ayyar - - *Appellant*

v.

Ramanathan Chettiar and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH MAY, 1940

Present at the Hearing:

LORD ROMER

LORD JUSTICE LUXMOORE

MR. M. R. JAYAKAR

[*Delivered by* LORD ROMER]

This is a consolidated appeal against the orders dated the 2nd October, 1934, and the 1st February, 1935, of the High Court of Madras affirming two orders dated the 23rd December, 1931, of the Court of the Subordinate Judge of Ramnad at Madura. The appeal arises out of certain execution proceedings, and the principal question to be determined is whether in the case of cross decrees for money the right of the party holding the decree for the larger amount to set off the smaller decree against him is defeated by reason of the smaller decree having been attached by third parties.

The facts that give rise to the appeal are not in dispute and can be stated with reasonable brevity.

On the 27th November, 1911, the appellant's father, one Ramanathan Chettiar, obtained a decree for a sum of Rs.46,253 odd with further interest and costs against the first respondent and his father Subrahmanyam Chettiar in Original Suit No. 77 of 1911 in the Court of the Temporary Subordinate Judge of Ramnad. On the 12th September, 1917, the first respondent's father the said Subrahmanyam obtained a decree in Suit No. 153 of 1910 against the said Ramanathan Chettiar in the same Court for Rs.33,068-0-9 and further interest. This decree was affirmed by the High Court on the 26th April, 1928. Thereupon viz., on the 25th July, 1928, the appellant's father applied for execution of his decree in Suit No. 77 of 1911 by execution petition No. 109 of 1928. He asked (1) that the decree obtained against him by the 1st respondent's father in Suit No. 153 of 1910 should be attached; (2) that the decree so attached should be executed by him as attaching decree holder and (3) that the amount realized by execution of the attached decree should be set off against the decretal amount due to him in Suit No. 77 of 1911.

The decree in Suit No. 153 of 1910 was accordingly attached by order of the 14th November, 1928. The two decrees having been passed by the same Court, the order was made under R. 53 (1) (*a*) of Order 21. By virtue of subsection (3) of the same rule the attaching creditor thereupon became the representative of the holder of the attached decree. By this time, however, both the father of the appellant and the father of the 1st respondent had died and the appellant and the 1st respondent had become the respective holders of the two decrees.

On the 2nd November, 1928, the appellant filed in the execution proceedings execution application No. 518 of 1928, which is one of the subjects of this appeal. By it he asked that execution should be ordered for the balance due to him from the 1st respondent after deducting the amount due from him under the decree in Suit No. 153 of 1910. The appellant also on the same date filed a memorandum of satisfaction of the decree in Suit No. 153 of 1910. This memorandum is the other subject matter of this appeal.

The application for set off and for execution of the balance of the decree in Suit No. 77 of 1911 and an application by the appellant to have the memorandum of satisfaction recorded came on for hearing together before the Subordinate Judge of Ramnad. The applications were opposed both by the 1st respondent as the judgment creditor in Suit No. 153 of 1910 as well as by the respondents 2 to 10 inclusive. These last mentioned respondents as judgment creditors of the 1st respondent's father had attached the decree in the last mentioned suit on varying dates of which the 26th August, 1918, would appear to have been the earliest. The attachment of that date had been obtained by the holder of a decree that had been passed in another Court in Suit No. 110 of 1915. The attachment had therefore been effected under the provisions of R. 53 (1) (*b*) of O. 21 by the issue to the Court of the Subordinate Judge of Ramnad at Madura by the Court effecting this attachment of a notice in the words following:—

> " You are therefore requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until execution of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment debtor.

Before continuing this narrative of the facts it will be convenient to set out the relevant part of O. 21 r. 18 upon which the appellant relied in support of his applications, and the relevant part of S. 73 of the Code of Civil Procedure upon which the opposition of the respondents was based. They are as follows:—

> R. (18). (1) " Where applications are made to a Court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then—
>
> (*a*) if the two sums are equal, satisfaction shall be entered upon both decrees; and

(*b*) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction of the decree for the smaller sum."

S. 73. " Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons."

The two applications were dismissed by the Subordinate Judge by orders of the 23rd December, 1931. He appears to have taken the view that all the attaching creditors were interested in the smaller decree and that without their concurrence it could not be set off against the larger decree.

The appellant thereupon preferred two separate appeals to the High Court, the one against the order refusing to execute for the balance in Suit No. 77 of 1911, after allowing a set off of the smaller decree, and the other against the rejection of the memorandum of satisfaction of the smaller decree. The appeals came before Madhavan Nair and Pandrang Row JJ. who on the 2nd October, 1934, delivered judgment dismissing both appeals. They rightly pointed out that O. 21 r. 18 only applies where both the decrees are before the Court for execution. But they considered that as the decree in Suit No. 153 of 1910 had not been actually attached by the appellant's father when he filed his execution petition on the 25th July, 1928, he was not at that time entitled to execute that decree. They further held that even if this objection—which they agreed was an extremely technical one—was got over, the decree could not be said to be before the Court for execution as it had been attached by other decree holders and without their concurrence or except on their behalf, the appellant alone could not have the right to execute it. They were also of opinion that the decree was not " capable of execution " in view of the fact that it had been attached by amongst others the decree holder in Suit No. 110 of 1915 at whose instance a request had been directed to the Court of the Subordinate Judge of Ramnad at Madura in the terms that have been referred to earlier in this judgment. " This notice " they said, " has not been cancelled and execution of the decree has not been applied for by the holder of the decree in O.S. No. 110 of 1915 or by his judgment debtor." They accordingly held that the appellant was not entitled to claim the set off in question, and his appeal against the refusal of the Subordinate Judge to allow it was dismissed by order dated the 1st February, 1935. It necessarily followed that the appeal against the refusal to record the memorandum of satisfaction was also dismissed, and the formal order to this effect was dated the 2nd October, 1934.

From these two orders an appeal has now been brought before His Majesty in Council.

It will be seen from this narrative of the facts that the appeal raises questions of considerable general importance. But before considering these questions it is necessary to dispose of a preliminary question that is peculiar to the present case. It is the question whether the appellant is precluded from obtaining an order under Order 21 r. 18 by reason of the fact that neither at the time when his father presented his execution petition No. 109 of 1928 nor at the time when the appellant filed his execution application No. 518 of 1928, the decree in Suit No. 153 of 1910 had actually been attached. The objection is a highly technical one without any merits and their Lordships are reluctant to allow it to prevail. The execution petition sought execution of the decree in Suit No. 77 of 1911 by attaching the decree in Suit No. 153 of 1910 and also execution of the latter decree. It is obvious that relief under the second head could not have been granted at the request of the appellant's father until he had attached the latter decree. But when the appellant's execution application came before the Subordinate Judge on the 23rd December, 1931, the decree had been attached for over three years. There was therefore at that time an application for the execution of the two decrees by the decree holder in the one case and the representative of the decree holder in the second. The fact that this state of affairs did not exist and could not have existed at the time when the execution petition was filed should not, in their Lordships' opinion, be regarded as fatal to the appellant's case.

The other questions arising on the appeal are however both substantial and of general importance. They are the following: (1) Is the right given to the holder of a decree by O. 21 r. 18 of setting off a cross decree for the same or a lesser amount defeated by the attachment by third parties of the cross decree? (2) Where a decree has been attached by more than one judgment creditor, can one of them apply for execution of the decree without the concurrence or consent of all the others? (3) Where a judgment creditor has attached a decree under the provisions of R. 53 (1) (*b*) of Order 21, is that decree "capable of execution" by the Court that passed it before Conditions (i) or Conditions (ii) mentioned in the request addressed to that Court by the Court making the attachment have been fulfilled?

As to the answer to be given to the first of these questions their Lordships are unable to entertain any doubt. The moment that cross decrees such as are mentioned in r. 18 are in existence the decree holders become entitled to the right of set off. It is true that effect cannot be given to the set off until applications are made to the Court for the execution of the two decrees. The right nevertheless is there, and this right of the holder of one decree cannot be defeated by an attachment in favour of a third party of the other decree made after the right of set off has arisen. Whatever may be the true position in law of an attaching creditor, it is plain that he can have no higher rights in respect of an attached decree than were possessed by his judgment debtor. If at

the time of the attachment of a decree the decree holder is liable to have his debt extinguished by being set off against a cross decree against him, the attaching creditor is subjected in respect of the decree to the same liability. The contention that this is not so is founded upon a misapprehension of the true effect of S. 73 of the Code. The right of having the assets of a judgment debtor rateably distributed amongst the executing creditors therein mentioned is confined to assets held by the Court. Where one of the judgment debtor's assets is a decree for the payment to him of a sum of money which is liable to be extinguished by being set off against a cross decree against him, no assets representing that decree will ever come into the possession of the Court if the right of set off be exercised. This was the view taken by Sulaiman C. J. and Bennet J. in the recent case of *Rajman Ram* v. *Sarju Prasad* reported in A.I.R. (1937) Allahabad p. 422. In the judgment in that case it was said:

> " Where there are cross decrees under O. 21. r. 18, a smaller decree must always be set off against the larger decree, and if the smaller decree is attached by some other decree holder, that other decree holder has no greater right than the decree holder whose decree has been attached, and the attaching decree holder cannot claim that he has a right to execute the smaller decree in spite of the existence of a larger decree held by the judgment debtor. In other words the rule laid down by O. 21. r. 8. must be first applied before any question can arise for rateable distribution under S. 73."

With these observations their Lordships desire to express their respectful agreement. But they express no opinion as to what would be the result if the larger decree was passed after the attachment of the smaller one.

The two remaining questions can be dealt with more shortly. Their Lordships can see no reason for thinking that a judgment creditor who has succeeded in attaching a decree is unable to apply to the Court for execution of the decree without obtaining the concurrence or consent of other attaching creditors. On the contrary. R. 53 (3) of Order 21 provides in terms that an attaching creditor shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute the attached decree in any manner lawful for the holder thereof. The fact that there may be other attaching creditors in the same position is immaterial. Any money recovered by the execution creditor will be held by the Court and be subject to the provisions of S. 73 of the Code. Any payments made out of Court to the attaching creditor as representative of the holder of the attached decree would be avoided as against the other attaching creditors by S. 64 of the Code. The other attaching creditors are therefore adequately protected, and their concurrence in or consent to the execution is unnecessary.

The third question mentioned above must, in their Lordships' opinion also be answered in favour of the appellant. To answer it otherwise would be tantamount to saying that, though one of several attaching creditors may apply for execution of the attached decree, he can never obtain any

practical result, if any one of the other attaching creditors has obtained his own decree in a Court different from the one that passed the attached decree and does not join in the application. In their Lordships' judgment a request made under Rule 53 (1) (b) does not have this effect. It is a mere request. The rule does not purport to prohibit the Court to which it is addressed from executing the decree unless the conditions contained in the request are fulfilled. The object of the request is to ensure that the holder of the decree does not himself proceed to execution without the leave of the Court making the attachment. It is not intended to prevent other attaching creditors from asking for execution of the decree.

For these reasons their Lordships are of opinion that the appeal should be allowed. The orders of the 23rd December, 1931, the 2nd October, 1934, and the 1st February, 1935, should be discharged, and an order made as asked by the appellant's execution application No. 518 of 1928, and as asked by his application to have recorded the memorandum of satisfaction of the decree in Suit No. 153 of 1910. The costs of the appellant in the Courts below and his costs of this appeal must be paid by the respondents 1 to 10 inclusive. In the case of the 11th respondent, who was added merely as a formal party for the purposes of this appeal, there will be no order as to costs.

Their Lordships will humbly advise His Majesty accordingly.

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In the Privy Council

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DELIVERED BY LORD ROMER

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