ANDHRA PRADESH HIGH COURT

Kothamasu Venkata Subbayya

Vs.

Udatha Pitchayya

A.A.A.O. Nos. 105 and 107 of 1956

(Basi Reddy, J.)

30.07.1956. 18.09.1959

JUDGMENT

Basi Reddy, J.

1. These two Civil Miscellaneous Second Appeals are directed against the orders passed by the Subordinate Judge, Narasaraopet, in A. S. No. 15 of 1955 and A. S. No. 111 of 1954 respectively, which were appeals filed against the orders of the District Munsif, Gurazala, in E. A. No. 666 of 1954 and E. A. No. 368 of 1949 respectively in O. S. No. 196 of 1943 on the file of the Court of the District Munsif, Gurazala. The two C. M. S. As. arise out of the same set of facts and can conveniently be disposed of by one judgment.

2. To appreciate the contentions raised on behalf of the appellant Venkata Subbayya, it is necessary to set out the facts in some detail.

3. On 12-7-1944 Pitchayya, the respondent in these two C. M. S. As., who will be referred to hereafter as the decree-holder, obtained a decree for Rs. 4864-14-0 against six defendants including the appellant and one Sadasivayya, who were defendants 1 and 2 respectively in O. S. No. 196 of 1943 on the file of the Court of the District Munsif, Gurazala. That was a suit filed for dissolution of partnership and settlement of account. The decree was transferred to the District Munsif's Court, Narasaraopet, for execution and on 5-4-1948 the decree-holder filed E. P. No. 243 of 1948 for attachment and sale of movable properties of the appellant and Sadasivayya, for recovery of the amount due to him under the decree with costs amounting to Rs. 6845-8-3. That application was opposed by the appellant and Sadasivayya alleging that the decree-holder could realise the amount only by sale of the assets of the partnership and not by proceeding against their personal properties, and that the application was barred by time. On 5-7-1948 the learned District Munsif overruled those objections and directed execution to proceed. That order was taken in appeal by both the judgment-debtors and those appeals were A. S. Nos. 341 and 376 of

1948 on the file of the District Court, Guntur. Sadasivayya sought stay of execution proceedings pending the disposal of his appeal A. S. No. 341 of 1948 and made an application I. A. No. 477 of 1948 under Order 41, Rule 5 and Section 151 C.P.C. Notice was ordered on that application. So on 9-7-1948 Sadasivayya again made another application I. A. No. 482 of 1948 in that appeal under Order 41, Rule 5 C.P.C., requesting the Court to receive the amount of Rs. 3500 as security, to keep that amount in deposit till the disposal of his appeal and to grant interim stay of execution of the decree in the lower court in E. P. No. 243 of 1948. In the affidavit it was stated that in his earlier application, notice had been ordered by the Court, that it would take time to serve that notice, that the decree-holder was rushing through to get his properties attached, that the decree-holder had singled out the petitioner to be proceeded against, that in case he was successful in the appeal there would be no possibility of getting himself reimbursed, and as such the amount of Rs. 3500 might be received from him and that he might be given an order of interim stay. On this application, on 9-7-1948 itself, the learned District Judge ordered interim stay and notice, while directing the office to receive the amount of Rs. 3500. To this application, the decree-holder filed a counter on 26-7-1948 opposing the grant of stay on the ground that Sadasivayya had not chosen to deposit the entire decretal amount. On 29-7-1948 the learned District Judge made the following order :

> "Heard learned counsel for both sides. The Petitioner has deposited Rs. 3500 in this Court. Interim stay order is made absolute. No order as to costs."

4. The appeals filed by the appellant and Sadasivayya were transferred to the Subordinate Judge's Court, Guntur, and both the appeals were dismissed by the Sub-Court on 21-2-1949.

5. On 2-3-1949 the decree-holder made an application I. A. No. 230 of 1949 in A. S. No. 341 of 1948 for the issue of a cheque to him for the amount of Rs. 3500 which had been deposited by Sadasivayya. On this, notice was ordered to 29-3-1949. On 16-4-49 it was dismissed as not pressed without notice batta having been paid.

6. Meanwhile on 6-4-1949 the executing court had taken up E. P. 243 of 1948 for further steps and had addressed a letter to the District Court to ascertain as to whether any amount was in deposit to the credit of O. S. No. 196 of 1943 on the file of the District Munsif's Court, Gurazala, and the purpose for which the deposit if any, was made. On 2-5-1949 the District Court informed the executing Court that Sadasivayya had deposited Rs 3500/-in A. S No. 341 of 1948 connected with O. S. No. 196 of 1943 towards security deposit under Bank receipt No. 49 dated 10-7-1948. On receipt of this letter the executing Court directed attachment of the movables of the appellant and on 30-6-1949 a warrant was issued for that purpose.

7. On 4-7-1949 the appellant filed E. A. 368 of 1949 under Order 21, Rule 26 and under Section 151 C.P.C. requesting the Court to recall the attachment warrant which had been issued for the entire decretal amount of Rs. 7277-13-0, alleging that the decree-holder was colluding with

Sadasivayya, that he was executing the decree for the entire amount against the appellant without crediting the amount of Rs. 3500/- deposited by Sadasivayya in the District Court towards the decree debt, that he was prepared to deposit the balance of the decree amount in Court and as such, the warrant should be recalled as otherwise it would cause injury to his trade and reputation.
On the same day after hearing the Advocates of both parties, the District Munsif allowed the application without costs as the appellant deposited 3723-13-0 and as Sadasivayya had already deposited Rs. 3500/- in A. S. No. 341 of 1948, observing that the decree-holder could withdraw the amount of Rs. 3723-13-0 by an application and could ask for sending for the amount from the appellate Court by getting it attached and to proceed for the balance, if any, left after these realizations. Accordingly the warrant of attachment was recalled on 6-7-1949. The amount of Rs. 3723-13-0 so deposited by the appellant, was withdrawn by the decree-holder and E. P. 243 of 1948 was dismissed after recording part satisfaction of the decree.

8. On 7-7-1949 the appellant made an application in E.A. 383 of 1949 before the executing Court to direct Sadasivayya not to withdraw the amount deposited by him in the District Court. On this application, notice was ordered on 12-7-1949 and from that date the matter was posted for counters, but ultimately this application was dismissed on 4-7-1950 for default evidently because the appellant did not choose to prosecute the application.

9. On 12-7-1949 Sadasivayya made an application in the District Court to withdraw the amount of Rs. 3500/- deposited by him on the ground that the appeal (A.S. 341/1948) preferred by him, had been dismissed. On 4-8-1949 the District Judge took a step which has resulted in a crop of applications. The learned Judge allowed the application filed by Sadasivayya and a cheque was issued in favour of his counsel Mr. J.Y. Narayana on 5-8-1949 without notice either to the decree-holder or to the appellant.

10. The order passed by the District Munsif on 6-7-49 allowing the application of the appellant for the recall of the warrant of attachment issued against him, was taken in appeal by the decree-holder in A.S. No. 73/1949 on the file of the Sub-Court, Guntur. This appeal was preferred on 11-8-1949 i.e., 7 days after Sadasivayya had withdrawn the amount of Rs. 3500/- from the District Court. The appeal was allowed on 9-1-1950. That judgment was taken in second appeal by the appellant herein to the High Court and pending the appeal A.A.O. 28 of 1950, a conditional order staying the execution proceedings was passed in C.M.P. No. 1512 of 1950 dated 24-4-1950 by the High Court, under which the appellant was directed to deposit an amount of Rs. 3500/-. The amount was accordingly deposited by the appellant on 29-6-1950 and it was withdrawn by the decree-holder on furnishing security. Ultimately the appeal was allowed by a learned Judge of the High Court on 15-11-1951 in these terms :

> "In these circumstances I set aside the order under appeal and remand the appellant's petition to the executing Court for determination of the contentions stated above as well

as the contentions of fact and law which may be put forward by either party in the re-enquiry by the executing Court. The parties will be at liberty to file fresh objections and adduce fresh evidence."

Earlier in that judgment the learned Judge had directed that the executing Court should determine the question as to whether the deposit of Rs. 3500/-made by Sadasivayya, was a security deposit unrelated to the decree in execution or whether it was in part satisfaction of the decree in the event of the failure of the appeal, and that the appellant must be given an opportunity for showing that this money withdrawn by Sadasivayya was really withdrawn by the decree-holder himself. The High Court also observed that it should be ascertained as to whether Sadasivayya was entitled to draw the money or whether it should go in part satisfaction of the decree.

11. Pursuant to that order, the District Munsif then in office, took up the re-enquiry and held that the payment was one available towards part satisfaction of the decree; that the decree-holder had nothing to do with the withdrawal of the amount by Sadasivayya and dismissed E.A. 368 of 1949. The District Munsif also dismissed another application E.A. 35 of 1952 made by the appellant for restitution in view of the District Munsif's order in E.A. 368 of 1949, This order was again taken up in appeal and then Subordinate Judge allowed the appeal and remanded E.A. 368 of 1949 for fresh disposal in the light of the observations made in his judgment dated 18-11-1953.

12. Again the District Munsif then in office disposal of the matter by an order dated 9-8-1954 holding that the amount of Rs. 3500/- deposited by Sadasivayya was only security deposit for obtaining a stay of execution and was not readily available to the decree-holder towards part-satisfaction of his decree; that there was collusion between Sadasivayya and the decree-holder to enable Sadasivayya to withdraw the amount of Rs. 3500/-, and in that view he allowed the application filed by the appellant to recall the attachment warrant issued against him and directed the decree-holder to proceed against Sadasivayya in the first instance and in case of non-realisation from him, to proceed against the appellant herein. A.S. 111 of 1954 was the appeal against that order and C.M.S.A. 107 of 1956 arises out of the order passed by the Subordinate Judge in that appeal.

13. While the matter was before the District Munsif, the appellant filed another application E.A. 666 of 1954 under Sections 144 and 151 C. P. C. for restitution of the amount of Rs. 3500/-, which had been deposited by him in Court on 29-6-1950 in pursuance of the order made by the High Court in C.M.P. No. 1512 of 1950 granting him stay of execution proceedings in O.S. No. 196 of 1943 pending A.A.O. 28 of 1950 on the file of the High Court.

14. The learned District Munsif dismissed this application for restitution. Against that order the appellant filed A.S. 15 of 1955 before the Subordinate Judge's Court and the Subordinate Judge dismissed the appeal. C.M.S.A. 105/56 is against that order.

15. The learned Subordinate Judge heard both the appeals together and set down the following points for his determination :

> 1. Whether the deposit of Rs. 3500/- in I.A. 482 of 1948 made by Sadasivayya, was a mere security not available for the decree-holder, or was it a part payment towards the decree in the event of the dismissal of the appeal which amount was available to the decree-holder?
> 2. Whether Sadasivayya was entitled to draw the money or whether it should go in part-satisfaction of the decree?
> 3. Whether the amount deposited was in fact withdrawn by the decree-holder himself or whether it should be deemed to have gone in discharge of the decree although it had not in fact gone to him?
> 4. Whether the appellant was entitled to restitution?

The Subordinate Judge decided all the above points against the appellant.
16. Mr. Konda Kotayya, on behalf of the appellant, advanced the following contentions :

> 1. On the facts and circumstances of the case, the lower appellate court was in error in holding that there was no collusion between the decree-holder and Sadasivayya.
> 2. Even if it is held that collusion has not been made out, the legal effect of a deposit made under Order 41, Rule 5(3) (c) C.P.C. is that inasmuch as the security is given by the applicant for the due performance of such decree or order as may ultimately be binding upon him, the security is towards the satisfaction of the decree and the amount so deposited belongs to the decree-holder; and if on the main appeal being decided against the judgment-debtor, the decree-holder fails to withdraw the money, the decree should, to the extent of the amount deposited by the judgment-debtor, be deemed to have been 'pro-tanto' discharged, and the decree-holder cannot seek to recover that amount over again from the same judgment-debtor or another judgment-debtor.
> 3. Since in this case the decree-holder had allowed Sadasivayya to withdraw the amount of Rs. 3500/- deposited by the latter, and had once again withdrawn the amount of Rs. 3500/- deposited by the appellant, the decree-holder must put back the latter amount into Court and the appellant should be granted restitution.

17. As regards the case of collusion alleged by the appellant, on a consideration of the facts and circumstances of the case, I agree with the lower appellate court that it is not possible to spell out collusion between the decree-holder and Sadasivayya with a view to defraud the appellant. Although it was alleged by the appellant that after withdrawing tile amount, Sadasivayya had paid over the amount to the decree-holder, the lower appellate Court was well-warranted in holding that the evidence to that effect given by the appellant, was wholly unacceptable. It must be held therefore that in truth the amount withdrawn by Sadasivayya was never paid over to the

decree-holder and his decree was not satisfied to that extent. Nor can collusion be inferred from the fact that having filed an application before the District Court for the issue of a cheque or the amount deposited by Sadasivayya, the decree-holder had allowed the application to be dismissed as not pressed. It must be remembered that that amount was in deposit in the District Court at Guntur and the execution petition was pending in the District Munsif's Court at Narasaraopet. The decree-holder must have experienced some difficulty in serving notices on the parties in his application before the District Court, and he might well have thought that instead of being tossed about from court to court, he could pursue the less troublesome course of realizing the fruits of his decree by proceeding against the appellant in respect of the entire decretal amount. In this connection another important circumstance to be borne in mind is that when the District Court allowed the application of Sadasivayya to withdraw the amount deposited by him, no notice was ordered to the decree-holder. Had notice been issued to him and he had not opposed the application or had failed to appear and oppose it, then it may be reasonably suggested that the decree-holder had colluded with Sadasivayya and by his conduct enabled Sadasivayya to withdraw the amount; but as no notice was issued to the decree-holder, he could not have known that the District Court was allowing the application of Sadasivayya for the withdrawal of the amount. There is therefore no warrant for the suggestion made by the appellant that the decree-holder had colluded with Sadasivayya with a view to harass the appellant by collecting the entire decretal amount from him alone.

18. In this context a pertinent question to ask is : What did the appellant himself do to prevent Sadasivayya from withdrawing the money? He had filed an application before the executing court to restrain Sadasivayya from drawing out the money lying in the District Court. Notices were ordered on that application to Sadasivayya and to the decree-holder, and they had filed counters. But for some inexplicable reason nothing more was done on that application. The appellant slept over the matter and woke up after one year. He has therefore himself to thank for not getting an order from the executing court or taking steps to bring the matter to the notice of the District Judge before the latter ordered the return of the money to Sadasivayya.

19. The next contention on behalf of the appellant turns on the legal effect of a deposit made under Order 41, Rule 5(3) (c) C.P.C. It is argued by the learned Advocate that since the decree-holder had not taken steps to withdraw the money from the District Court, which money became his, the moment the appeal filed by Sadasivayya was dismissed, and by his default Sadasivayya was able to withdraw the money, the decree-holder must be deemed to have realized that amount in part satisfaction of his decree and the decree must be deemed to have been satisfied 'pro tanto'; and consequently the decree-holder should not have recovered the amount over again from the appellant. In support of this contention, the learned Advocate placed strong reliance on two decisions: the first is *Sheo Gholam Sahoo v. Rahut Hossein*[1] the facts of that case were as follows : The 'mukhtear' of the judgment-debtors who sought for stay of execution of the decree, deposited in the appellate court in lieu of security, money and jewellery of value sufficient to satisfy the decree. The appeal was ultimately dismissed but the decree-holder did not attempt to

draw the amount. More than three years elapsed. Then the 'Mukhtear' sought to withdraw the cash and jewels by an application. The decree-holder resisted the application. The contention was that the decree-holder was precluded by the law of limitation to keep alive his decree and enforce it any longer and as such he was not entitled to resist the application. The Court held that it must be taken that when the appeal was dismissed, the cash and the jewels deposited by the judgment-debtors stood transferred to the credit of the decree-holder and as such there would be no question of limitation and therefore the person who had made the deposit, could not withdraw the cash and jewels. It will be observed that in that case the contest was between the judgment-debtors who had given the security on the one side and the decree-holder on the other, and further the cash and jewels were still in Court and had not been withdrawn by the judgment-debtors. That case would have been on all fours with the present case if the decree-holder here had sought to resist the application made by Sadasivayya to withdraw the amount deposited by him. But that situation never arose in this case because the District Court paid over the amount to Sadasivayya without giving notice to the decree-holder. That case is therefore not an authority for holding, as contended for on

[1] ILR 4 Cal 6

behalf of the appellant, that even if the decree-holder had not received the amount, he must be deemed to have received it and to that extent his decree should be deemed to have been satisfied by importing a fiction.

20. The second case relied on by the learned Advocate for the appellant is *Ramiah Aiyar v. Gopala Aiyar*[2], There the defendant was arrested before judgment and was ordered to be released from custody on depositing in Court a sum of money sufficient to meet the claim in the suit under Order 38, Rule 2 of the Civil Procedure Code. There was subsequently an attachment of the money by a decree-holder and an adjudication of the defendant as an insolvent. The Court held that "the money was paid into Court to the general credit of the action, as such, charged with lien on the plaintiff obtaining a decree in his favor;" and that the attaching creditor's and the Official Receiver's claims were subject to this lien.

21. In the course of the judgment Coutts-Trotter, J. incidentally referred to Order 41, Rule 5 and made an observation at page 1057 (of ILR Mad) , on which reliance is placed by the learned Advocate :

> "It has been uniformly held in England that when, as a condition of granting leave to defend a suit, money is paid into court, that money is the property, subject to his proving his claim, of the plaintiff and that it cannot be attached by the creditors or assignee in bankruptcy of the person who paid it. And that has been followed in this country in the Madras Courts in two different sets of cases. In one case it has been decided that if money has been deposited under Order 41, Rule 5, as a condition of leave to appeal, it is ear-marked to the appeal (What the learned Judge must have meant by "as a condition of leave to appeal" is, as a condition of obtaining stay of execution of the decree appealed

from)."

22. But it is one thing to say that in such a case the money so deposited is "ear-marked to the appeal" or "charged with lien", but quite a different thing to say, as the learned Advocate would have it, that on the appeal being dismissed, the decree is automatically and at once, discharged 'pro tanto' whether the decree-holder gets the money or not. The mere availability of a certain sum for the satisfaction of a decree cannot be equated with the actual satisfaction of the decree.

23. Reference may now be made to a few rulings which directly deal with the legal effect of a security given under Order 41, Rule 5(3) (c) C.P.C. for the due performance of such decree or order as may ultimately be binding upon the applicant seeking stay of execution of the decree appealed from.

24. In *Sujan Singh v. Sardar Har Baksh Singh*[3], the facts were : There was a rent decree against A and B. A paid his share of the decree. The decree-holder applied for execution of the rest of the decree against A. He objected but his objections were overruled. He went up in appeal and then applied for staying of the execution proceedings. The stay was granted on condition that A deposited cash security in the

[2] ILR 41 Mad. 1053

[3] 1955 All. L.J. 241

Court below. A deposited the amount which was the share of the decree payable by B. A's appeal was dismissed and the decree-holder realised the amount deposited in court. A brought a suit for contribution for recovery of the amount from B. B pleaded the bar of limitation. According to him, limitation commenced to run from the date on which the amount had been deposited in court, or at any rate on which the appeal was dismissed. In dealing with that contention, which is precisely the contention raised in the present case on behalf of the appellant, Agarwala J. delivering the judgment of the Division Bench, observed :

> "The only question is whether the suit is barred by time and the argument is that on the date on which the appeal was dismissed the decree-holder became entitled to realise the amount from court. We do not consider that the dismissal of the appeal is the crucial date. The amount was deposited in the court not as payment to the decree-holder under the decree but as security under Order 41, Rule 5 of the C.P.C. Where the security amount is in deposit, it can only be withdrawn if the decree-holder applies to the court for executing his decree by the payment to him of the decretal amount out of the amount in deposit. The security deposit in court does not 'ipso facto' without an order of the court become the property of the decree-holder. In this view of the matter the date on which the court ordered the payment to be made to the decree-holder should be taken as the date from which the amount in deposit would be deemed to be a payment by the plaintiff to the decree-holder."

25. I respectfully agree with the above reasoning. In the present case the decree-holder could not

have laid his hands on the money deposited by Sadasivayya without an order of the District Court, and the District Court made an order allowing Sadasivayya to withdraw the amount even without giving notice to the decree-holder.

26. In *Keshavlal v. Chandulal*[4], Macklin, J. stated the legal position thus, after referring to a decision of the Calcutta High Court in *Chowthmul Mangumull v. Calcutta Wheat and Seeds Association*[5],

> "It was stated moreover (in the Calcutta case) that the money was paid into Court to give security to the decree-holders that in the event of their succeeding in the appeal, they should obtain the fruits of their success. In my opinion this is the correct way of regarding the deposit in the present case also; it was primarily a deposit of security rather than a deposit of the decretal debt, and the decree-holder cannot claim it as his own unless the judgment-debtor fails to satisfy the decree by the payment of the money due under the decree."

These observations were made by the learned Judge in dealing with a case wherein a judgment-debtor who had appealed from the lower court's decree was granted stay on his depositing the decretal amount. The decree-holder was allowed to withdraw the sum on furnishing security but he did not do so. Thereupon on the application of the judgment-debtor, the amount was invested in Government promissory notes and by the time the appeal was disposed of by the Appellate Court, the securities had vastly

[4] AIR 1935 Bom 200
[5] AIR 1925 Cal 416

appreciated in value and the decree-holder claimed the same. The Court held that all
that the decree-holder could claim was the sum found due under the decree with interest and that no more could be given to him, while the profit must go to the person who had made the deposit.

27. It is not necessary to multiply citations. I am clearly of opinion that the amount which had been deposited by Sadasivayya, did not go towards the satisfaction of the decree, and the decree-holder was entitled in law to proceed against either of the judgment-debtors for the realization of the entire decretal amount. It follows that the appellant had not made out a case for restitution.

28. To sum up : There was no collusion between the decree-holder and Sadasivayya; the liability under the decree was joint and several; the decree-holder was entitled to choose the easiest mode of realising the fruits of his decree and he chose to proceed against the appellant. When he chose to proceed against the appellant, his decree had not been satisfied in full and the notional satisfaction suggested by the learned Advocate for the appellant, is, in my opinion, neither good in law nor sound in principle. In these circumstances, it is difficult to see what illegality has been committed by the decree-holder and what fraud has been perpetrated by him that he should be asked to restore the amount of Rs. 3,500/- to the appellant by way of restitution and save the

latter the trouble and expenses of filing a suit for contribution.

29. In this view, it is not necessary to consider the further question whether, even if the decree-holder had received part of the amount due under the decree from Sadasivayya, in the absence of a certification as contemplated by Order 21, Rule 2, C.P.C. the decree could be said to have been satisfied.

30. In the result the two C.M.S. As. must fail. C.M.S.A. 105 of 1956 is dismissed with costs; and C.M.S.A. 107 of 1956 is dismissed but without costs.
Appeals dismissed.