SUNDARAM CHETTIAR *v.* VALLI AMMAL.

Civil Miscellaneous Petition No. 3065 of 1934.
Original Side Appeal No. 36 of 1934.

Sir Owen Beasley Kt., C. J. and King, J.

30th July, 1934.

G. SUNDARAM CHETTIAR ... ... *Petitioner.*

v.

P. A. VALLI AMMAL ... ... *Respondent.*

Summary procedure—Triable issue—Conditional leave to defend—Invalidity—Appeal against—Absence of appeal against the decree passed on non-fulfilment of the condition—Power of appellate Court to stay execution proceedings under that decree—Code of Civil Procedure (V of 1908), O. 41, R. 5.

The plaintiff, a woman, filed under the summary procedure a suit on a promissory note claiming Rs. 3150, the face value of the note being Rs. 4,000. She did not produce the note, her case being that the defendant who made a part-payment of Rs. 1,000 took the promissory note from her saying that he would make an endorsement of the part-payment and return it to her but that he did not do either. The defendant put in an application for leave to defend supported by an affidavit in which he denied the plaintiff's case and stated that the amount paid by him which was only Rs. 950 was accepted by the plaintiff in full satisfaction of the promissory note amount in accordance with a written composition among his creditors. The defendant was given only a conditional leave to defend, the condition being that he should, within a prescribed period, give security for the full amount claimed in the suit. Against this order granting only conditional leave, the defendant appealed. In the meantime, the defendant having failed to give the security within the time fixed, a decree was given to the plaintiff who thereupon sought to execute the decree.

Held: (i) that the defendant should have been given under the circumstances, an unconditional leave to defend, and the order granting him only a conditional leave to defend was erroneous. If a defendant set up a defence in his affidavit in support of his application for leave to defend, which if he should succeed in proving, would entitle him to succeed in the suit, then the Master or the Court who heard the application had no discretion whatever in the matter and unconditional leave to defend must be granted. In such a case there was a triable issue raised by the defendant and it was not open to the Master or any body else other than the trial Judge to go into the merits and discover whether that case was a true one.

Peria Miyana Marakayar v. *Subramania Aiyar* (*1*) *Powszechny Bank Zwiazkony W Plsce* v. *Paros* (*2*) and *Jacobs* v. *Booth's Distillery Company* (*3*) Followed.

and (ii) that though no appeal had been preferred by the defendant against the decree in the suit, the order granting conditional leave to defend having been held to be wrong the decree consequential upon that wrong order had no force, and it was competent for the appellate Court disposing of the appeal against the wrong order to entertain an application under O. 41, R. 5 of the Civil Procedure Code for stay of execution of that decree.

Lakshmi v. *Maru Devi* (*4*) *Ramuvien* v. *Veerappudayan* (*5*) and *Talebal* v. *Abdul Aziz* (6) : Referred to.

(1) 46 M.L.J. 355=19 L.W. 342.
(2) (1932) 2 K.B. 353.
(3) 85 L.T. 262.
(4) 37 Mad. 29.
(5) 37 Mad. 455.
(6) 57 Cal. 1013.

SUNDARAM CHETTIAR *v.* VALLI AMMAL.

Petition praying that in the circumstances stated in the affidavit filed therewith and in the memorandum of grounds in O. S. A. No. 36 of 1934 on the file of the High Court, the High Court will be pleased to issue an order directing stay of further proceedings in C. S. No. 150 of 1934 whether by way of execution or otherwise pending O. S. A. No. 36 of 1934 preferred to the High Court against the order of the Hon'ble Mr. Justice Stone dated the 9th May, 1934 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in application No. 1490 of 1934 in C. S. No. 150 of 1934.

On appeal from the order of the Hon'ble Mr. Justice Stone dated the 9th May, 1934 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in application No. 1490 of 1934 in C. S. No. 150 of 1934.

Mr. *K. S. Krishnaswami Ayyangar* for Mr. *N. T. Shamanna* for the Petitioner.

Mr. *S. Doraiswami Ayyar* for Messrs. *Srinivasaraghavan* and *Thyagarajan* for the Respondents.

JUDGMENT.

The Chief Justice.—This is an application by the defendant in C. S. No. 150 of 1934 for an order staying further proceedings in the suit whether by way of execution or otherwise pending disposal of O. S. A. No. 36 of 1934 which appeal is before us for admission.

The following are the facts of the case. O. S. A. 36 of 1934 is an appeal against an order of Mr. Justice Stone which itself was made on an appeal from an order of the Master. It is necessary to go back to the inception of this matter. The respondent here is a woman. She filed a suit on a promissory note against the appellant claiming Rs. 3150, the face value of the promissory note being Rs. 4000. She was unable to produce the promissory note and sued for the lesser amount upon the following ground, namely, that the defendant had made a part payment of Rs. 1000. That accounts for the suit being for a lesser amount than the face value of the promissory note. As regards her inability to produce it with the plaint she stated in her plaint that she had parted with the promissory note under the following circumstances, namely, that when the defendant made the part-payment of Rs. 1000 he got from her the promissory note in order to take it away with him and endorse thereon the part-payment and that he refused to return it to her or indeed endorse that part-payment upon it. In other words, she alleged that she had parted with the promissory note to the defendant who she stated

occupied a position of confidence and trust upon the fraudulent misrepresentation made by him that he would endorse the part-payment on the promissory note and return it. She accordingly filed her suit under the summary procedure. The defendant put in an application for leave to defend supported by an affidavit in which he denied the plaintiff's case and stated that the amount paid by him was not Rs. 1000 but Rs. 950 and that that payment had been made by him and accepted by the plaintiff in full satisfaction of the promissory note amount by reason of the fact that she together with a number of other creditors of the defendant had agreed to accept payment of four annas in the Rupee which was evidenced by a written composition. The Master was of the opinion that this defence was not *bona fide* or he had doubts as to the *bona fide* nature of it and he accordingly only gave conditional leave to defend, the condition being that the defendant should, within one week from the date of the order, pay the full amount claimed in the plaint into Court. The defendant appealed and Mr. Justice Stone upheld the learned Master's order granting only conditional leave to defend but varied the condition altering it to one that security for the full amount claimed in the suit should be given within fourteen days from the date of his order. It would appear that at that hearing at some stage—we are told by Mr. K. S. Krishnaswamy Ayyangar at the stage when it was recognised that a condition was going to be imposed upon the leave to defend—the defendant said that he would give security. That to my mind is not a matter of very much importance or one which should be allowed to influence us at all in the consideration of this question. He was unable to furnish security. Mr. Justice Stone's order was made on the 9th May last, i. e., two days before the closing of the Court for the summer vacation, and according to that order, upon failure of the defendant to furnish security within the period fixed, the application for leave to defend would stand dismissed with costs. No security was furnished although leave was given to furnish security to the Vacation Officer and at the expiration of the 14 days the application stood dismissed. On the 24th July last a decree was passed in favour of the plaintiff for the amount claimed and no appeal has been presented against that decree. The only appeal before us is the appeal against Mr. Justice Stone's order granting conditional leave to defend. It was urged before us on behalf of the appellant that this was a case in which unconditional leave to defend should have been given. In support of that contention two English decisions were referred to. One of them was *Jacobs* v. *Booth's Distillery Company* (1). The head-note

(1) 85 L.T. 262.

of that case reads as follows :—Judgment should only be ordered under O. 14 where, assuming all the facts in favour of the defendant, they do not amount to a defence in law. Where there is a triable issue, though it may appear that the defence is not likely to succeed, the defendant should not be shut out from laying his defence before the Court either by having judgment entered against him, or by being put under terms to pay money into Court as a condition of obtaining leave to defend. The other case was *Powszechny Bank Zwiazkony W Plsce* v. *Paros* (1), a decision of the Court of Appeal in England. The head-note is as follows: In an action brought on a writ specially indorsed under O. 3 R. 6 by indorsees against the maker of a promissory note, the plaintiffs in an affidavit in support of a summons for leave to sign final judgment under O. 14 R. 1 stated that they were holders in due course of the note, having taken it in good faith for value from the payees without notice of any defect in their title. The defendant in his affidavit in answer stated facts which, if true, showed that the note had been negotiated in fraud of him. The Judge in Chambers made an order, under O. 14 R. 6 that the defendant should have leave to defend the action if he brought a sum of money into Court within a certain time, but that if he failed to do this, the plaintiffs should have leave to sign judgment for the amount claimed. On appeal from this order it was held that a triable issue was raised between the parties, that the mere statement in the plaintiff's affidavit that they had given value without notice of any defect in their indorser's title was not sufficient to decide that issue in the plaintiff's favour, but that the Court must have an opportunity of deciding it, and that therefore the defendant was entitled to leave to defend the action without the condition that he should pay money into Court. It was further held that where a defendant is entitled to leave to defend, the Judge in Chambers cannot under O. 14 R. 6 make an order for conditional leave to defend, the effect of which is to give the plaintiff conditional leave to sign judgment. There is also a decision of this High Court namely, *Periya Miyana Marakayar* v. *Subramania Aiyar* (2), a decision of Sir Walter Schwabe, C.J., and Ramesam, J. The head-note reads as follows: The question to be considered on applications under O. 37 R. 3, Civil Procedure Code, is whether or not a triable issue is disclosed on affidavit or otherwise by the defendant. By triable issue is meant a plea which is at least plausible. The defendant must state what his defence is, and must, as a rule, bring something more before the Court to show that it is a *bona fide* defence, and not a mere attempt to gain time by getting

(1) (1932) 2. K. B. 353. (2) 46 M.L.J. 255=19 L.W. 342.

leave to defend. Once the Court comes to the conclusion that there is a triable issue in the case, it must grant leave to defend without requiring the defendant either to pay the amount claimed into Court or to furnish security therefor. Such a condition must be imposed only in exceptional cases, where, for instance, there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in only in order to obtain further time. It is not necessary to refer to the judgment of Sir Walter Schwabe, C.J., because the head-note to which reference has been made has been taken bodily from his judgment. The position to my mind is clear although it may be one which leads to unfortunate results in some cases. With that, however, we are not concerned. If a defendant sets up a defence in his affidavit in support of his application for leave to defend which if he should succeed in proving would entitle him to succeed in the suit, then the Master or the Court before whom the application comes has no discretion whatever in the matter and unconditional leave to defend must be granted. A triable issue in such a case has been raised by the defendant and it is not open to the Master or any body else other than the trial Judge to go into the merits and discover whether that case is a true one. In this case it is argued by the plaintiff (respondent) that no triable issue was raised. That seems to me to be a hopeless contention. The plaintiff's contention is that the suit promissory note had only been discharged in part and that she is unable to produce it because by fraud the defendant has got possession of it. The defendant denies this and says that by agreement the part-payment was accepted as a complete discharge and that in consequence of this arrangement and part-payment he got possession of the promissory note. Clearly there are two issues to be tried. I am, therefore, of the opinion that the orders made by the learned Master and by Mr. Justice Stone were wrong and that unconditional leave to defend ought to have been given. As it has been agreed by both the applicant and the respondent that the hearing of the application for the admission of this appeal may be treated as the hearing of the appeal, the appeal must be allowed.

A further point raised is that this Court is not competent to grant the order asked for, namely, a stay of execution by reason of the fact that no appeal has been presented against the decree which was passed on the 24th July. That is quite true. No appeal has been filed against that at all. It is pointed out that under O. 41, R. 5, Civil Procedure Code, where a decree has been passed and no appeal has been presented against it the proper Court to which an application should be presented for stay of execution

within the available time is the Court which passed the decree and that it is only in cases where an appeal has been presented against a decree that the appellate Court has seisin of the case and can order or refuse stay of execution of the proceedings. At first sight, this contention of the respondent would appear to be right but it has been contended that where as a matter of fact it is held by the appellate Court that an order consequential upon which a later decree is passed was wrong the effect of that ruling is to render the final or later decree as of no force and that has been the view taken by this Court for many years and accepted by the Allahabad High Court and recently by a Full Bench of the Calcutta High Court. The first case upon this point to which our attention was drawn was *Lakshmi* v. *Maru Devi* (1). There it was held that an appeal against a preliminary order in execution can be filed even after the date of the final order which merely carries out and is consequential to the preliminary order though no appeal has been filed against the final order and that with the reversal of the earlier order, the later order which depends for its validity upon the earlier one *ipso facto* ceases to have any force. It is argued therefore that if in this appeal it is held that Mr. Justice Stone's order was wrong the later order, namely, the decree which was passed in consequence of it is of no force. There is another decision upon this point, viz., *Ramuvien* v. *Veerappudayan* (2) in the same volume to the same effect, and there is also a decision of the Calcutta High Court, *Talebali* v. *Abdul Aziz* (3). It is quite true that those cases were cases in which a preliminary decree had been passed but it seems to me, although I say so with some hesitation, that the same effect must be given to cases where a wrong order has resulted in a wrong decree. Clearly, if in this case the order which is under appeal and which in my opinion was a wrong order had not been made, the defendant would have been given leave to defend and the result might have been quite different to what it has been. I am, therefore, of the opinion, though as I said before I came to this opinion with some hesitation, that it is competent in such a case as this for the appellate Court to entertain an application for stay of proceedings under O. 41, R. 5, Civil Procedure Code. At the same time sub-clause (3) of that rule prevents an order for stay of execution being made unless security has been given by the appellant for the due performance of such decree or order as may ultimately be binding upon him. It appears to me that that provision is mandatory and that, no security having been given, it

(1) 37 Mad. 29. (2) 37 Mad. 455
(3) 57 Cal. 1013.

is impossible for this Court to order stay of execution; and stay of execution must accordingly be refused.

It is most desirable that this case should be tried at the earliest possible moment in view of the fact that no stay of execution has been ordered. The order, therefore, is that this case should be tried on the Original Side by the Original Side Judge who is hearing this class of cases on next Friday. We are told that the parties will then be ready and in any case there is no reason why they should not be ready. No pleadings will be necessary and the affidavits so far filed will be the pleadings in the suit and no issues need be framed.

Costs of the application for stay of execution, costs of the appeal and costs in the Courts below will be costs in the cause.

King J:—I agree.

N. R. R. *Ordered accordingly.*

Civil Revision Petition No. 847 of 1930.

Curgenven, J.

9th February, 1934.

Kaipath MOIDIN KUTTI (deceased) and others ... *Petitioners.*

v.

Karuvarakkandi Parambil Veshala PUTHIYA PURAYIL alias Ambu ... *Respondent.*

Landlord and tenant—Privity of contract—Absence of, between lessor and lessee's mortgagee—Latter's non-liability to lessor—Res judicata—*If a ground for revisional interference—Civil Procedure Code (V of 1908) S. 115.*

The plaintiff's brother was the original usufructuary mortgagee who had as such leased the property back to the mortgagor. Subsequenty one K took a usufructuary mortgage of the mortgagor's rights, that is this later mortgage comprised both the mortgagor's equity of redemption and his rights as the lessee. The defendant purchased K's rights in Court auction and thus occupied the same position as mortgagee of the lessee. In two previous Small Cause suits, the plaintiff obtained decrees against the defendant for rent, and the relationship of landlord and tenant was not then disputed. The questions to be decided in the present suit were: (i) whether the defendant was legally liable to pay rent to the plaintiff and (ii) whether the matter had been so decided in the previous suits as to constitute *res judicata*. The lower Court held that the decrees in the previous suits did not constitute *res judicata* and that there being no privity of contract between the plaintiff and the defendant who in law occupied the position of the plaintiff's lessee's mortgagee, the defendant was not liable for rent,

Held: (i) that though the decision of the lower Court that there was no privity of contract between the plaintiff and the defendant was correct and in accordance with the Full Bench ruling in *Thethalan* v. *The Eralpad Rajah, Calicut* (*1*), yet the decrees in the prior suits operated as *res judicata* on the

(1) 40 Mad. 1111.