

AYYAVAYYAN
 v.
 SHASTRAM
 AYYAR.

This decision was also followed by the High Court of Allahabad in *Jaswant Singh v. Dip Singh*(1) and was held not inconsistent with the Full Bench ruling in *Ram Ghulam v. Dwarka Rai*.(2)

We are of opinion therefore that the Court has power to award appellant interest upon the amount improperly levied. We set aside the order of the Subordinate Judge and allow appellant interest upon the sum levied at the rate of 6 per cent. per annum from the date of his payment of the sum to the Court Amin till the date of refund. The respondent must pay appellant's costs in this appeal.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
 Mr. Justice Parker.*

VENKATARAMAN AND OTHERS (PETITIONERS AND APPELLANTS)

and

MAHALINGAYYAN (RESPONDENT)*

1886.
 July 30.
 August 4.

*Civil Procedure Code, ss. 248, 295, 622—Execution Proceedings—Rateable distribution—
 Application for further execution—Notice.*

A, and subsequently B, obtained decrees against X, in execution of which the same land was attached, and B obtained an order for rateable distribution. Neither decree was satisfied. A then applied for attachment of other property and the sale was fixed for 28th September. On 25th September B filed a petition for further attachment under ss. 250, 274, and also a petition for rateable distribution under s. 295 of the Code of Civil Procedure. The District Judge rejected the application for execution as being too late, and then the application under s. 295, because no application for execution was pending :

Held, on appeal, that the petition for execution was wrongly rejected, but that the High Court could not, under s. 622 of the Code of Civil Procedure, revise the order rejecting the application under s. 295 for rateable distribution.

PETITION, under s. 622 of the Code of Civil Procedure, praying the High Court to revise the order made by J. A. Davies, Acting District Judge of Tanjore, on civil miscellaneous petition No. 757, and Appeal against the order passed by the same Court on civil miscellaneous petition 758 of 1885, between the same parties.

(1) I.L.R., 7 All., 432.

(2) I.L.R., 7 All., 170.

* Appeal against Order 7 of 1886 and C.R.P. 10 of 1886.

The facts are stated in the judgment of the Court (Collins, VENKATARAMAN C.J., and Parker, J.).

Rámá Ráu for petitioners and appellants.

Subramanya Ayyar for respondent.

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MAHALINGAYAN.

JUDGMENT.—A decree was passed against the respondent, Gopala Mahalingayyan, in original suit 2 of 1884, on the file of the District Court of Tanjore, in execution of which certain lands were attached, the sale of which was fixed for 1st December 1884.

The present petitioners had got a decree for money against respondent in the Subordinate Court of Tanjore (original suit 74 of 1882), in execution of which the same land was attached and the sale fixed for 17th November 1884.

By miscellaneous petition 640 of 1884, the petitioners applied on 15th November 1884 to the District Court for rateable distribution of the sum realized by the sale, and the petition was granted, but neither of the two decrees was fully satisfied.

The plaintiff in original suit 2 of 1884 again applied for the attachment of other properties.

In petition No. 757, the present petitioners applied for further execution in original suit 74 of 1882, but the Acting District Judge, on 25th September 1885, rejected the application on the ground that it was too late, since the lands of which the attachment was sought were to be sold on 28th September in execution of the decree in original suit 2 of 1884, and as notice had to go to the judgment-debtor, more than a year having elapsed since the date of the last application. They appeal against this order, urging that no notice under s. 248 of the Code of Civil Procedure was necessary, since they had made an application for execution on 15th November 1884, in civil miscellaneous petition 640, which order had been subsequently confirmed by the High Court on appeal.

Simultaneously with applying for further execution on 24th September 1885, the petitioners by civil miscellaneous petition 758 of 1885 asked for rateable distribution of the assets to be realized by the sale to take place on 28th September. The Acting District Judge disposed of this on the same day (26th September), having previously disposed of the application for execution, and rejected it as no execution petition was pending.

We have no doubt that the Judge was in error in dismissing the application for further execution. No notice under s. 248 of

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the Code of Civil Procedure was necessary, and even if it had been, all that is required by s. 295 is that the petitioners should apply to the Court for rateable distribution before the assets have been realized, and this they did in the present case.

We have, however, further to consider whether this Court can, and should interfere under s. 622 of the Code of Civil Procedure, since no application was pending, one having been rejected by mistake, when the Judge passed the order refusing rateable distribution. As, at the moment of the rejection of the application no execution petition was pending, it can hardly in strictness be said that the Judge failed to exercise a jurisdiction vested in him by law, though he passed an order which he would not have done had he not been under a mistake in the first instance. It might be possible to hold that the petitioners were entitled to be placed in the same position as they would have been had the Judge not made a mistake, but they are not without their remedy, and as the assets have probably now been already distributed, we will refer them to the remedy indicated in the penultimate clause of s. 295.

The Appeal against the order refusing execution must be allowed with costs, and the Civil Revision Petition 10 of 1886 is dismissed, but without costs.
