APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

LAKSHMI (APPELLANT)

and

KUTTUNNI (RESPONDENT).*

1886.
Sept. 24, 29.

...l Procedure Code, s. 311—"Decree-holder" not restricted to decree-holder who has attached, but includes one entitled to ratable distribution under s. 295.

Where one decree-holder had attached certain land and another decree-holder against the same debtor had entitled himself to ratable distribution of the assets under s. 295 of the Code of Civil Procedure:

Held that the latter was entitled to apply under s. 311 of the Code to set aside the sale on the ground of material irregularity.

APPEAL against an order of J. A. DeRozario, District Múnsif of Kutnád, under s. 588 (16) of the Code of Civil Procedure.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (Kernan and Brandt, JJ.).

Gopálan Náyar for appellant.

Anantan Náyar for respondent.

KERNAN, J.—In suit No. 537 of 1884 the plaintiff therein got a decree, applied for execution and sale of Palisseri and other lands held by the defendant. The land was attached. One P. V. Kuttunni proved a claim, by way of mortgage, before the Múnsif against the lands for Rs. 300. Owing to an error in the Múnsif's Court, the proclamation issued by the Court stated that the property was to be sold subject to the mortgage debt of Rs. 430, whereas the admitted amount was only Rs. 300. At a sale by auction on the 14th of December 1885 under that proclamation, the mortgagee, P. V. Kuttunni, was the highest bidder for the sum of Rs. 125.

Before the sale took place, Lakshmi Amma Anakkara Vadaketh, the appellant, had obtained three Small Cause decrees in suits Nos. 343 and 312 of 1882 and No. 390 of 1884 for Rs. 300, and had applied before the sale to the Court of the same District Múnsif for execution against the defendant of those decrees by sale

* Appeal against Order 78 of 1886.

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of the same land and did not get satisfaction. On the 18th December 1885 the appellant applied to the Múnsif to set aside the sale by reason of the irregularity of the statement that the land was sold subject to Rs. 430 instead of Rs. 300, and alleged that if the property had been sold subject only to the proper amount of the incumbrances, both the petitioner in No. 537 and appellant would have been paid in full. The Múnsif by order of the 9th January 1886 recorded the mistake and his opinion that the irregularity vitiated the sale. But he held that appellant had no right to apply under s. 311 for cancellation of the sale, on the ground, as it appears, that she was not a "decree-holder" within the meaning of s. 311, and that the decree-holder within the meaning of that section is the decree-holder at whose instance the lands were first attached.

I think however that, upon the construction of the provisions of the Code, the expression "decree-holder" in s. 311 is not limited to the decree-holder at whose instance the lands were first attached. If such limited construction is the only correct one, then the right of the other decree-holder who applied for execution would, in certain given events, be prejudiced. For instance, if the first decree-holder dies, and if no representative of his applied under s. 311, or if that decree-holder did not, as in this case, choose to point out to the Court the irregularity and apply for a re-sale, then, if no other decree-holder could apply, the irregularity and consequent loss would be incapable of remedy. The excess amount of the mortgage stated is small in this case, still that sum of Rs. 130 and the Rs. 125, the purchase money, would be sufficient, it is alleged, to pay the petitioner and the previous decree-holder. But suppose a case occurred when the excess amount was large, the loss would be serious. If the sale now stands, the purchaser (the mortgagee) will get the land for Rs. 130 less than he contracted to pay, and will retain that sum which ought to be distributed under s. 295.

The definition of "decree-holder" in s. 2 of the Code applies certainly in terms to the case of the present appellant, and although in ordinary circumstances, probably the first attaching decree-holder would be the most proper decree-holder to apply under s. 295 for re-sale if he was willing to do so; but that is no valid reason for holding that an application by any other decree-holder is not provided for by s. 311. It was suggested that if *any*

decree-holder could apply, all or any number of decree-holders might apply. But in such case, the Judge to whom the application should be made could either refuse to hear the application of any other decree-holder, if the first decree-holder was willing to proceed; or if he was not willing to proceed, then the Judge could appoint any of the other decree-holders to apply under s. 295, as he should think fit.

The rights of all the decree-holders under s. 295 are the same, and the same proceeding must be taken by the subsequent decree-holders to apply to the Court for execution as the first decree-holder took.

From the date that the Court grants the order to execute the decree under s. 245, all proceedings to attachment and sale are directed by the Code to be taken by the *Court*, and the first attaching creditor has no more to do with the attachment and the sale than the subsequent decree-holders. The first attaching decree-holder could not stay the sale even if he was paid *in full* after the other decree-holders had applied to the Court for execution. It was certainly open to the appellant to have informed the Múnsif before the sale that proclamation was wrong, if the appellant was in fact aware of the error before the sale. But apparently the decree-holders were not aware of the error until the sale, or if they were aware of the error, neither applied to have the error corrected. I do not, however, think the omission to do so affects the question.

For the above reasons, I think that the power of any decree-holder to apply under s. 311 is essential to the rights of all decree-holders. I also think that upon the ground on which the Múnsif put his order, it is wrong. I would therefore reverse it and instruct the Múnsif that he is at liberty to entertain the application of the appellant and act on the facts, if he thinks it is a proper case to set aside the sale. Costs to be provided for in the revised order.

BRANDT, J.—It is admitted that the appellant has a right to appeal in this case if she is "the decree-holder" or "a decree-holder" within the terms of s. 311, Civil Procedure Code, and not otherwise.

She is a person holding three decrees for money against the judgment-debtor in execution of a decree against whom another judgment-creditor (the plaintiff in Original Suit No. 537 of 1884)

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attached and eventually brought to sale certain immovable property; and prior to realization of the "assets," *i.e.*, the purchase money paid for the property sold, the appellant had applied to the Court which ordered the sale for execution of his decree against the same judgment-debtor.

The property sold was subject to an encumbrance; inquiry was held by the Court as to this, and the Court allowed the claim of the encumbrancer to the extent of Rs. 300; but, by a mistake in the execution department, it would seem the property was advertised for sale as subject to an encumbrance of Rs. 430.

The encumbrancer himself purchased the property. The appellant applied to the Court which executed the decree to set aside the sale on the grounds that if the amount of the charge on the land had been correctly stated, the property would have sold for a higher price, for a price sufficient to satisfy the appellant's claims in full, and that the mistake constituted a material irregularity, by reason of which the appellant had sustained substantial loss.

The District Múnsif held that there was such an irregularity as would vitiate the sale, but that, as the appellant is not the holder of the decree in executing which the property was attached and sold, she has no *locus standi* under s. 311 of the Code.

If we are to hold that the District Múnsif is wrong in this respect, we must hold that the words "the decree-holder" in that section include "any decree-holder" who has made an application under s. 295.

The Code deals with the sale and delivery of property in sections commencing with 286. There are, first, general rules, ss. 286 to 295 inclusive; then ss. 296 to 303 deal with sale of movable, and s. 304 *et seq.* with the sale of immovable, property. In these sections the holder of a decree is referred to first in s. 293 as "the judgment-creditor;" in s. 294, it is provided that "no holder of a decree" shall purchase without the leave of the Court, and prescribes what shall be done in case of a decree-holder who purchases with such permission; up to s. 320 (beyond which we need not go for present purposes) the only section which contains a reference to the decree-holder is s. 311; and the only persons at whose instance a sale of immovable property under the chapter can be set aside are "the decree-holder," any person whose immovable property has been sold at such sale, and the auction-purchaser.

It appears to me then that, according to the ordinary rules of construction, the words "the decree-holder" should apply to the decree-holder at whose instance the property has been brought to sale. On the other hand, it is contended that even if the words cannot be read as "any decree-holder,"—and this certainly cannot be, for it could not be contended that a decree-holder who had taken no steps whatever in execution could come under s. 311—they do include any decree-holder who has taken action under s. 295. Section 295 is very curiously worded. The "assets" therein specified are not "assets" until the property had been sold and the proceeds realized; and there cannot strictly speaking be any application "to the Court by which such assets are held, prior to realization" thereof, for there are, according to the terms used, no assets until the purchase money is in the hands of the Court. Some reasonable construction must however be placed on the wording.

The section requires that application be made "for execution" by those holding decrees and desirous of coming to share ratably; it appears to have been generally assumed, and I do not say wrongly, that there is a sufficient application for execution if such decree-holders simply ask to share ratably in the net proceeds when realized.

It is said that great hardship may be inflicted on such decree-holders if they have no means of having sales set aside on good and sufficient grounds.

If the balance of convenience clearly is in favor of the more extended construction to be put on the words "the decree-holder" in s. 311, and such construction is not evidently not allowable, such extended construction should be given. I think that no inference either way can be drawn from the definition of "a decree-holder" in s. 2 of the Code; appellant certainly is *a* decree-holder within the meaning of the term as used in the Code; the only question is as above stated.

Under s. 271 of Act VIII of 1859, the first attaching creditor, even though he proceeded no further and a subsequently attaching creditor brought the property to sale, had priority; s. 295 of the present Code was intended to prevent this and to provide for ratable distribution, after deduction of the costs of the proceedings necessary for and anterior to sale, and of the sale; and the holders of decrees for money only come in last, so that the

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preferential claims of decree-holders having superior rights and of the creditor, at whose cost the sale is carried out, are provided for.

These are difficulties which occur to me from the peculiar wording of s. 295 which I have above indicated; but on the whole, I am not prepared to dissent from my learned colleague in the conclusion arrived at by him, viz., that it is open to us to hold petitioner to be entitled to call the sale in question under s. 311.

I, therefore, concur in the proposed order—*Girdhari Singh* v. *Hurdeo Narain Singh* (1) being authority that a material error in describing the encumbrances on the property sold may be a material irregularity in publishing and conducting the sale.

(1) L.R., 3 I.A., 230.