advances. No doubt the letters between defendant and Von Glehn and Co. show that the former imposed limits after the consignments were sent, and neither plaintiff nor Von Glehn and Co. at first repudiated, or protested against, his right to do so. Von Glehn & Co. protested against the advisability of his holding out for impossible prices, and put off sales in deference to his wishes, but we do not think that this action amounts to an admission by Von Glehn & Co. that they were bound, in all circumstances, to obey his instructions. They were naturally anxious to please a client and to defer to his wishes but when the market continued to fall month after month, and the security in their hands to become less and less, they at length resorted to the power of sale given to them and sold without regard to the limits named by the defendant. They would, no doubt, have postponed the sales still further if defendant had complied with their request to remit them a sufficient sum to cover the estimated fall in the value of the goods, so that the security in their hands might still be sufficient, but this the defendant did not do. In these circumstances it seems to us that the consignees were justified in exercising their legal right of sale, instead of allowing the security in their hands to diminish still further.

We must, therefore, reverse the decree and give judgment for plaintiff as sued for with costs throughout.

Wilson & King, attorneys for appellant.

Branson & Branson, attorneys for respondent.

APPELLATE CIVIL.

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

KOMMACHI KATHER (PLAINTIFF), APPELLANT,

v.

PAKKER AND OTHERS (DEFENDANTS), RESPONDENTS.*

1896. October 8, 20.

Civil Procedure Code—Act XIV of 1882, s. 295—Rateable distribution—Decree for money—Mortgage decree.

The plaintiff and defendant, respectively, held successive mortgages on the same land. The defendant obtained a decree on his mortgage against the land and

* Second Appeal No. 819 of 1895.

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in respect of any unrealized balance against the mortgagor, two months' time for redemption being given. The plaintiff then obtained a like decree. The defendant abandoned his claim on the mortgage premises and attached other property of the mortgagor. The plaintiff applied to execute his decree against the mortgage premises and the other property, but with regard to the latter his application was rejected. The defendant, having brought to sale the property attached, the plaintiff applied under Civil Procedure Code, section 295, for rateable distribution which was refused. The plaintiff then brought to sale the mortgage premises which did not realize the amount of the debt, and he now sued to recover the sum which would have been payable to him under section 295:

Held, that the plaintiff's decree was a decree for money within the meaning of section 295, and that he was entitled to recover the sum claimed:

Per curiam, the property ought not to have been sold and the money paid to the defendant until the mortgaged property had been sold and had been found insufficient to pay his debt.

SECOND APPEAL against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 445 of 1894, confirming the decree of K. Imbichunni Nayar, District Munsif of Taliparamba, in original suit No. 199 of 1894.

The facts of this case were stated by the District Munsif in paragraph 8 of his judgment as follows:—

"The plaintiff in the present case was the mortgagee of eight "items of real properties under one K. V. Chintan and five of his "Anandiravans. The first defendant held a puisne mortgage on "two or three of the same items. In original suit No. 76 of 1893, "the first defendant sued his mortgagors and the present plaintiff "for the recovery of his mortgage amount by the sale of the pro- "perties mortgaged and from the persons of the mortgagors. A "decree was recorded in his favour to the effect that in default of "the defendants' paying the amount of his claim within two months, "the properties mortgaged should be sold subject to the prior claim "of the present plaintiff and if the sale-proceeds be insufficient to "satisfy the whole of his decree, the balance should be paid by the "mortgagors personally. The present plaintiff then brought a suit "on his prior mortgage and a decree worded almost as above was "recorded in favour of him also. The present defendant was a "party to it. He then gave up his claim on the properties mort- "gaged to him and caused attachment of the parambas mentioned "in the present plaint which were finally sold in auction for "Rs. 1,377. The sale-proceeds were set off against the first "defendant's decree amount. Over two months before the aforesaid "sale, the present plaintiff applied for the realization of his decree

"by the sale of the properties mortgaged, and by attachment of "other properties. The first part of his prayer was allowed while "the second part was disallowed. In the case of the plaintiff, then, "the judgment-debtors applied for an adjournment of the sale and "obtained time till September 1893. The sale, at the instance of "the first defendant, took place in the meantime and the plaintiff "asked for rateable share. His application was rejected on the "ground that he had then no decree which was capable of being "executed against the judgment-debtors personally. The plaintiff "appealed and the appeal was rejected as being not maintainable. "In a subsequent application for share made by the plaintiff after "the properties mortgaged to him were sold and the sale-proceeds "were found to be insufficient to fully meet his claim, he was "given Rs. 25. The plaintiff now sues to recover Rs. 495-15-0, "alleging that he was entitled to get the same when he first "applied for share."

The terms of the decree in question are given in the judgment of the High Court.

The District Munsif dismissed the plaintiff's suit and the District Judge upheld his decision for the reasons stated by the High Court.

The plaintiff preferred this second appeal.

Ryru Nambiar for appellant.

Sankara Menon for respondents.

JUDGMENT.—The facts of the case are correctly stated in paragraph 8 of the District Munsif's judgment.

The District Munsif, assuming that the plaintiff had a 'decree for money' within the meaning of section 295, Civil Procedure Code, still dismissed the suit on the ground that it was incapable of execution, except as against the mortgaged property, at the time when the plaint property was sold at the instance of first defendant.

The District Judge confirmed the District Munsif's decree for two reasons, firstly, because section 295 (*c*) in his opinion barred the plaintiff's claim, and secondly, because the plaintiff's decree was not 'a decree for money' within the meaning of section 295, Civil Procedure Code.

The plaintiff appeals, and we think, with good reason. The District Judge is manifestly in error in supposing that clause (*c*)

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of section 295 governs the case. That clause refers only to property sold "in execution of a decree ordering its sale for the discharge of an incumbrance thereon." In the present case, the property sold by first defendant was not the encumbered property, but other property of the judgment-debtor.

The plaintiff and defendant had respectively a first and a second mortgage over other property of the same mortgagor, but neither of them held any incumbrance on the property sold by first defendant. It seems to us that the plaintiff and first defendant were in exactly the same position with regard to this property, and each was equally entitled to a rateable share of the sale-proceeds.

The District Judge is, in our opinion, wrong in holding that the present decree is not 'a decree for money' within the meaning of section 295, Civil Procedure Code. No doubt, his view is supported by the language used in *Ram Charan Bhagat* v. *Sheobarat Rai*(1); but the opposite view was held by the Calcutta High Court in *Hart* v. *Tara Prasanna Mukherji*(2). The exact terms of the decree in the Allahabad case are not reported, nor is the Calcutta case referred to therein; but in our opinion the law is correctly stated in the latter case.

The decree before us runs as follows:—"That the defendants "do pay plaintiff within two months from this date Rs. 2,500 "with interest and costs and that in default plaintiff do recover "the same by sale of the plaint property, and the balance, if any, "from first to sixth defendants." It seems to us that this is a decree for money and that it does not lose this character, because the decree declares the mode and the order of the procedure by which it is to be realized.

The first paragraph of section 295 runs as follows:—"When-"ever assets are realized by sale or otherwise in execution of a "decree, and more persons than one have, prior to the realization, "applied to the Court by which such assets are held for execution "of decrees for money against the same judgment-debtor, and "have not obtained satisfaction thereof, the assets, after deducting "the costs of the realization, shall be divided rateably among all "such persons."

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(1) I.L.R., 16 All., 418. (2) I.L.R., 11 Calc., 718.

It is under this paragraph that the plaintiff claims the right to a rateable share of the property. Formerly the creditor who first attached property had a prior claim to have his decree satisfied out of the sale-proceeds to the exclusion of other creditors, but now all judgment-creditors who apply to the Court, prior to realization, are entitled to share rateably, and under the penultimate paragraph of the section, if any of such assets be wrongly paid to any person, a judgment-creditor entitled to a rateable share may sue to recover the same from the person wrongly paid. It is under this paragraph that the plaintiff brings his suit. In the words of the Calcutta case already referred to "The object of the "section appears to us to be to provide for the rateable distribution "of the assets of a judgment-debtor among all persons who have "obtained decrees ordering the payment of money to them from the "judgment-debtor; and the fact that a person, who has obtained "such a decree, also holds security or is entitled to any other relief "under the decree is immaterial. There is, therefore, we think "nothing in the section which takes away the right of a mortgagee, "who has obtained a decree upon his mortgage, to proceed in the "same suit against property of the mortgagor not subject to the "mortgage when there are other creditors—nothing which shows "that the only persons entitled to share rateably in the proceeds of "sale of property sold in execution of a decree are those who have "obtained decrees for money only. We think, therefore, that every "decree, by virtue of which money is payable, is to that extent a "'decree for money' within the meaning of the section, even "though other relief may be granted by the decree; and that the "holder of such a decree is entitled to claim rateable distribution "with holders of decrees for money only."

If it were held otherwise it would often result that the insufficiently secured creditor might find himself worse off than the wholly unsecured, but more prompt and pressing, creditor, and an inducement would exist for that scramble for first attachment which the recent alterations of the law were designed to remove. The unsecured creditor is not placed at an unfair disadvantage, since he advanced his money on the faith of the debtor's general credit apart from the property mortgaged, and it is always open to such a creditor to compel the sale of mortgaged property, if it is likely to yield any surplus over and above the mortgage money.

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It remains to consider the ground on which the District Munsif dismissed the suit, viz., that the plaintiff's decree was incapable of execution against anything save the mortgaged property, at the time when the first defendant attached the other property. It is true that at that time the plaintiff was not in a position to immediately execute his decree, but neither was the first defendant, for the decree in favour of the latter was subject to precisely the same limitation as the plaintiff's decree. The property ought not, therefore, to have been sold and the money paid to the first defendant until the mortgaged property had been sold and had been found to be insufficient to pay his debt. His title to receive payment out of the property sold, did not arise until the mortgaged property was found to be insufficient, and the plaintiff's title arose at precisely the same time. The payment of the whole of the sale-proceeds to the first defendant was, therefore, wrong, as the plaintiff was entitled to a rateable share.

In this view we must set aside the decrees of the Courts below, and give judgment for plaintiff as sued for with costs throughout.

APPELLATE CIVIL.

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

1896. October 19, 20, 21. November 26.

NALLA KARUPPA SETTIAR (PLAINTIFF), APPELLANT,

v.

MAHOMED IBURAM SAHEB (DEFENDANT), RESPONDENT.*

Suit on a foreign judgment—Jurisdiction of foreign Court—Residence of defendant—Constructive residence.

The plaintiff having obtained against defendant a judgment in the District Court of Kandy now sued in British India to enforce it. It appeared that the defendant was domiciled and ordinarily resident in British India and that he had not appeared to defend the suit at Kandy and was not at the date of that suit or subsequently even temporarily resident in Ceylon: but he was a partner in a firm which carried on business at Kandy and he was interested in lands at that place which he had visited once or twice:

Held, that the Court at Kandy had no jurisdiction over the defendant.

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* Second Appeal No. 854 of 1895.