

as one falling under section 244, Code of Civil Procedure, and therefore appealable.

SRINIVASA
AYYANGAR
P.
APPATHORAI
PILLAI.

It is next objected that the appellant before us being only a mortgagee is not entitled to the benefit of section 310A, Code of Civil Procedure. On the analogy of the decision in *Rukhai Chunder Bose v. Dwarika Nath Misser*(1) we think that the appellant is an "owner of the immovable property" within the meaning of section 310A, and as his mortgage was subject to the right of the respondent under the mortgage decree in execution of which the sale took place, he would be affected by the sale, and should therefore be held entitled to ask for cancellation of the sale on making the payments prescribed by that section, (*Cf. Asmutunnessa Begum v. Ashraf Ali*(2)). We must therefore set aside the orders of the Lower Courts and direct the petition to be restored to the file of the District Munsif, and the appellant must be allowed to pay into Court the sum payable under section 310A within a time to be fixed by the District Munsif, and of which reasonable notice is to be given to both parties. If the payment is made within the time fixed, the sale should be set aside. In default the petition will stand dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

SAMI PILLAI (PETITIONER), APPELLANT,

1897.
December 9.

v.

KRISHNASAMI CHETTI AND OTHERS (COUNTER-PETITIONERS),
RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882. ss. 244, 311, 588—Execution proceedings at instance of attaching creditor—Party to a suit—Right of appeal—Irregular sale.

A attached a decree which B, his judgment debtor, had obtained against C, and in execution thereof he brought to sale land belonging to C. After the publication of the proclamation of sale, one of the advertised lots was sub-divided

(1) I.L.R., 13 Calc., 346.

(2) I.L.R., 15 Calc., 488 at pp. 491, 492.

* Appeal against Order No. 63 of 1897.

SAMI PILLAI into various lots for the purposes of the sale. B applied to have the sale set
 v. aside, and his application was refused:
KRISHNASAMI
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Held, that B had a right of appeal under Civil Procedure Code, section 311, and not under section 244, but that the sub-division of the lots was no irregularity and the appellant was not entitled to the relief sought by him.

APPEAL against the order of L. C. Miller, Acting District Judge of Trichinopoly, in Miscellaneous Petitions Nos. 511 and 511A of 1896.

This was an application under Civil Procedure Code, section 244, to have set aside a sale that was held in execution of the decree in Original Suit No. 5 of 1888. The execution had proceeded at the instance of certain persons who, in execution of a decree against the applicant, had attached the decree obtained by him in the above suit. A like application was made by the same applicant under section 311. He objected to the mode in which the attachment had taken place, and also to the circumstance that one of the lots which was advertised for sale was subsequently divided into five lots for the purpose of the sale.

The District Judge dismissed both the applications and the applicant preferred this appeal.

Desikachariar for appellant.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), *V. Krishnasami Ayyar*, *Ranga Ramanujachariar* and *R. A. Krishnasami Ayyar* for respondents.

JUDGMENT.—We must hold that the appellant is not entitled to appeal under section 244, Civil Procedure Code. No doubt the respondents Nos. 1 to 3 as attaching creditors in Original Suit No. 21 of 1894, became entitled to execute the decree in Original Suit No. 5 of 1888, but the sale took place in execution of the latter decree, and so far as Original Suit No. 5 of 1888 is concerned these respondents cannot be held to be parties to the suit, so as to entitle the appellant to treat any question arising between him and them as one under section 244. We, however, think that he is entitled to appeal under section 311.

The right of the said respondents to execute as attaching creditors of the decree in Original Suit No. 5 of 1888 is a special right created by section 273, Civil Procedure Code; but they do not thereby become transferees of the decree as was contended on their behalf before us. The holder of the decree in Original Suit No. 5 of 1888 remains decree-holder notwithstanding the

attachment of his rights and as such he was entitled to apply under section 311 and to appeal against the order passed under that section.

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Turning now to the merits the only irregularity that was pressed before us as vitiating the sale was that lot No. 1 of the property was sold in five sub-lots. Having regard to the facts stated by the Judge in his order and to the other circumstances of the case, we do not think that this was an irregularity at all, but was a prudent step in the interest of all concerned.

The result is that we dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

SUBRAMANIA PILLAI (DEFENDANT No. 1), PETITIONER,

1897.
December 10.

v.

SUBRAMANIA AYYAR (PLAINTIFF), RESPONDENT.*

*Civil Procedure Code—Act XIV of 1882, ss. 78, 80, 82—Substituted service—
Duty of process-server.*

Mere temporary absence of a person to be served does not justify the process-server in affixing the summons to a door. It is the duty of the process-server to take pains to find out the person to be served in order that, if possible, personal service may be effected.

PETITION under Provincial Small Cause Courts Act IX of 1887, section 25, praying the High Court to revise the proceedings of S. Gopala Chariar, Subordinate Judge of Tinnevely, in Small Cause Suit No. 1427 of 1896.

A decree had been passed in favour of the plaintiff, the defendants having been declared *ex parte*. The defendants then made an application under Civil Procedure Code, section 108, and Provincial Small Cause Courts Act, 1887, section 17, praying that the decree be set aside and that the suit be tried on the ground that they had not been served with the summons.

The allegations contained in the plaint were as follows:—

“It is learnt that a decree has been passed in the said suit, declaring the defendants *ex parte*.”

* Civil Revision Petition No. 302 of 1897.