

## APPELLATE CIVIL.

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

1897.  
December  
7, 9.

SRINIVASA AYYANGAR (DEFENDANT No. 6), APPELLANT,

v.

AYYATHORAI PILLAI (PLAINTIFF), RESPONDENT.\*

*Civil Procedure Code—Act XIV of 1882, ss. 244, 310A—Right of a mortgagee to the benefit of s. 310A—Appeal against order adverse to mortgagee.*

A mortgagee being a party to a suit objected that the mortgage premises had been attached and sold in execution of the decree and applied to have the sale set aside on payment being made by him under Civil Procedure Code, section 310A. The purchaser was the decree-holder. The application having been refused by the Courts of First Instance and First Appeal the applicant appealed to the High Court:

*Held*, that the appeal was maintainable and the appellant was entitled to the relief sought.

APPEAL against the order of F. H. Hamnett, Acting District Judge of Tanjore, on Appeal against Order No. 33 of 1896, affirming the order of T. Ramasami Ayyar, District Munsif of Tirutturaippundi, on Miscellaneous Petition No. 393 of 1896 in Original Suit No. 157 of 1890.

This was an application by the sixth defendant that a sale of land held in execution of the decree in the above suit be set aside under Civil Procedure Code, section 310A, on payment being made by him under the decree. The applicant was a mortgagee of the land in question. The District Munsif refused the application and his decision was upheld on appeal by the District Judge.

The applicant preferred this appeal.

*Gopalasami Ayyangar* for appellant.

*V. Krishnasami Ayyar* for respondent.

JUDGMENT.—We cannot accept the respondent's contention that no appeal lies in this case. The respondent before us, who is the purchaser, is the decree-holder. The question is one which arises in execution between him and the appellant before us who is also a party to the suit. The order therefore must be treated

\* Appeal against Appellate Order No. 41 of 1897.

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.

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## 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.