ARUNACHELLAM CHETTI v. GANAPATHI AYYAR.

The Deputy Collector passed a decree in favour of the plaintiffs but the District Judge on appeal reversed his decision and dismissed the suit on the ground that it was barred, there being no difference between the puttahs, except in the persons tendering them.

The plaintiffs preferred this second appeal.

S. Srinivasa Ayyangar for appellants.

The respondent was not represented.

JUDGMENT.—We think the learned Judge was wrong in his view that the suit was barred by limitation. The second puttah tendered in this case was substantially different from the first puttah, and that being so the two months period of limitation prescribed by sections 9 and 51 of the Rent Recovery Act runs from the tender of the second puttah. See the decision of this Court in *Krishna Doss Balamukunda Doss* v. *Guruva Reddi*(1). On the merits the findings of the lower Appellate Court are in the plaintiffs' favour.

We must set aside the decree of the lower Appellate Court and restore that of the Deputy Collector with costs in this Court and in the lower Appellate Court.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Davies.

1905. February 1, 2, 8.

VIBUDHAPRIYA TIRTHASWAMI (PLAINTIFF), APPELLANT IN BOTH,

v.

YUSUF SAHIB (DEFENDANT), RESPONDENT IN SECOND APPEAL No. 117 of 1903, AND

BANUBIBI (DEFENDANT), RESPONDENT IN SECOND APPEAL No. 118 of 1903.*

Civil Procedure Code—Act XIV of 1882, ss. 276, 295—"Assets realised by sale or otherwise in execution of a decree," what are.

The words "assets realised by sale or otherwise in execution of a decree" in section 295 of the Code of Civil Procedure mean that the assets must be realised by some process of Court in execution and can apply only to a sale by the Court and not to a private sale by the judgment-debtor of properties attached.

(1) S.A. No. 831 of 1898 (unreported).

* Second Appeals Nos. 117 and 118 of 1903, presented against the decree of J. W. F. Dumergue, Esq., District Judge of South Canara, in Appeal Suits Nos. 181 and 182 of 1901, presented against the decrees of M.R.Ry. M. Deva Row, District Munsif of Udipi, in Original Suits Nos. 797 and 798 of 1900.

The assets are not realised by the attachment but by the sale. The realisation must be by sale by the Court in execution or by one of the other remedies prescribed by the Code of Civil Procedure. The fact that the money is paid into Court in satisfaction of the attaching creditor's debt does not make such money assets realised under section 295 of the Code of Civil Procedure.

Gopal Dai v. *Chunni Lal*, (I.L.R., 8 All., 67), and *Purshotamdass Tribhovandass* v. *Mahanant Surajbharthi Haribharthi*, (I.L.R., 6 Bom., 588), referred to and approved.

Lakshmi v. *Kuttunni*, (I.L.R., 10 Mad., 57), and *Sorabji Edulji Warden* v. *Govind Ramji F. N. Wadia*, (I.L.R., 16 Bom., 91), referred to.

Manilal Umedram v. *Nanabhai Maneklal*, (I.L.R., 28 Bom., 264), distinguished.

Sew Bux Bogla v. *Shib Chunder Sen*, (I.L.R., 13 Calc., 225), and *Prosonnomoyi Dassi* v. *Sreenauth Roy*, (I.L.R., 21 Calc., 809), approved.

An attachment ceases to be operative from the moment money is paid into Court or at the latest from the time satisfaction is entered.

Kunhi Moossa v. *Makki* (I.L.R., 23 Mad., 482).

THE facts are fully stated in the judgment.

C. Ramachandra Rao Saheb for appellant in both.

K. P. Madhava Rau and *A. Srinivasa Poi* for respondent in Second Appeal No. 117.

K. Narayana Rau for respondent in Second Appeal No. 118.

Sir ARNOLD WHITE, C.J.—For the purposes of the question to be decided in these appeals the material facts and dates are as follows:—

One Kalinga Hebbara obtained a decree against one Krishnaraya. On 5th July 1900 he attached certain property belonging to Krishnaraya and the sale was fixed for 22nd August. Yusuf and Banubibi (the defendants in these suits) had also obtained decrees against Krishnaraya. On 19th July Yusuf applied for an order for rateable distribution under section 295 of the Code of Civil Procedure and on 27th July an order for rateable distribution was made. On 23rd July Banubibi applied for a similar order and on 1st August the order was made. Meantime, on 18th July the plaintiff bought from Krishnaraya, the judgment-debtor, the property which had been attached by Hebbara. The consideration for the sale was a sum of Rs. 1,500. The property had been mortgaged to the plaintiff by Krishnaraya. The sale-deed recites that the amount due to the plaintiff on his mortgage, and certain other moneys were set off against this sum of Rs. 1,500. Apparently there was good consideration for the sale and the transaction was *bonâ fide*. The sale-deed also recites the attachment by Hebbara and makes provision for payment by the plaintiff to Hebbara of

VIBUDHA-PRIYA TIRTHASWAMI *v.* YUSUF SAHIB.

the amount of his judgment debt in order that the property might be freed from the attachment. On 28th July the amount of the judgment debt was paid into Court by the plaintiff to be paid to Hebbara in satisfaction of his decree against Krishnaraya. On 1st August and 3rd August the defendants obtained orders of attachment. On 23rd August satisfaction of Hebbara's decree was entered up. Hebbara brought the claims of the other judgment-creditors to the notice of the Court and the order entering up satisfaction was made without prejudice to their rights to question the sale to the plaintiff. The attachment made by Hebbara was not formally withdrawn. The plaintiff claimed the property. Yusuf and Banubibi resisted the claim on the ground that they were entitled to execution against the property and rateable distribution. The plaintiff's claim was rejected. The suits now under appeal were then brought by him. The Munsif decided in favour of the plaintiff, but the District Judge held that the sale to the plaintiff was void and dismissed his suits.

On these facts the question for determination is whether the sale to the plaintiff was void as against the defendants under section 276 of the Code?

This depends upon whether in the events which happened assets were realised by sale or otherwise in execution of a decree within the meaning of section 295 of the Code so as to entitle the defendants to the benefit of that section. Their rights depend upon that section and if they have no rights under that section they can have no claim "enforceable under the attachment" within the meaning of section 276. In my opinion on the facts of this case, there was no realisation of assets by sale or otherwise in execution of a decree. The sale was not made under any process of Court. It was made under a private arrangement between the judgment-debtor and the plaintiff. No doubt at the time of sale the property had been attached, but where moneys are realized by a private sale of attached property by the judgment-debtor to a third party there is not as it seems to me, a realization of assets in execution within the meaning of section 295. There is no doubt a realization of assets, but the realization is not in execution. In execution means by execution, *i.e.*, by same process of the Court. I do not think the words "wherever assets are realized by sale or otherwise in execution of a decree" can be read as if they simply meant where assets are realized for the purposes of satisfying a

decree. The fact that the amount of the judgment debt was paid into Court does not make the money so paid "assets realized in execution."

The money was paid into Court by the plaintiff on behalf of the judgment-debtor, but neither the plaintiff nor the judgment-debtor was under any obligation to pay the money into Court. Satisfaction could have been entered up under section 258 without the money having been paid into Court. But even if it were otherwise I fail to see how the fact of payment into Court in itself would make the money so paid "assets realized in execution" I see no reason why section 295 should not be construed strictly as against judgment-creditors who claim rateable distribution. The effect of such a claim, if allowed necessarily diminishes *pro tanto* the amount available for the judgment-creditor through whose diligence the assets have been realized.

The fact that the order of August 23rd entering up satisfaction was without prejudice to the right of the other judgment-creditors to question the alienation does not affect the legal rights of the parties. This order, of course, gave them no legal rights which they would not otherwise have had.

I do not think that any of the authorities are really in conflict with the view I have indicated. On the other hand there is a strong body of authority in support of it.

In *Gopal Dai* v. *Chunni Lal*(1) the judgment-debtor's property was attached, but there was no sale. He paid into Court a sum on account of the judgment debt. It was held that the money paid into Court could not be regarded as "assets realized in execution." The fact that the money was there paid in by the judgment-debtor himself and in the case before us it was paid in by a third party does not, as it seems to me, make any difference. Neither does the fact that only a portion of the judgment debt, and not as in the case before us, the whole amount was paid into Court. In the case of *Purshotamdass Tribhovandass* v. *Mahanant Surajbharthi Haribharthi*(2), it was held that monies paid by a judgment-debtor under arrest, in satisfaction of a decree against him, are not assets realized by sale or otherwise, the ground of the decision being that "realized in execution" meant realized by the sale by the Court of the property of the judgment-debtor.

---

(1) I.L.R., 8 All., 67.

(2) I.L.R., 6 Bom., 588.

VIBUDHA-PRIYA TIRTHASWAMI v. YUSUF SAHIB.

In the present case there was no doubt a sale of the debtor's property but the sale was not by order of the Court but was the outcome of a private arrangement between the debtor and a third party. It is quite clear that an order for attachment under section 274 is not "realization." There is no realization till the property is sold. If the sale is a sale by the Court, there is a realization in execution. If the sale is not by the Court there is realization but not realization in execution. It seems to me the test to apply is whether the assets were realized by sale or otherwise by a process in execution provided for by the Code. The case of *Sorabji Edulji Warden* v. *Govind Ramji F. N. Wadia and another*(1) satisfies this test for there the debt due to the judgment-debtor was realized by means of an order made under section 268, a process in execution provided for by the Code. A further ground of distinction is that in that case there was no payment off of the attaching creditor by the party to whom the debt due by the Railway Company to the judgment-debtor had been assigned. In the case of *Manilal Umedram and others* v. *Nanabhai Maneklal and others*(2), the money was realized by a process in execution provided for by the Code, viz., an order under section 272. This is quite clear from a passage in the judgment of Jenkins, C.J., in page 274. The learned Judge observes "The Subordinate Judge acting (as he appears to us to have acted) under section 272, whether rightly or wrongly, ordered the letter to be written to the Collector which resulted in the payment into Court of this sum of Rs. 15,623-11-0. How can it, with fairness, be said by the present petitioners that that money was not brought in in execution?"

In the case before us the realization of the assets resulted not from the attachment of the property but from the sale of the property by the judgment-debtor to the plaintiff. In the cases of *Sew Bux Bogla* v. *Shib Chunder Sen*(3) and *Prosonnomoyi Dassi* v. *Sreenauth Roy*(4) respectively the Court adopted the test which, I think, is the true one, viz., that to constitute a "realization" within the meaning of section 295 there must be either a realization by a sale in execution under the process of the Court or a realization in one of the other modes expressly

(1) I.L.R., 16 Bom., 91. (2) I.L.R., 28 Bom., 264.
(3) I.L.R., 13 Calc., 225. (4) I.L.R., 21 Calc., 809.

VIBUDHAPRIYA TIRTHASWAMI v. YUSUF SAHIB.

prescribed by the Code. There is nothing in Kernan J.'s judgment in the case of *Lakshmi* v. *Kuttunni*(1) where it was held that where one decree-holder had attached land and another decree-holder against the same debtor had entitled himself to rateable distribution, the latter was entitled to apply under section 311 of the Code to set aside a sale, which is in conflict with the view taken in the two Calcutta cases to which I have referred. The fact that the defendants themselves obtained orders of attachment on August 1st and August 3rd does not affect the question whether there was a realization of assets within the meaning of section 295.

On the facts of the present case, I am of opinion that there was no realization of assets in execution within the meaning of section 295. This being so it is not necessary to consider whether the words "claims enforceable under the attachment" which were added to section 276 by Act X of 1877 would include claims of judgment-creditors other than the judgment-creditor at whose instance the property was attached or whether, as held in *Manohar Das* v. *Ram Autar Pande*(2), they only applied to the claims of the attaching creditor. It is also unnecessary to consider whether having regard to the fact that the judgment debt was paid on July 28th, although satisfaction was not certified till August 23rd, the attachment ceased to subsist on July 28th or whether it subsisted till August 23rd. The case of *Kunhi Moossa* v. *Makki*(3) would seem to be a clear authority for holding that, at any rate, as from August 23rd, if not from July 28th, the attachment of the property by Hebbara ceased to be operative. It is also unnecessary to consider whether an application for rateable distribution, whilst the attachment subsisted, followed by an order for rateable distribution made after the attachment ceased to be operative constituted a claim "enforceable under the attachment."

These questions, of course, only arise in the view that the case is one to which section 295 applies.

For the reasons which I have stated I think the plaintiff is entitled to a decree. I would set aside the decree of the District Judge and restore the decree of the Munsif with costs in this Court and the lower Appellate Court.

DAVIES, J.—I concur.

---

(1) I.L.R., 10 Mad., 57. (2) I.L.R., 25 All., 431.
(3) I.L.R., 23 Mad., 478 at p. 482.