

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim.

ARIMUTHU CHETTY (PETITIONER),

v.

VYAPURIPANDARAM (RESPONDENT).*

1910.
December 8.
1911.
March 24.

Civil Procedure Code, Act XIV of 1882, s. 295, and ss. 63, 73 of the Code (Act V of 1908)—Realisation of assets—Transfer of decree not necessary for rateable distribution of sale-proceeds of attached property—Application for rateable distribution may be made though copy of decree not received.

Where the same property is attached in execution of decrees by two Courts of different grades, the decree-holder in the inferior Court who had attached prior to realisation, may apply to the superior Court for rateable distribution of the sale-proceeds of the attached property and the transfer of his decree for execution to the superior Court is not necessary to enable him to do so.

Assets are realised not when the deposit is made by the purchaser, but only when the balance of the purchase money is paid into Court.

An application for execution to the superior Court is an essential pre-requisite of a general claim to rateable distribution. Where the lower Court has ordered the transfer of the decree for execution to the superior Court, an application after such order to the superior Court before it has received a copy of the decree would be sufficient to satisfy the requirements of section 73, and to entitle the applicant to rateable distribution.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of W. B. Ayling, District Judge of Salem, in Regular Execution Petition No. 62 of 1909 (in Original Suit No. 87 of 1908) on the file of the Court of the Principal District Munsif of Salem, dated 20th December 1909.

The facts for the purpose of this report are set out in the judgment.

T. M. Krishnaswami Ayyar for petitioner.

This petition coming on for hearing on Thursday, the 8th day of December 1910, before the Hon. Mr. Justice KRISHNASWAMI AYYAR, the Court delivered the following

JUDGMENT.—The petitioner is the decree-holder in Original Suit No. 87 of 1908 on the file of the Principal District Munsif of

* Civil Revision Petition No. 76 of 1910.

Salem. Property of the judgment-debtors was attached in execution of another decree against them in Original Suit No. 35 of 1906 on the file of the District Court of Salem. It was sold by the District Court in execution of that decree. The purchaser made the deposit on the 17th September 1909 and the balance of the purchase money was paid into Court on the 29th September 1909. It must be taken having regard to the decision in *Ramanathan Chettiar v. Subramania Sastrial* (1), that the assets were realised only on the 29th of September 1909 within the meaning of section 295 of the old Code. There is no doubt a change in the corresponding provision of section 73 of the present Code. But so far as the question before me is concerned the change in the language is immaterial. The purchase money becomes the asset of the judgment-debtor only when the balance is received and not when the deposit is made. I am bound to hold on the authority of *Muttalagiri v. Muttayyar* (2), that an application to the District Court before the receipt of assets for execution is an essential pre-requisite of a general claim to rateable distribution. The District Judge seems to have assumed that, although an application was made apparently before the time when the assets were received, the petitioner had no right to make the application before the Munsif's decree was received by the District Court under the latter's order of transfer. It is true that the decree was only received by the District Court on the 30th of September. It appears to me that this does not preclude the petitioner's claim to rateable distribution, if he had attached the same property in execution of the Munsif's decree. If the property had been attached in execution of that decree as well as in execution of the decree of the District Court, the Court which should realise the property was the District Court under section 63. That section provides "the Court which shall receive or realise such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade." Supposing such a realisation is made by the higher Court, there can be no need for a transfer of the decree of the lower Court to the higher, to entitle the decree-holder of the lower Court, who has also attached the property realised, to share in the proceeds of such realisation. It seems to me that the right to

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(1) (1903) I. L. R., 26 Mad., 179.

(2) (1883) I. L. R., 6 Mad., 357.

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share in the proceeds realised by sale of attached property is independent of a transfer of the decree for execution to the higher Court. Section 38 no doubt provides that a decree may be executed by the Court which passed it or by the Court to which it is sent for execution. I am inclined to think that there is no other Court which can execute a decree and that section 38 is exhaustive. What the decree-holder of the Munsif's Court is entitled to, when there is no transfer of his decree to the District Court, is not a general execution of his decree by the District Court or rateable distribution in all the assets of the judgment-debtor received by the District Court, but only to share by virtue of his attachment in the proceeds of the attached property realised. To a relief so limited, it appears to me to be not essential that the decree of the Munsif's Court shall have been previously transferred to the District Court, though this view runs counter to the observation in *Muttalagiri v. Muttayyar* (1) as to the need of transfer. I do not feel bound by that case on this point, though it is followed in *Nimbaji Tulsiram v. Vadia Venkati* (2) as the absence of an application to the higher Court was sufficient to sustain the decision. I prefer the reasoning of SALE, JJ., in *Clark v. Alexander* (3) to the extent at least of holding that a transfer of the decree was unnecessary to entitle the petitioner to rateable distribution in the sale-proceeds of the attached property.

It was also argued that the transfer was complete when the order was made by the Munsif, and that the receipt of the decree by the District Court on the next day had nothing to do with the petitioner's right to apply to the District Court for rateable distribution on the 29th itself. The petitioner has put in an affidavit in which he says that the transfer was made by the Munsif first on the forenoon of the 29th, that he then applied to the District Court for execution, and that the assets were received thereafter. I am not at all sure, having regard to the provisions of Rules 6, 7 and 8 of Order 21, that the Court to which a decree is sent for execution is authorized to execute it before a copy of the decree is received; but I think there is force in the contention that, when once an order is made sending a decree to another Court for execution, that by itself is sufficient to entitle the decree-holder

(1) (1888) I. L. R., 6 Mad., 357.

(2) (1892) I. L. R., 16 Bom., 683.

(3) (1894) I. L. R., 21 Calc., 200 at p. 203.

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to apply to the Court to which the decree is sent for execution. In this view the application to the District Court after the Munsif's order sending the decree to the District Court would be perfectly competent and sufficient to satisfy the requirements of section 73. Although the Munsif's order, the application to the District Court and the payment of the balance of the sale-proceeds into Court were all on the same day, the last two were the acts of parties and the Court is bound to ascertain the order in which they were done [*Clarke v. Bradlaugh* (1)]. I must ask the District Judge to return findings on the following points—

Was the property sold by the District Court in Original Suit No. 35 of 1906 attached under the Munsif's decree in Original Suit No. 87 of 1908 before realisation ?

Were the Munsif's order of the transfer of the decree in Original Suit No. 87 of 1908 and the petitioner's application to the District Court to execute it prior in point of time to the payment of the purchase money into Court on the 29th September, 1909 ?

Eight weeks will be allowed for findings and one week for objections.

In compliance with the above order, the District Judge submitted the following

FINDING.—I am asked for findings.

Was the property sold by the District Court in Original Suit No. 35 of 1906 attached under the Munsif's decree in Original Suit No. 87 of 1908 before realisation ?

Were the Munsif's order of transfer of the decree in Original Suit No. 87 of 1908 and the petitioner's application to the District Court to execute it prior in point of time to the payment of the purchase money into Court on 29th September, 1909 ?

The attachment under the Munsif's decree in Original Suit No. 87 of 1908 was on 28th September, 1909.

The realisation of the money under the District Court sale was on 29th September, 1909. The property was therefore attached before realisation.

The Munsif's order transferring the decree to this Court, the petitioner's application in this Court for rateable distribution and the payment of the money all took place on 29th September, 1909.

(1) (1884) 8 Q.B.D., 63.

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As regards the time of these three events, the petitioner who alone appears examines himself and swears that the Munsif passed orders at 11 A.M. He filed his application at 12 and the money was paid at 4 P.M., or so. That is, the receipt was produced in this Court after that. This evidence stands alone and is probable and I accept it.

I therefore find that the Munsif's order of transfer and the application to this Court were prior in point of time to the payment of the money into Court.

This petition coming on for final hearing after the return of the finding of the lower Court, the Court delivered the following

JUDGMENT.—Accepting the finding I allow this petition and revise the order of the District Judge. The petitioner will be entitled to share in the rateable distribution of the money in deposit in the District Court. The petitioner will have costs in this and the lower Court.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

SREEPADA VENKATARAMANNA *alias* VENKATA SURYA
NARAYANA MOORTHY, MINOR BY NEXT FRIEND, PULLELA
SRI RAMA SASTRI (PLAINTIFF), APPELLANT,

v.

SREEPADA RAMALAKSHMAMMA (DEFENDANT),
RESPONDENT.²

Specific Relief Act (I of 1877), s. 42—Fabrication of authority to adopt by widow does not justify suit by reversioner for declaring the authority not genuine.

The mere fabrication of an authority to adopt by the widow will not entitle the reversioner to claim a declaration under section 42 of the Specific Relief Act that the authority is not genuine.

SECOND APPEAL against the decree of T. Gopalakrishna Pillai, the Subordinate Judge of Kistna at Ellore, in Appeal Suit No. 46 of