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mere expectancy as is referred to in the Transfer of Property Act, section 6 (a) support this view. For, if the reversionary interest in the widow's husband's estate is a mere expectancy so far as the reversioner is concerned the only person in whom "the legal estate" (I use that expression for brevity perhaps at the sacrifice of accuracy) can be said to be vested must be the widow.

N.R.

APPELLATE CIVIL.

*Before Mr. Justice Seshagiri Ayyar and Mr. Justice
Kumaraswami Sastriyar.*

VENKATAPERUNAL RAJA BAHADUR VARU, RAJAH OF
KARVETNAGAR (MINOR BY GUARDIAN W. A. VARADA-
CHARIAR)—(PETITIONER), APPELLANT IN ALL.

v.

VENKATA REDDI AND TWELVE OTHERS (COUNTER-PETITIONERS),
RESPONDENTS.*

Civil Procedure Code (Act V of 1908), ss. 47, 73 and 104—Rateable distribution, order for—Right of appeal—Mortgage-decree—Provision for execution personally against the mortgagor—Application for execution for sale of mortgaged property—Sale held—Application, not disposed of—Sale of other properties by other decree-holders—Proceeds paid into Court—Application for rateable distribution by holder of mortgage-decree, if maintainable—Application for execution, not formally disposed of, if pending.

An order for rateable distribution under section 73 of the Code of Civil Procedure is appealable if it was passed between the parties to the suit in which the decree was passed and related to the execution of the decree and so fell under the provisions of section 47 of the Code.

Section 73 of the Code does not say that no appeal shall lie against orders passed under it; nor does the omission to provide for an appeal against such orders in section 104 of the Code deprive a party of the right of appeal conferred by other provisions of the Code.

Where an application for execution prayed for specific reliefs and they were all granted by the Court and obtained by the decree-holder, but no final order of disposal was passed by the Court on the application, it must be deemed to be a pending application for execution for purposes of section 73 of the Code.

APPEALS against the orders of L. C. MOORE, District Judge of North Arcot, in Civil Miscellaneous Petitions Nos. 898, 899, 900,

* Appeals Against Orders Nos. 486 to 280 of 1913.

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and
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901 and 904 of 1912 (Execution Petitions Nos. 124, 88, 133, 135 and 82 of 1905, in Original Suit No. 5 of 1887, No. 22 of 1889, No. 11 of 1889, No. 24 of 1889 and No. 11 of 1886 respectively).

The respondent obtained a decree for sale on a mortgage executed by the appellant. The decree contained a provision for the recovery of the balance of the decree-amount from the person and the other properties of the judgment-debtor; an application was made by the decree-holder for execution of the decree by the sale of the mortgaged properties; the application was granted and the properties were sold and the sale-proceeds were paid towards the decree, which was not however thereby fully satisfied. The execution application was not finally disposed of by an order of Court, though the prayers in the application were all granted and no further reliefs could be asked for or obtained on the petition. Two other decree-holders against the same judgment-debtor, in execution of their decrees in the same Court, attached some other properties of the latter and brought them to sale; the sale-proceeds were paid into Court. The respondent applied for rateable distribution in respect of his decree and for payment out of the amount deposited in Court. The judgment-debtor objected among other grounds that the respondent was not entitled to rateable distribution as the latter had no subsisting application for execution pending at the time in the Court within the terms of section 73 of the Code. The lower Court overruled the objection and granted rateable distribution in favour of the respondent. The judgment-debtor preferred an appeal to the High Court against the order of the lower Court. The respondent (the decree-holder) raised a preliminary objection that there was no appeal provided under the Code of Civil Procedure against the order in question, as it was passed under section 73 of the Code, and no appeal was given under section 104 of the Code.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the appellant.

M. Krishnamachari for *V. Parthasarathy Ayyangar* and *R. V. Venkataramana Row* for the respondents.

The following judgment of the Court was delivered by *SESHAGIRI AYYAR, J.*:—The respondents in these connected appeals obtained mortgage decrees against the appellant. These decrees provided for the recovery of the balance from the person

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and the other properties of the judgment-debtor: certain properties not included in the mortgage to the respondents were attached in execution of two other decrees against the same judgment-debtor; the realised assets were paid into Court. The present respondents applied for rateable distribution. Notwithstanding the objection of the judgment-debtor, the applications were granted. The judgment-debtor has appealed. A preliminary objection is taken that as the order was passed under section 73 of the Code of Civil Procedure against which no appeal is provided by section 104 of the Code, no appeal should be entertained. It is conceded that the question agitated in the applications relates to the execution of the decrees between the parties to the suits in which the decrees were passed. *Primâ facie*, therefore, the orders are appealable as falling under section 47 of the Code of Civil Procedure. Has that right of appeal been taken away in the present case by section 73? That section does not say that no appeal shall lie against orders passed under it. It is by the omission to provide for an appeal in section 104 that it is argued that an appeal is not given against the order. It has been held with reference to orders passed under Order XXI, rule 63 that if the adjudication was between the parties to the suit, although the matter may arise in a claim petition, an appeal will lie under section 47 of the Code of Civil Procedure. This principle was recognized both under the old and the new codes. See *Sundar Singh v. Ghasi*(1), *Krishnabhupati Devu v. Vikrama Devu*(2), *Vengapayyan v. Karimpavakal Parvati*(3) and *Kali Prasanna Ghosh v. Shaikh Golam Rahman*(4). On the analogy of these decisions, we are of opinion that orders passed under section 73 of the Code of Civil Procedure are appealable, if they affect parties to the suits. In *Jagadish Chandra Shaha v. Kripa Nath Shaha*(5) and *Kashi Ram v. Mani Ram*(6), the contest was between rival decree-holders. They are not governed by section 47 of the Code of Civil Procedure. This distinction was pointedly referred to in *Balmer Lawrie & Co. v. Jadunath Banerjee*(7).

But our attention was drawn to the judgment of SANKARAN NAIR AND AYLING, JJ., in *Chennamma v. Rajah of Karvetnagar*(8),

(1) (1896) I.L.R., 18 All., 410.

(3) (1903) I.L.R., 26 Mad., 501.

(5) (1899) I.L.R., 36 Calc., 130.

(7) (1915) I.L.R., 42 Calc., 1.

(2) (1895) I.L.R., 18 Mad., 13 at p. 17.

(4) (1913) 18 C.W.N., 910.

(6) (1892) I.L.R., 14 All., 210.

(8) (1914) 1 L.W., 234.

which at first sight appeared to be a direct authority in favour of the respondents. In that case, the appellant was one of the decree-holders. To him the provision of clause (2) of section 73 of the Code of Civil Procedure would have applied, and he could have had his remedy by way of suit if the order went against him. The judgment-debtor cannot avail himself of the rights of suit which that sub-clause provides. The present case may be distinguished from *Chennamma v. Rajah of Karvetnagar*(1) on that ground. We think that a party to whom a right of appeal is given, if he comes under section 47 of the Code of Civil Procedure should not be deprived of it, unless the Civil Procedure Code expressly denies it to him. As we find no such denial in section 73 of the Civil Procedure Code, we must hold that an appeal lies. We overrule the preliminary objection.

The appeals then coming on for hearing on merits on the same day and having stood over for consideration the Court delivered the following judgments:—

SESHAGIRI AYYAR, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver. I entirely agree with his conclusions. The respondents are entitled to rateable distribution, even though their decrees are on mortgages. The order for payment of the amount from the person and the other properties of the judgment-debtor was also obtained in these cases. See *Abdulla Sahib v. Doctor Oosman Sahib*(2) and *Gatti Lal v. Bir Bahadur Singh*(3). It is not disputed that no formal order was passed disposing of their execution applications. Under the old Code of Civil Procedure, it was held that even when an application was “struck off,” it must be taken to be still pending, as the law provided no procedure for taking such a step; *Sasivarna Tevar v. Arulanandam Pillai*(4). In the present Code, there is an express provision for dismissing an execution application when no further step is taken by the decree-holder. It is clear, therefore, that until that step is taken under the new Code, the application is on the file of the Court. The fact that the decree-holder moved the Court only for a particular remedy open to him cannot lead to the inference that he was not entitled to ask that his decree be satisfied by other means which

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(1) (1914) 1 L.W., 234.

(2) (1905) I.L.R., 28 Mad., 224.

(3) (1905) I.L.R., 27 All., 158.

(4) (1898) I.L.R., 21 Mad., 261.

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the law enables him to adopt. The District Judge is right in treating the applications of the respondents as pending at the time that the claim for rateable distribution arose. These appeals must be dismissed with costs. There will be no costs in Civil Miscellaneous Appeal No. 289.

KUMARASWAMI SASTRIYAR, J.—These are appeals against the orders of the District Judge of North Arcot declaring that the respondents are entitled to rateable distribution out of the sale-proceeds realized in Execution Petitions Nos. 78 of 1905 and 108 of 1906. The respondents obtained mortgage decrees against the appellant which directed that the judgment-debtors should be personally liable for any deficiency that may arise after the sale of the mortgaged properties and the application of the sale-proceeds towards the amounts due on the decrees. Though the decrees were not in accordance with the provisions of the Transfer of Property Act, the irregularity cannot be questioned in execution proceedings; *Raja of Kalahasti v. Venkataperumal Raja*(1). The respondents had, therefore, decrees for money and would be entitled to rateable distribution if they had applied for execution and their applications were still undisposed of and on the file at the date when assets were realized in execution of the decrees in Execution Petitions Nos. 78 of 1905 and 108 of 1906: *Tiruchittambala Chetti v. Seshayyanagar*(2).

The respondents in 1905 filed execution applications on the decrees obtained by them which prayed for (1) issue of notices to the judgment-debtors under section 248 of the old Civil Procedure Code, and (2) sale of the mortgaged properties, leave being given to the decree-holders to bid. Orders were passed granting the reliefs and it is admitted that the decree-holders obtained all the reliefs they had prayed for. For some reason or other (not explained) no formal orders were passed taking the petitions off the file of pending execution applications and the District Judge, treating the applications as pending, ordered rateable distribution on the applications of the decree-holders. The question for decision is whether execution applications, praying for specific reliefs which were all granted several years before assets were realized, and on which no further reliefs could be asked or granted, can be said to be still on the file and

(1) (1911) 21 M.L.J., 1036.

(2) (1882) I.L.R., 4 Mad., 383.

undisposed of, because no final orders have been passed taking them off the file of pending applications.

The point is not free from difficulty. When an execution petition is filed, and the Court either rejects all or some of the prayers, it has to pass final orders to that effect. If all or any of the prayers are granted, the decree-holder has to obtain the appropriate reliefs by taking further steps either on the execution petition or in interlocutory application on the execution petition. When he has obtained all the reliefs he asks for, all that remains to be done on the execution petition is to record the fact that the petition has been disposed of. The Court cannot do anything further. It is argued by Mr. Govindaraghava Ayyar that anything that the Court might do after all the prayers have been granted and reliefs sought obtained by the decree-holder will only be purely ministerial and for statistical and not judicial purposes.

There can be little doubt that only a formal order can be passed on the petition after all the reliefs prayed for have been granted and obtained by the decree-holder ; but it does not follow that the order is not a judicial order simply because it records that the execution petition has been disposed of. Many purely formal orders are still judicial and not ministerial. The Madras Civil Rules of Practice contemplates final orders being passed on execution petitions. Rule 167 of the Civil Rules of Practice requires that when orders for sale are passed, the execution petition shall be adjourned to a fixed date and clearly contemplates final orders being passed by the Court on the petition after the sale has been confirmed.

It was the duty of the Court to have fixed a date for the final disposal of the execution petitions and the fact that it did not do so has the effect of keeping the applications pending till final orders are passed.

I am of opinion that the District Judge was right in treating the execution petitions as pending and dismissing the appeals (except Civil Miscellaneous Appeal No. 289) with costs.

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