

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

SARAVANA PILLAI, PETITIONER,

v.

ARUNACHALAM CHETTIAR, RESPONDENT.*

1916,
November,
8, 9 and 15.

Civil Procedure Code (Act V of 1908), sec. 73—Rateable distribution, application for—Decree, validity of, if can be impeached—Inquiry, judicial or administrative—Objection to decree as collusive, if can be raised—Power of Court—Conditions under section 73.

An inquiry under section 73 of the Civil Procedure Code is of a non-judicial character and a Court charged with the distribution of assets under that section has no power to inquire into the validity or the *bona fides* of a decree on the strength of which rateable distribution is claimed.

Shankar Sarup v. Mejo Mal (1901) I.L.R., 23 All., 313 (P.C.), referred to.

The only conditions to be satisfied under section 73 are that there must have been an application before the assets are realized, and that the decree should not have been satisfied.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908), praying the High Court to revise the order of MAULAVI GHULAM JILANI QUIRASHI SAHIB BAHADUR, the District Munsif of Shiyali, dismissing the Execution Application No. 1460 of 1915 in Execution Petition No. 285 of 1915 praying for rateable distribution of the sale-proceeds in Original Suit No. 158 of 1915.

The petitioner, Saravana Pillai, obtained a decree for money against Sabapathia Pillai in Original Suit No. 289 of 1915 on the file of the District Munsif's Court of Shiyali, and filed an application for execution of the decree. One Arunachalam Chettiar had also obtained a decree in Original Suit No. 158 of 1915 on the file of the same Court against the same defendant; he filed an application for execution of his decree and attached some immoveable properties belonging to Sabapathy Pillai; the sale of the properties was fixed for the 20th December 1915. Saravana Pillai, the decree-holder in Original Suit No. 289 of 1915 filed an application dated 20th December, 1915 in Original

* Civil Revision Petition No. 664 of 1916.

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Suit No. 158 of 1915 for rateable distribution of the proceeds that might be realized by the sale in execution. The decree-holder in Original Suit No. 158 of 1915 objected that Saravana Pillai was not entitled to rateable distribution as the decree in Original Suit No. 289 of 1915 was a collusive one and was not based on any real debt. The District Munsif held that it was competent for the decree-holder to raise this objection and called on the petitioner to prove the *bona fide* character of his decree. The petitioner let in no evidence; the District Munsif dismissed the petition. The petitioner preferred this Civil Revision Petition to the High Court.

R. Gopalaswami Ayyangar for the petitioner.

K. V. Sesha Ayyangar for the respondent.

SESHAGIRI
AYYAR, J.

The following judgment of the Court was delivered by SESHAGIRI AYYAR, J.—The petitioner in this case applied for rateable distribution along with others to the District Munsif. Objection was taken that the decree of the petitioner was a collusive one and that consequently he should not be allowed to share in the distribution of the assets. The District Munsif held that it was open to him to inquire into the *bona fides* of the decree obtained by the petitioner. The question for consideration is whether the District Munsif's view is right.

As the counter-petitioner was unrepresented, we requested Mr. K. V. Sesha Ayyangar to assist us in this case. We are indebted to him for the care and energy he has displayed in arguing the case on behalf of the counter-petitioner.

We do not propose to consider the question whether under no circumstances can an executing Court inquire into the validity of a decree. It is fairly well settled that a judgment-debtor is not entitled in execution to impeach the soundness of a decree obtained against him: *Sudindra v. Budan*(1) and *Mahomed Isub v. Bashotappa*(2). This principle applies only as between parties to the decree. As regards strangers, it seems clear that collaterally they can attack the validity of a decree to which they were not parties. The judgment of Lord BROUGHAM in *Earl of Bandon v. Becher*(3) establishes that proposition: see also Bigelow on Estoppel, fifth edition, pages 203 and 211. The

(1) (1886) I.L.R., 9 Mad., 80.

(2) (1903) I.L.R., 27 Bom., 302.

(3) (1835) 3 C. & F., 479 at p. 510.

larger proposition, however, that an executing Court is disentitled from questioning the correctness of a decree does not directly arise in this case. In our opinion, whatever may be the rights of an executing Court in this respect, a Court charged with the distribution of assets under section 73 of the Code of Civil Procedure has no such power. It was held by the Judicial Committee in *Shankar Sarup v. Mejo Mal*(1) that such a Court is acting ministerially in apportioning the moneys realized in execution. The question before their Lordships related to limitation. It was argued that a suit brought to contest the validity of payments made to one of the decree-holders should have been instituted within a year of the decision under article 13 of the Limitation Act. Their Lordships pointed out that in making a rateable distribution under section 295 of the Code of Civil Procedure, 1882, the officer was acting departmentally and not as a Court, and that consequently the decision of such an officer was not one which should have been set aside within a year. A comparison of the provisions of the Code of Civil Procedure relating to rateable distribution and to claim proceedings fully bears out this view. Order XXI, which relates to execution, makes provision in rules 58 to 63 for investigating the claims of third parties. There are similar provisions beginning with rule 97 where there is resistance to delivery of possession to the decree-holder. An inquiry is provided for in these rules, and the unsuccessful party is directed to establish his right in a Court of law, failing which it is declared that the orders passed under the rules shall be final. No such provision is to be found with reference to section 73. Clause (2) of that section says that a wrongful distribution may be questioned in a regular suit. No procedure is prescribed for ascertaining the legality or otherwise of the decrees under which rateable distribution is sought. The absence of such a provision indicates that the inquiry under section 73 is non-judicial. It follows from this that an officer distributing the assets can have no power to inquire into the *bona fides* or otherwise of a decree brought to his notice. Section 73 (c), clause (4), does not contemplate any such enquiry. The only conditions to be satisfied are there must have been an application before the assets are

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(1) (1901) I.L.R., 23 All., 313 (P.C.).

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realized and the decree should not have been satisfied. Both these are matters of record which do not necessitate any lengthy investigation. We are, therefore, on the construction of the provisions relating to rateable distribution, of opinion that it is not competent to the District Munsif to inquire into the validity of a decree on the strength of which rateable distribution is claimed.

Before we examine the decisions which have been quoted before us, we may point out that section 73 of the Code of Civil Procedure, 1908, is only an enabling section. It does not say that the orders passed under it are final unless set aside by a regular suit. It is clear that failure to participate does not prevent a decree-holder from executing his decree against the person and other properties of the judgment-debtor: *Syud Nadir Hossein v. Baboo Pearoo Thovildarinee*(1) and *Janoky Bullubh Sen v. Johiruddin Mahomed Abu Ali Soher Chowdhry*(2).

Now as regards the cases directly bearing on the question, there is no doubt that in Calcutta there are a number of decisions which hold that the *bona fides* of a decree can be inquired into under section 295 of the Code of Civil Procedure of 1882, corresponding to section 73 of the present Code of Civil Procedure. *In re Sunder Dass*(3) enunciates that principle. That was followed in *Chhaganlal v. Fazarali*(4). In *Puran Chand v. Surendra Narain*(5), Justice MOOKERJEE says that the question is not free from difficulty, but that, having regard to the previous decisions of the Calcutta High Court, he was not prepared to dissent from the view that, under section 295 of the old Code, the *bona fides* of a decree can be inquired into. In *Mathura Nath Sarkar v. Umesh Chandra Sarkar*(6), MACLEAN, C.J., doubts the correctness of *In re Sunder Dass*(3). In *Peary Lal Das v. Peary Lal Dawn*(7), Justice MOOKERJEE follows his previous decision in *Puran Chand v. Surendra Narain*(5). The learned Judge, in the earlier case already referred to, says that as, in re-enacting section 73 of the present Code of Civil Procedure, the legislature with knowledge of the decisions in

(1) (1873) 19 W. R., 255 (O.R.).

(3) (1885) I.L.R., 11 Cal., 42.

(5) (1912) 16 C.L.J., 582.

(2) (1884) I.L.R., 10 Calc., 567.

(4) (1889) I.L.R., 13 Bom., 154.

(6) (1897) 1 O.W.N., 633.

(7) (1913) 19 C.W.N., 903.

In re Sundar Das(1) and *Ohhaganlal v. Fazarali*(2), has not made any departure from section 295 of the Code of 1882, it may be taken that it accepted as correct the view taken in these cases. But it has to be remembered that *Shankar Sarup v. Mejo Mal*(3), was also under the old Code, and that notwithstanding the pronouncement of the Judicial Committee that the officer distributing the assets is only acting ministerially, the legislature has not thought fit to declare that he was performing judicial functions.

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We are not prepared to attach any significance to the fact that section 73 of the present code is almost identical in language with section 295 of the old Code. On the whole, limiting our observations solely to the functions of an officer exercising his duties under section 73, we are of opinion that it is not open to him to enquire into the legality or validity of a decree brought to his notice in distributing the assets.

The order of the Munsif must be set aside: and the petition should be restored to file, and be disposed of according to law. Costs to abide.

K.R.

(1) (1885) I.L.R., 11 Calc., 42. (2) (1889) I.L.R., 13 Bom., 154.
(3) (1901) I.L.R., 23 All., 313 (P.C.).