APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

1917, November 19.

THIRAVIYAM PILLAI AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

v.

LAKSHMANA PILLAI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXI, rr. 73 and 83—Several decree-holders—Execution—Attachment in each decree—Applications for sale—Permission to judgment-debtor to raise money by private alienation to pay off one of the decrees—Money paid into Court by alienee—Rateable distribution—"Assets held by a Court", meaning of.

Where several decree-holders in different suits had attached the same property of their judgment-debtor and applied for sale in execution of their respective decrees, but the judgment-debtor obtained permission of the Court under Order XXI, rule 83, to raise money by private alienation of the property to pay the decree amount due in one of the decrees, and the amount was paid into Court by the alienee.

Held, that the money, having been paid into Court under a pending execution application, was assets held by the Court under Order XXI, rule 73 of the Code, and was liable to rateable distribution among the several decree-holders who had applied for execution.

Sorabji Coovarji v. *Kala Raghunath* (1912) I.L.R., 36 Bom., 156, dissented from.

Kathum Sahiba v. *Hajee Badsha Sahib* (1915) I.L.R., 38 Mad., 221 at p. 224, referred to.

Golstrum v. *Woomes Chandra Bonnerjee* (1917) I.L.R., 44 Calo., 789, distinguished.

SECOND APPEAL against the decree of V. DANDAPANI PILLAI, the Subordinate Judge of Madura, in Appeal No. 40 of 1915, preferred against the decree of K. W. RAMA RAO, the Additional District Munsif of Madura, in Original Suit No. 153 of 1913.

The material facts appear from the judgment.

C. V. Anantakrishna Ayyar for the appellants.

T. R. Venkatarama Sastriyar and *P. S. Narayanaswami Ayyar* for the respondent.

The judgment of the Court was delivered by

* Second Appeal No. 1269 of 1916.

SESHAGIRI AYYAR, J.—Plaintiff and first defendant obtained decrees against one Thoppiah Pillai. Plaintiff applied for execution and an order was made for the attachment of the judgment-debtor's property. The first defendant also applied for execution and the same property was again attached at his instance. When the property was about to be sold, the judgment-debtor applied under Order XXI, rule 83 of the Code of Civil Procedure, for permission to raise money by private alienation. The District Munsif gave him permission. Why he granted it when there was an attachment at the instance of the first defendant, and why he accepted the payment by the judgment-debtor of monies which could only have covered the amount due to the plaintiff have not been explained. It seems to us that the permission should not have been accorded, but as the judgment-debtor is not before us, we shall not deal with that question any further. In accordance with the permission, the judgment-debtor executed a mortgage on the property and the mortgagee paid into Court money just enough to cover the plaintiff's decree. The District Munsif divided this amount rateably between the plaintiff and the first defendant. Thereupon this suit was instituted to contest that order. The Courts below have held that the money should entirely be given to the plaintiff apparently on the ground that it was deposited in Court by virtue of the permission obtained in the proceedings taken by the plaintiff. We are unable to agree with them.

Mr. Venkatarama Sastriyar vakil for the respondent, in his able argument took us through the various provisions contained in Order XXI and argued that the money paid by the judgment-debtor must be taken to have been ear-marked for the benefit of the plaintiff. A significant change has been made in the language of section 73 of the present Civil Procedure Code. In the old Code, the words were "whenever assets are realized by sale or otherwise in execution of a decree". In the present Code, the words are "where assets are held by a Court". The change was apparently intended to set at rest the question whether the word realization should not be restricted to what is paid in by virtue of process taken in execution; but apparently the legislature has not succeeded in the object. There can be no question that the language of the present Code is wide enough to cover cases where monies are in the hands of

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the Court by whatever process the same has been realized. It is true that the learned Judges of the Bombay High Court hold that even under the new Code, the money to be held by the Court must have reached its hands in execution : see *Sorabji Coovarji* v. *Kala Raghunath*(1). An observation of Mr. Justice BAKEWELL in *Kathum Sahiba* v. *Hajee Badsha Sahib*(2) lends support to this proposition. It is not necessary to express any opinion on this question, as we are of opinion that when permission is granted under Order XXI, rule 83, to raise money by private alienation the money is paid under a pending execution application. The further point which Mr. Venkatarama Sastriyar pressed before us was that the money should be taken to have been paid solely to the credit of his client's decree. The learned vakil asked us to apply the analogy of Order XXI, rule 55. In that rule, three classes of payments are indicated. We are prepared to concede that if money is paid outside the Court and the decree-holder certifies the payment, it cannot be said that it is an asset held by the Court. It may be that in such a case, as the attachment would cease to subsist, rival decree-holders can have no remedy ; but if money is paid into Court by the other modes mentioned in rule 55, we are not satisfied that this money cannot be regarded as an asset held by the Court. If *Sorabji Coovarji* v. *Kala Raghunath*(1) lays down this proposition we are not prepared to follow it. It must be remembered that an attaching creditor acquires no lien upon the proceeds of the sale because he procured the attachment and we fail to see why the fact that the attachment is raised in consequence of the payment made into Court should take the money out of the expression "assets held by the Court". As regards *Golstrum* v. *Woomes Chandra Bonnerjee*(3) that was a decision under Order XXI, rule 89. That order distinctly provides for payment to the decree-holder or to the purchaser, consequently the payment must be taken to have been ear-marked.

The learned vakil for the respondent conceded that where monies are realized by process of Court solely at the instance of one of the attaching decree-holders he does not obtain, apart from getting his expenses paid, any higher right than the other

(1) (1912) I.L.R., 36 Bom., 156. (2) (1915) I.L.R., 38 Mad., 221 at p. 224.
(3) (1917) I.L.R., 44 Calc., 789.

decree-holders who have before payment applied for execution. This being so, we fail to see on what principle the fact that the money was paid into Court by virtue of the permission granted to raise money privately should give a larger right to the person in execution of whose decree permission was so granted. The policy of the legislature seems to be to bring all monies realized at least in process of execution to the hotchpot to be shared by all the decree-holders. It is analogous to distribution on an insolvency. The language of Order XXI, rule 72, shows that even when monies are not actually paid into Court, as in cases where the decree-holder is given permission to purchase property and the sale-proceeds are applied to the satisfaction of his decree, the legislature specifically provided for the money being regarded as assets held by the Court. The intention of the legislature is to afford every creditor equal opportunities of obtaining a rateable advantage in the available assets of the judgment-debtor. Therefore unless there is something clear in the language of the provisions of the Code to exempt a payment from being applied to the benefit of all the creditors, Courts should incline to the view that monies in the hands of the Court should be shared by all decree-holders rateably.

In this view, we must reverse the decrees of the Courts below and dismiss the plaintiff's suit with costs throughout. The memorandum of objections is dismissed. There will be no order as to costs.

K.R.