APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

1925, September 14.

SREE MAHANT PRAYAGA DOSS JEE VARU (PETITIONER), APPELLANT,

v.

UMADE RAJA RAJAI RAJA DAMARA KUMARA THIMMA NAYANIM BAHADUR VARU, RAJA OF KALAHASTI AND OTHERS (RESPONDENTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 73, and O. XXI, r. 71 —Auction sale—Deposit of 25 per cent of price into Court by auction-purchaser—Default by him to pay balance of price—Re-sale—Deficiency in price—Application to recover deficiency from defaulter, by whom can be made—Attachment of deposit by decree-holder—Application by other decree-holders for rateable distribution of the deposit amount.

Where an auction-purchaser in execution of a decree, who had paid the deposit of 25 per cent of the purchase money, defaulted to pay the balance and the property was resold and fetched a much lower price, only the decree-holder who brought the property to sale or the judgment-debtor, and not any other decree-holder, can apply, under Order XXI, rule 71, to recover from the defaulter the entire deficiency in price caused by the re-sale.

Where such decree-holder had applied under rule 71 and attached the amount of the 25 per cent of the price in deposit in Court, other decree-holders, who had applied previously for execution of their decrees, are entitled to rateable distribution of the amount in deposit in Court as the amount became assets by reason of the attachment.

APPEAL against the order of W. L. VENKATARAMAYYA, District Judge of Nellore, in E.P. No. 121 of 1917 in O.S. No. 40 of 1910 on the file of the District Court of North Arcot.

* Civil Miscellaneous Appeal No. 31 of 1919.

The material facts appear from the Judgment.

T. V. Venkatarama Ayyar for appellant.

S. Varadachari for respondent.

JUDGMENT.

DEVADOSS, J.—The taluk of Pamur in Kalahasti zamin was sold by the District Court of Nellore on 25th August 1914 in execution of the decree in C.S. No. 187 of 1912 and was knocked down for Rs. 6,90,000 to one Ramagarji Neelakanthagarji who made a deposit of 25 per cent of the amount of his bid and subsequently defaulted to pay the balance. The property was again put up to sale but did not fetch more than Rs. 1,01,000. The decree-holder in C.S. No. 187 of 1912 thereupon applied to the Court under Order XXI, rule 71 for the recovery of the difference between Rs. 6,90,000 and Rs. 1,01,000 from the defaulting purchaser. The District Judge dismissed his application, but the High Court in L.P.A. No. 42 of 1917 set aside the order of the District Judge and directed him to dispose of the petition according to law. DEVADOSS, J.

Several persons who had obtained decrees against the Raja of Kalahasti applied to the District Court for attachment of the deposit made on 25th August 1914 and prayed in the alternative for a rateable distribution of the amount under section 73, Civil Procedure Code. The District Judge held that the only person entitled to proceed against the defaulting purchaser was the decree-holder in C.S. No. 187 of 1912 and the other decree-holders were neither entitled to attach the amount in Court under Order XXI, rule 52 nor to claim rateable distribution of the same under section 73 and dismissed their applications. Decree-holders other than decree-holder in C.S. No. 187 of 1912 preferred these appeals against the orders of the District Judge.

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The facts are not disputed. The only question for determination is, are the appellants entitled to any relief, and if so, what? It is admitted by both the appellants and the respondents that the deposit of 25 per cent in Court belonged to the defaulting purchaser and that the decree-holder in C.S. No. 187 of 1912 made an application under Order XXI, rule 71 for the recovery of the deficiency from the defaulting purchaser. It is common ground that the defaulting purchaser is a man of straw and there is no likelihood of any amount being recovered from him. Under Order XIX, rule 86 if the auction purchaser makes any default in payment within the time mentioned the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government and the property shall be resold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold. Mr. HUGHES, the then District Judge of Nellore, held that it was not a proper case for forfeiting the amount of the deposit to the Government and directed that the amount should be in Court pending the disposal of certain petitions.

Re-sale of the property was held under Order XXI, rule 87, and, as the property fetched a considerably lower sum than that for which it was first sold, a certificate was given as to the amount of deficiency by the officer conducting the sale. Order XXI, rule 71, is in these terms:

> "Any deficiency of price which may happen on a re-sale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money."

Under this rule the decree-holder became entitled to proceed against the defaulting purchaser for the difference between 6,90,000 and 1,01,000. From the terms of this rule it is quite clear that the decree-holder who brings the property to sale gets a decree against the defaulting purchaser for the deficiency and may recover the amount from him under the provisions relating to execution of decrees. If he does not choose to execute the decree, the judgment-debtor is entitled to execute the decree against the defaulting purchaser for the deficiency. A good deal of confusion has arisen from overlooking the distinction between the capacity of the decree-holder who brings the property to sale and his capacity as a decree-holder by reason of the provisions of Order XXI, rule 71. In his capacity as decree-holder he is entitled to be paid only the amount of his decree. As a decree-holder by reason of the provisions of Order XXI, rule 71 he is entitled to execute the decree against the defaulting purchaser for the whole amount of the deficiency. He cannot partially execute the decree only to the extent of the amount due to him. When he executes the decree for the deficiency he executes it for the whole amount of the deficiency. When the decree-holder in C.S. No. 187 of 1912 applied to the Court to proceed under Order XXI, rule 71, he did not ask for the execution of the decree in C.S. No. 187 of 1912 but he asked for the execution of the decree for the deficiency from the defaulting purchaser In execution of what I may call the decree for the deficiency, the judgment-debtor is not the original judgment-debtor, but the defaulting purchaser. The position would be clear if the judgment-debtor himself applied to proceed under rule 71 against the defaulting purchaser. The defaulting purchaser is a judgment-debtor to the extent of the deficiency by virtue of the certificate of the officer holding the sale.

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If the defaulting purchaser paid the amount of the deficiency into Court, what would be, the character of the amount so paid? Would it or would it not be assets within the meaning of section 73, Civil Procedure Code? The defaulting auction purchaser is to make good the deficiency caused by reason of his default in paying the balance of the purchase money. If he pays the balance without execution being taken against him, that would be assets in the same way as it would be if he had made no default at all. The mere fact that the defaulting purchaser is made to pay the amount of the deficiency by a coercive process or by proceeding under the provisions relating to the execution of a decree for payment of money, would not change the character of the amount paid by him into Court.

In this case the defaulting purchaser is said to be a man of straw and nothing could be recovered from him. He had to his credit Rs. 1,72,500 being the amount of 25 per cent on the amount of his bid. When the decree-holder who brought the property to sale asked the Court to attach the money in Court under Order XXI, rule 71, the money was attached as the money of the defaulting purchaser. Under Order XXI, rule 52,

> "Where the property to be attached is in the custody of any Court or Public Officer, the attachment shall be made by a notice to such Court or Officer, requesting that such property and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued."

Here the money was in the Court which effected the attchment. The effect of the attachment for an amount much larger than that in Court was to convert what belonged to the defaulting purchaser into assets within the meaning of section 73. If a debt due to the defaulting purchaser was attached under Order XXI in execution of the decree for the deficiency and if the debtor of the defaulting purchaser pays the amount into Court would

that amount not be assets in Court? Whether the amount of the deficiency is paid by the defaulting purchaser or whether a debt of his is attached and the debtor pays the amount into Court or whether the money of the defaulting purchaser in Court is attached the result is the same. The money paid into Court or in Court becomes the proceeds realized in execution of the decree for the deficiency and such amount is not only for the benefit of the decree-holder who brought the property to sale but of all the other decree-holders who are entitled to rateable distribution under section 73, Civil Procedure Code. It is difficult to see any difference between the proceeds of auction sale held at the instance of a decree-holder and the amount paid by a defaulting purchaser by reason of his not being able to pay the whole of the sale amount within the time fixed, so far as the rights of the other decree-holders are concerned. It is not disputed that if the defaulting purchaser had not made any default and paid the whole amount of Rs. 6,90,000 into Court, the decree-holder who brought the property to sale as well as the other decree-holders entitled to rateable distribution under section 73 would be entitled to be paid rateably, and the defaulting auction purchaser being forced to make good the deficiency by an execution against him cannot change the character of the amount which he either voluntarily pays into Court or is recoverable from him or from his property or funds belonging to him. In this view of the case, it is unnecessary to consider in detail the arguments advanced on both sides.

The contention of Mr. T. V. Venkatarama Ayyar for the appellants is that the expression "decree-holder" in Order XXI, rule 71 should be held to mean all the decree-holders who are entitled to share rateably under section 73, Civil Procedure Code. His argument is that

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under the old Code the expression "decree-holder" was held to include all decree-holders entitled to share rateably under section 73. He relies upon *Chakrapani Chetty* v. *Dhanji Settu*(1) and *Bajoy Singh Dudhuna* v. *Hukumchand*(2). Such a construction would no doubt be a beneficial one so far as the decreeholders are concerned. But reading Order XXI, rule 71, it cannot be said that the legislatnre intended by the expression "decree-holder" any decree-holder or all the decree-holders against the judgment-debtor. It cannot be that each decree-holder who was entitled to share rateably has the right to proceed under rule 71. From the juxta position of the expression "at the instance of either the decree-holder or the judgment-debtor", it is clear that the legislature intended by the term "decree-holder" the decree-holder who brings the property to sale, for, the right to proceed against the defaulting purchaser for the deficiency is given to the judgment-debtor as well as to the decree-holder. If it was intended that any other decree-holder should have the benefit, the legislature would have made the matter clear by adding an explanation as in section 64 or by using the expression "at the instance of *any* decree-holder" instead of the expression "*the* decree-holder."

It has been urged on the side of the respondent by Mr. Varadachari that the decree-holder in C.S. No. 187 of 1912 did not act for the other decree-holders and was not a trustee for the other decree-holders. No doubt he does not act for the other decree-holders nor is he a trustee for them, but he is entitled as a decree-holder to proceed against the defaulting purchaser for the whole amount of the deficiency and when he does so the whole amount of the deficiency is recoverable and not only a

(1) (1901) I.L.R., 24 Mad., 311. (2) (1902) I.L.R., 29 Calc., 548.

portion thereof. As I have already remarked, when the decree-holder in C.S. No. 187 of 1912 applied under rule 71 for an order against the defaulting purchaser for the recovery of the deficiency he did not execute his decree but the decree for the deficiency under rule 71. He, having been given a specific decree against a specific individual, is entitled to have that decree executed, and all that rule 71 says is that at the instance of either the decree-holder or the judgment-debtor any deficiency shall be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

It has been urged that an application under Order XXI, rule 71, was made by the judgment-debtor and that application was dismissed, and no appeal was preferred against that order, and therefore the amount in Court cannot become the assets within the meaning of section 73. The District Judge of Nellore dismissed both the applications of the decree-holder and the judgment-debtor under rule 71, and the decree-holder preferred an appeal to the High Court, and the High Court in L.P.A. No. 42 of 1917 set aside the order of the District Judge and remanded the petition for disposal according to law. It is contended by Mr. Venkatrama Ayyar that this order enures for the benefit of the judgment-debtor as well under Order XLI, rule 33. It is not necessary to consider this aspect of the question as I have already held that the amount in Court became assets by reason of the attachment at the instance of the decree-holder.

The argument is advanced on behalf of the respondents that an attachment could be raised by paying the attaching creditor the amount of his decree and the other decree-holders entitled to claim under section 73 would have no remedy and even if the property is sold and the amount of the decree due to the decree-holder who brings the property to sale is paid with the costs of the

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sale, etc., the sale could be set aside under rule 89. But these arguments do not meet the real question in the case. No doubt if the decree-holder in C.S. No. 187 of 1912 was paid the amount of his decree before the sale was effected, the attachment could have been raised, but if after the sale was effected and the sale-proceeds were put into Court, the decree-holder who brings the property to sale can only share rateably with the other decree-holders under section 73. We are not concerned at present to consider what might have happened if he was paid off before the sale under rule 55 or after the sale under rule 89. Here the defaulting auction purchaser had funds in Court which have by reason of execution of the decree under Order XXI, rule 71, become assets. Section 73 of the Civil Procedure Code runs thus:

> "Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets after deducting the costs of realization shall be rateably distributed among all such persons."

The legislature has considerably amended the old section 295. The assets were to have been realized by sale or otherwise in execution of a decree. Under the present section if the assests are held by a Court, i.e., the assets of the judgment-debtor are held by a Court, persons who have applied for execution before the receipt of such assets are entitled to share rateably. In this case the appellants did apply for execution against the Raja of Kalahasti before the decree-holder in C.S. No. 187 of 1912 brought the property to sale and the amount now in Court had been realized by means of the provisions of Order XXI, rule 71. The money in Court therefore is assets held by the Court and all the appellants are entitled to share rateably along with the

decree-holder in C.S. No. 187 of 1912. The learned District Judge has directed that the whole amount of his decree should be paid to him. In the view we have taken he is only entitled to share rateably along with the other creditors.

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In the result the appeals are allowed and the petitions remanded to the lower Court for rateable distribution under section 73, Civil Procedure Code. As the question involved in these appeals is not one free from difficulty, the appellants and respondent (1), i.e., the decree-holder in C.S. No. 187 of 1912 are entitled to their costs out of the amount in Court.

WALLER, J.—I agree. The position seems to me to be this. It is clear that, if there had been no default, if, in fact, the whole of the purchase money had been paid, appellants would have been entitled to rateable distribution. I can see no reason for holding that the auction purchaser's default alters the situation entirely to their detriment, so that they are not entitled to share in the percentage of the purchase price which he deposited.

WALLER, J.

K.R.