

decision, namely, whether an appeal lies against the order in question and whether the previous order passed by the learned Judge in this case would be a bar to the passing of this order. The appeal is dismissed with costs.

THIRUMALAI  
GOUNDER  
v.  
TOWN BANK,  
LIMITED,  
POLLACHI.

A.S.V.

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APPELLATE CIVIL.

*Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.*

RAMASAMI IYER AND ANOTHER (RESPONDENTS),  
PETITIONERS,

1934,  
May 4.

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v.

VEDAMBAL AMMAL (PETITIONER), RESPONDENT.\*

*Code of Civil Procedure (Act V of 1908), sec. 78—Mesne profits—Decree for—Holder of, who has obtained attachment under O. XXI, r. 42, of Code before ascertainment of amount of profits—Right to rateable distribution of—Execution application by him after ascertainment of profits—Necessity.*

The holder of a decree for mesne profits who has obtained an attachment under Order XXI, rule 42, of the Code of Civil Procedure before the amount of mesne profits has been ascertained is entitled to a rateable distribution with other decreeholders under section 78 of the Code. An application for execution by him after the ascertainment of profits is not necessary to entitle him to the benefit of that section.

*Viraragava v. Varada* (1882) I.L.R. 5 Mad. 123, relied upon.

PETITION under sections 115 and 151 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Tiruvarur

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\* Civil Revision Petition No. 1716 of 1930.

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dated 29th January 1930 and made in Miscellaneous Application No. 48 of 1930 in Original Suit No. 8 of 1921 on the file of the Court of the Additional Subordinate Judge of Mayavaram.

*K. Venguswami Ayyar* for petitioners.

*K. S. Rajagopalachariar* for *K. Rajah Ayyar* for respondent.

*Cur. adv. vult.*

MADHAVAN  
NAIR J.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The petitioners are the decree-holders in Small Cause Suits Nos. 747 of 1928 and 1021 of 1927, Sub-Court, Tuticorin, who obtained decrees in those suits against the same judgment-debtor. The respondent obtained a preliminary decree in Original Suit No. 8 of 1921, Sub-Court, Mayavaram, for possession and mesne profits against the same judgment-debtor under Order XX, rule 12, Civil Procedure Code, declaring her right to the properties and ordering an enquiry into mesne profits. In execution of his decree in Small Cause Suit No. 1021 of 1927, money in the hands of the garnishee was attached and deposited in Court to the credit of the decree-holder in Small Cause suit No. 1021 of 1927 on 2nd December 1929. In Execution Petition Register No. 19 of 1925 the respondent had applied for the attachment of the very amount under Order XXI, rule 42, Civil Procedure Code, and the attachment had been ordered on 18th March 1925. On 14th December 1929 she filed Miscellaneous Application No. 435 of 1929 for the ascertainment of mesne profits. On 25th January 1930, she filed the application out of which this appeal arises, Miscellaneous Application No. 48 of 1930, for rateable distribution, under sections 73 and 151,

Civil Procedure Code, of the amount attached in respect of future profits which have to be ascertained hereafter and for which she had already filed Miscellaneous Application No. 435 of 1929.

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The petitioners who had also applied for rateable distribution opposed the respondent's application on the ground that section 73, Civil Procedure Code, is inapplicable inasmuch as she had not made her application to the Court before the receipt of assets and there was no application from her "for the execution of a decree for the payment of money" as required under the section. The latter objection is based on the ground that an enquiry into mesne profits being a proceeding in the suit itself under Order XX, rule 12, even though under Order XXI, rule 42, a decree-holder for mesne profits may obtain an attachment before the amount is ascertained, still to enable him to claim the benefit under section 73 he must have filed a petition for execution after the amount is ascertained. These objections were overruled by the lower Court and rateable distribution was ordered in favour of the respondent.

The above objections have again been pressed before us. It is clear that, if Execution Petition Register No. 19 of 1925, the application for attachment under Order XXI, rule 42, can be considered to be an application for execution, then both the objections of the petitioners are answered. Order XXI, rule 42, says that

"where a decree directs an enquiry as to mesne profits . . . the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money."

The attachment in the present case was obtained by the respondent under this rule. In *Viraragava*

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v. *Varada*(1) it was held under the old Code that the holder of a decree for unascertained mesne profits who has applied to the Court to ascertain the amount thereof and to attach immovable property under section 255 (corresponding to Order XXI, rule 42, of the present Code) comes within the purview of section 295 (corresponding to the present section 73, Civil Procedure Code), and is entitled to share rateably with the attaching creditor in the assets realised. In the course of the judgment the learned Judges pointed out :

“ The decree held by the petitioner for mesne profits was a decree for money. Although the amount was still uncertain, the petitioner had applied to the Court to execute that decree.”

It is argued for the petitioners that, as under the old Code the ascertainment of mesne profits was a proceeding in execution, the application in that behalf was sufficient to satisfy the requirements of section 73 ; while under the present Code the ascertainment of mesne profits is a proceeding in the suit itself (Order XX, rule 12, Civil Procedure Code) and therefore, unless a petition for execution after the amount of mesne profits has been ascertained is filed, the respondent cannot apply under section 73. For the purpose of section 73 the difference in procedure between the two Codes with regard to the ascertainment of mesne profits does not necessarily lead to the conclusion that without an application for execution after the ascertainment of profits rateable distribution cannot be claimed by the respondent. The Code allows under Order XXI, rule 42, an

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(1) (1882) I.L.R. 5 Mad. 123.

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attachment to be made to realise the amount to be ascertained in future “as in the case of an ordinary decree for the payment of money”. This provision, in our opinion, treats the attachment as a proceeding in execution of the decree and the application for attachment may well therefore be treated as one for execution. It is not unreasonable therefore to hold that as soon as the amount is ascertained the application made for obtaining the attachment becomes one for the execution of the decree for the realisation of the ascertained money. In this connection it may be observed that rule 42 finds a place under Order XXI, the Order relating to the execution of decrees. If the view expressed above is not accepted, it would mean that under the old Code the decree-holder would under circumstances similar to those appearing in the present case be entitled to obtain rateable distribution, while he cannot do so under the present Code. In our opinion there is no justification for such a conclusion. In Mulla’s Commentaries on the Code of Civil Procedure, under section 73, the following statement of law appears :

“A decree for the payment of mesne profits is a ‘decree for the payment of money’ within the meaning of this section, notwithstanding that the amount of mesne profits has not yet been ascertained. The holder of such a decree, who has applied for attachment under Order XXI, rule 42 (Code of 1882, section 255), is entitled to a rateable distribution with other decree-holders under this section” ;

and the authority referred to for this proposition is *Viraragava v. Varada*(1)—the decision under the old Code we have already quoted. For the above reasons we hold that under the present

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(1) (1882) I.L.R. 5 Mad. 123.

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Code the respondent can claim rateable distribution under section 73, Civil Procedure Code.

It cannot be doubted that in equity the distribution of the assets in this case should abide the passing of the final decree. The respondent was the first to attach the amount in question and the delay in passing the final decree should not in our opinion be allowed to stand in the way of her obtaining rateable distribution. She has made the application under section 151, Civil Procedure Code, also. We think this is pre-eminently a case for the application of that section. In our opinion, both under section 73 and under section 151 of the Civil Procedure Code the respondent's claim for rateable distribution should be recognised. We confirm the lower Court's order and dismiss this civil revision petition with costs.

A.S.V.

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## APPELLATE CIVIL.

*Before Mr. Justice Ramesam and Mr. Justice Curgenvan.*

KALIMUTHU PILLAI, MINOR BY HIS MOTHER AND NEXT  
 FRIEND THIRUPILLAI AMMAL, (PLAINTIFF),  
 APPELLANT,

v.

AMMAMUTHU PILLAI AND ANOTHER (DEFENDANTS),  
 RESPONDENTS.\*

*Hindu Law—Inheritance—Bandhus—Atmabandhus—Preference among—Principle applicable—Daughter's daughter's son—Sister's son—Preference as between—Order of succession among Bandhus—Rules as to.*

According to Hindu Law as between the daughter's daughter's son of the propositus and the sister's son of the propositus

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\* Second Appeal No. 272 of 1930.