would, in the absence of any reasons given by the learned Judge for his opinion in *Swaminatha Ayyar* v. *Official Receiver, South Malabar*(1) and with great deference, decline to follow the interpretation placed by him on the word "benefit" in section 51 of the Act.

For the above reasons I would hold that the appellant cannot claim to retain any benefit for himself out of the money which he had realised in his execution. This appeal therefore fails and is dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar.

MARUDAMUTHU MUDALIAR (PETITIONER—FIRST DEFENDANT), PETITIONER,

1938, December 16.

v.

N. K. VENKATRAMA AYYAR (DECREE-HOLDER), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XLIII, r. 1 (j)—Order refusing to set aside sale—Order rejecting application under O. XXI, r. 90, of the Code for failure to furnish security if an—Effect of proviso added to O. XXI, r. 90, by Madras High Court.

A Court to which an application under Order XXI, rule 90, Civil Procedure Code, was made, acting under the proviso added in the Madras Presidency to that rule, ordered the applicant to deposit the sale amount in cash. He tendered a draft bond offering immovable property as security. The Court declined to accept it and accordingly rejected the petition.

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(1) (1933) I.L.R. 57 Mad. 330.

* Civil Revision Petition No. 1447 of 1938.

MARUDAMUTHU v. VENKATRAMA.

Held that the order rejecting the petition was an order "refusing to set aside a sale" within the meaning of sub-clause (*j*) of Order XLIII, rule 1, Civil Procedure Code, and that an appeal lay against that order under the said sub-clause.

Sub-clause (*j*) of Order XLIII, rule 1, merely refers to an order "refusing to set aside a sale." If a person applies to have a sale set aside, a rejection of his petition is none the less a refusal to set aside the sale because the Court passed that order even before admitting the petition.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam, dated 20th July 1938 and made in Appeal No. 23 of 1938 preferred against the order of the Court of the District Munsif of Kumbakonam, dated 10th February 1938 and made in Execution Application No. 64 of 1938 in Original Suit No. 43 of 1937.

T. K. Subramania Pillai for petitioner.

R. Rajagopala Ayyangar for respondent.

JUDGMENT.

VARADA-CHARIAR J.

VARADACHARIAR J.—This revision petition raises a question of some importance turning on the effect of the proviso recently added in this Presidency to Order XXI, rule 90, Civil Procedure Code. Under that proviso, the Court to which an application under rule 90 is presented may "before admitting the application call upon the applicant to furnish security." In the present case, the Court ordered the applicant to deposit the sale amount in cash. He tendered a draft bond offering immovable property as security. The Court declined to accept it and accordingly rejected the petition. Against this order the petitioner preferred an appeal to the lower appellate Court and that Court has dismissed the appeal on the ground that the case does not fall within the terms of Order XLIII, rule 1

(*j*), which gives a right of appeal against an order "refusing to set aside a sale." The learned Judge was of opinion that an order contemplated by this sub-rule was one passed after the Court had entertained the application and not one whereby the Court declined to entertain the application.

There can be little doubt that at the time when the sub-clauses of Order XLIII, rule 1, were framed, this distinction between an order *on* the petition and an order declining to entertain the petition could not have been thought of, so far as applications under Order XXI, rule 90, are concerned. A distinction was recognized by the Code in the case of plaints; and different provisions were made for appeals against adjudications on the merits and appeals against orders rejecting the plaints. But as the scheme of the Code as it originally stood did not contemplate any such differentiation in respect of an application under rule 90 of Order XXI, it is unreasonable to expect any recognition of that distinction in the rules relating to appeals therefrom. When the proviso now in question was recently added to rule 90, the attention of the framers of the rule does not appear to have been specifically directed to the question of appealability. There has indeed been some discussion as to the legality of the proviso itself; but this Court has so far declined to hold the new rule to be *ultra vires*. While I follow that ruling, I do not wish to deprive the petitioner of whatever benefit he may get, even if it be a mere matter of accident, out of the language of sub-clause (*j*) of Order XLIII, rule 1, as it stands.

The position so far as the present case is concerned is different from what may arise in cases where a right of appeal will be available only by treating any disposal as amounting to a "decree" because in that case the

MARUDAMUTHU v. VENKATRAMA. — VARADACHARIAR J.

Court has to consider, in view of the definition of the word "decree", whether there has been an *adjudication* determining the rights of the parties. An order merely rejecting a plaint will thus not *prima facie* fall within the definition of "decree." But sub-clause (*j*) of Order XLIII, rule 1, merely refers to an order "refusing to set aside a sale." The learned Judge thinks that such an order of refusal *prima facie* implies that the petition had been admitted. As I have already pointed out, this question could never have arisen under the scheme of the Code as it formerly stood. I cannot therefore call in aid any argument founded upon the probable intention of the Legislature. I have only to see whether the etymological meaning of the words found in the sub-clause will or will not apply to the case.

If a person applies to have a sale set aside, I do not see how a rejection of his petition is any the less a refusal to set aside the sale because the Court passed that order even before admitting the petition. After all, on an appeal against such an order, the appellate Court can only consider the reasonableness or otherwise of the order refusing to admit the petition; and I prefer not to deprive the petitioner of the right to seek the opinion of the appellate Court in the matter, unless it is possible to hold that the language of Order XLIII, rule 1 (*j*), is clearly incapable of being construed as comprehending the order of rejection.

The lower appellate Court's order is accordingly set aside and the learned Subordinate Judge is directed to deal with the appeal on the merits. But the question is certainly novel and not free from difficulty; I accordingly make no order as to costs.

A.S.V.