

APPELLATE CIVIL.

*Before Mr. Justice Venkatasubba Rao.*1935,
April 9.A. M. A. MURUGAPPA CHETTIAR BY AGENT
K. PONNUSAMI KALINGAROYA GOUNDAN
(FIRST RESPONDENT), PETITIONER,

v.

S. M. A. M. RAMASAMI CHETTIAR AND FOUR OTHERS
(PETITIONER AND RESPONDENTS 2 TO 5), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 73 and O. XXI, r. 72—Execution petitions—Some filed before date of sale and others within fifteen days of the sale—Rateable distribution—Right to—Executing decree-holder purchasing property with permission of Court—Right to set off—Liability to bring into Court enough rateably to distribute in execution petition pending on the date of sale—Civil Rules of Practice—R. 199—Conflict between r. 199 and Order XXI, r. 72, of the Code of Civil Procedure—R. 199 ultra vires to the extent it conflicts with O. XXI, r. 72.

In execution of a decree for Rs. 4,000 and odd a person brought to sale certain properties and purchased them with the leave of the Court under O. XXI, r. 72, of the Code of Civil Procedure, for Rs. 3,315 and without paying any amount into Court set it off against his decree amount. On the date of sale certain execution petitions of other parties were pending and certain other execution petitions were filed within fifteen days of the date of sale.

Held that, when the purchase price is either equal to or less than the decree amount, the right of the decree-holder (purchasing with permission) to set off is controlled only to this extent, namely, that he is bound to bring into Court such sums alone as are due to those decree-holders whose applications for execution were pending on the date of the sale in order that the same might be rateably distributed to them under section 73 of the Code and that the persons who filed their applications after the date of sale were not entitled to rateable distribution.

Rule 199 of the Civil Rules of Practice, to the extent to which it is opposed to and inconsistent with the provisions of

* Civil Revision Petitions Nos. 1191 to 1193 of 1933.

the First Schedule of the Code of Civil Procedure, is inoperative.

MURUGAPPA
CHETTIAR
v.
RAMASAMI
CHETTIAR.

PETITIONS under sections 115 of the Code of Civil Procedure (Act V of 1908) and 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Coimbatore dated 24th July 1933 and made in Execution Applications Nos. 378, 379 and 380 of 1931 respectively in Execution Petition No. 464 of 1929 in Original Suit No. 142 of 1929.

K. V. Ramachandra Ayyar for petitioner.

K. S. Desikan for first respondent.

Cur. adv. vult.

JUDGMENT.

The question that arises is whether the respondents are entitled to rateable distribution under section 73, Civil Procedure Code. The petitioner in execution of his decree brought to sale certain properties and purchased them himself with the leave of the Court under Order XXI, rule 72. The amount due to him under the decree was Rs. 4,000 and odd and, as the highest bidder, he purchased the properties for about Rs. 3,315. This he set off against the decree amount, that is to say, he did not deposit any sum in Court.

Order XXI, rule 72, provides :

(1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

(2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

The purchase price having been less than the sum due to him under the decree, the petitioner

MURUGAPPA
CHETTIAR
v.
RAMASAMI
CHETTIAR.

was entitled to set off the price against the decree amount ; but that right is, as the rule just quoted shows, " subject to the provisions of section 73 ". Now, turning to that section we find that all such persons as had applied for the execution of their decrees before the assets were received by the Court are entitled to rateable distribution. In rule 72, clause 2, extracted above, the use of the word " may " in the first part of it and " shall " in the second part is, in my opinion, significant. The decree-holder, when the amount of his bid is either equal to or less than the decree amount, may at his option set off against it the purchase price. The use of the word " may " shows that he has such liberty, of which he may at his pleasure avail himself or not ; if he chooses to take advantage of it, the Court has no option (that is the effect of the word " shall ") but to enter up satisfaction of the decree in whole or in part as the case may be. Several decree-holders had obtained decrees against the judgment-debtor in question and there were, pending on the date of the sale, petitions filed by some of them (either three or four, the exact number does not matter). Rule 72, clause 2, referred to above shows, as already stated, that the petitioner's right to set off is subject to the provisions of section 73, that is to say, he is bound to bring into Court such amounts as may be payable to the rival decree-holders whose execution petitions were pending on the date of the sale. The correctness of that position, the petitioner does not question and indeed he has acquiesced in the order of the lower Court in so far as it has directed him to bring in the amounts payable to the decree-holders to whom I have just referred. But the

difficulty arises in this way. Subsequent to the sale but before the expiry of the fifteenth day therefrom, three other decree-holders (the respondents before me) applied for execution and the question to be decided is whether the lower Court's view that they are also entitled to rateable distribution is correct. It is necessary to quote here two further provisions.

Order XXI, rule 84 :

(1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent on the amount of his purchase-money to the officer or other person conducting the sale, and, in default of such deposit, the property shall forthwith be resold.

(2) Where the decree-holder is the purchaser and is entitled to set off the purchase-money under rule 72, the Court may dispense with the requirements of this rule.

Order XXI, rule 85 :

The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property :

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set off to which he may be entitled under rule 72.

The second clause of rule 84, though the word there used is "may", must be construed in such a way as to be consistent with rule 72, clause 2, with which I have just dealt, and with the proviso to rule 85 where the word that occurs is "shall". To construe the rule differently would lead to the anomaly that, where a decree-holder is entitled to set off, the Court, as regards the twenty-five per cent, may, at its option, require him to deposit it, but, as regards the balance of the purchase-money, it has no such option and cannot compel him to bring it into Court. The scheme of these various provisions is perfectly plain. Where the purchase

MURUGAPPA
CHETTIAR
v.
RAMASAMI
CHETTIAR.

price is either equal to, or less than, the decree amount, the right of the decree-holder (purchasing with permission) to set off is controlled only to this extent, namely, that he is bound to bring into Court such sums alone as are due to those decree-holders whose applications for execution were pending on the date of the sale. For the respondents, Mr. K. S. Desikan argues that, if there is a single person entitled on the date of sale to rateable distribution, there is a duty cast upon the decree-holder to bring into Court the entire purchase price. This contention renders the right to set off, expressly conferred by the provisions, illusory and I am therefore unable to accept it. The literal wording of rule 199 of the Civil Rules of Practice which says :

“ Provided that, if there are several decree-holders entitled to rateable distribution, the purchase-money shall be paid into Court ”,

lends some support to the learned Counsel's argument, but those words I must reject as being repugnant to the provisions already mentioned. Under section 121 of the Civil Procedure Code, the rules in the First Schedule must be regarded as a part of the body of the Code, but the High Court may alter or annul them by following the procedure prescribed in Part X, and section 128 goes on to enact that the High Court has power to make rules not inconsistent with those in the First Schedule. Rule 199 of the Civil Rules of Practice (the rule in question) occurs in the body of the rules made under the previous Code of Civil Procedure, to which section 157 of the present Code applies. That section says that the rules made under the repealed Code shall have operation only “ so far as they are consistent with this

Code", i.e., the present Code. I am therefore prepared to hold that rule 199 to the extent to which it is opposed to, and inconsistent with, the provisions of the First Schedule, cannot take effect. *Re, The District Munsif of Tiruvallur*(1) does not, in my opinion, lay down any general rule in the opposite sense. The inconvenience and hardship that results, should the contrary view prevail, is obvious. Let us suppose that the amount due to the decree-holder purchaser is Rs. 20,000 and to the rival decree-holder Rs. 400 (i.e., one fiftieth of the other amount). Let us further suppose that the amount of the bid is Rs. 10,200. The decree-holder would then be entitled to Rs. 10,000 and the opposite party to Rs. 200. According to the respondents' contention, although the amount due to the other person is only Rs. 200, the decree-holder is nevertheless bound to bring into Court the entire sum of Rs. 10,200. It is with a view to avoid this result that the various provisions to which I have referred have been enacted; it would be a barren formality to require the decree-holder to bring in the Rs. 10,000 to which he himself is entitled. I am therefore of the opinion that the only amount that the petitioner was bound to bring into Court was the sum due to those decree-holders whose execution applications were pending on the date of the sale.

Where there has been a set-off of the nature described, the assets are realized within the meaning of section 73 on the date of the sale itself. It has been so held in *Bhyraraju Ramaraju v. Lakshmiah*(2), where it is pointed out,

"the whole of the amount must be deemed to have been received or realized *eo instanti* the sale is made",

MURUGAPPA
CHETTIAR
v.
RAMASAMI
CHETTIAR.

(1) (1911) I.L.R. 37 Mad. 17 (F.B.).

(2) A.I.R. 1931 Mad. 103.

MURUGAPPA
CHETTIAR
v.
RAMASAMI
CHETTIAR.

a view that has also been adopted in *Sait Punnamchand Chatraban v. Satyanandan*(1).

The respondents' Counsel then contends—granting that the petitioner was bound to bring into Court only the sum due to those decree-holders whose execution applications were pending on the date of the sale, even then, the bringing into Court of such sum amounts to a receipt of the assets within the meaning of section 73. He puts his argument thus: the amount which the decree-holder is bound to bring in must be deposited within the fifteenth day of the sale; whether it is in fact so deposited or not, by some fiction the amount must be regarded as having been brought in on the last day of the period; therefore (that is the argument) when a rival decree-holder presents a petition after the date of the sale but before the fifteenth day, he must be deemed to have presented it before the receipt of the assets. There is in this argument a fallacy. The bringing in of the money does not constitute “realization” or “receipt” within section 73; the money is brought in for the benefit of those persons alone whose applications were pending on the date of the sale. Decree-holders who come in later, i.e., after the date of the sale but before the expiry of the fifteenth day, cannot, by calling the deposit “realization” or “receipt”, claim rateable distribution.

In the result, the orders of the lower Courts are reversed and each of these petitions is allowed with costs which will not include Counsel's fee.

G.R.

(1) (1933) 65 M.L.J. 569.