

1886 late Court refers—*Jibunti Nath Khan v. Shib Nath Chuckerbutty*
 (1)—the learned Judge who delivered the judgment says, at page
 NONOO SINGH 822, that “a cause of action consists of the circumstances and
 MONDA facts, which are alleged by the plaintiff to exist, and which, if
 ANAND proved, will entitle him to the relief, or to some part of the relief
 SINGH prayed for, and is to be sought for within the four corners of the
 MONDA, plaint.” It appears that the circumstances and facts alleged in
 the present plaint were not the same as those alleged in the
 plaint in the former suit. That being so, we think that the
 Judge was right in saying that the two suits were not on the
 same cause of action.

We accordingly dismiss this appeal with costs.

H. T. H.

Appeal dismissed.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

DEBOKI NUNDUN SEN (PLAINTIFF) v. HART AND OTHERS
 (DEFENDANTS)*

1886
 August 24.

*Civil Procedure Code (Act XIV of 1882), s. 295—Rateable distribution of
 Sale Proceeds—Sums judgment-debtor—Sale in execution of decree—
 Execution Proceedings.*

Where a judgment-creditor has obtained a decree against two judgment-debtors *A* and *B*, and in execution of that decree has attached and caused to be sold joint property belonging to such judgment-debtors, another judgment-creditor holding a decree against *A* alone, who has also applied for execution, is not entitled to claim under the provisions of s. 295 of the Civil Procedure Code to share rateably in the sale proceeds, the decree not being against the same judgment-debtor, and a Court having no power in execution proceedings to ascertain the respective shares of joint judgment-debtors.

In *Shumbhoo Nath Poddar v. Luckynath Dey* (2), it was not intended to lay down that a person who has obtained a decree for money against a single judgment-debtor is entitled to come in and share rateably with a person who has obtained a decree against the same judgment-debtor and other persons.

THIS was a suit under the penultimate clause of s. 295 of the Civil Procedure Code, for rateable distribution of sale proceeds which had been paid to the defendant Hart.

* Appeal from Appellate Decree No. 546 of 1885, against the decree of T. F. Bignold, Esq., District Judge of Beerbhoom, dated the 28rd of December 1884, reversing the decree of Baboo Gobind Chandra Bose, Sudder Munsiff of Suri, dated the 16th of September 1884.

(1) I. L. R., 8 Calc., 819.

(2) I. L. R., 9 Calo., 920.

The plaintiff was the son and heir of one Gunga Narain Sen, who had obtained a decree against the 4th defendant, Hurish Chunder Ghose. The first defendant, Hart, had obtained a decree against the 4th defendant Hurish Chunder Ghose and the fifth defendant Brojendrabala Dasi. Of the other two defendants, defendant No. 2 Tara Prosunno Mookerjee, held a decree against Hurish Chunder Ghose and his brother Panchanun Ghose who had died, and he was seeking to execute it against Hurish Chunder Ghose and Brojendrabala Dasi, as widow and representative of Panchanun Ghose; and defendant No. 3 Srikristo Biswas had obtained a decree against the father of Hurish Chunder and Panchanun, which he was also seeking to execute against the same person. In execution of his decree, Hart caused certain property to be attached and sold, and the sale proceeds, Rs. 9,905, were paid into Court. The plaintiff and the defendants, No. 2 and No. 3, who had all applied for execution, thereupon preferred claims to share rateably in the said proceeds under s. 295, but their claims were disallowed in the execution proceedings and Hart was declared entitled solely to draw out the money.

The plaintiff thereupon instituted this suit against Hart to have his right declared to share in such proceeds, and to make Hart refund such share to him. Defendants No. 2 and No. 3 were joined as defendants, because they also being dissatisfied with the decision in the execution proceedings, had filed suits claiming to share in the same manner as the plaintiff.

The defence raised on behalf of Hart and Tara Prosunno Mookerjee was mainly that the plaintiff was not entitled to share in the sale proceeds, the subject-matter of the suit, inasmuch as his decree was not against the same judgment-debtor as theirs, being against Hurish Chunder Ghose alone, whereas theirs was against Hurish Chunder Ghose and Brojendrabala Dasi. Tara Prosunno also pleaded that there was no cause of action against him as he had received none of the sale proceeds. The plaintiff alleged in his plaint that Tara Prosunno had succeeded in his suit in obtaining a decree declaring that he was entitled to share, and Tara Prosunno, whilst admitting that, stated that though defendant No. 1 had appealed against that decree and been unsuccessful, still there was a chance of the case being carried on special appeal to the High Court.

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As a matter of fact Hart did prefer a special appeal in that suit to the High Court, and the case was decided on that appeal and the lower Court's decree varied. [See *Hart v. Tara Prosunno Mookerjee* (1)].

In the present case the first Court, relying upon the authority of the ruling in the case of *Shumbhoo Nath Poddar v. Luckymath Dey* (2) held that the suit would lie, and gave the plaintiff a decree. That Court considered that there was nothing to prevent the interests of the two judgment-debtors in the property sold, being ascertained in the execution proceedings, and in giving the plaintiff the proportionate amount of the proceeds of that portion of the property which was found to belong to Hurish, and that in the absence of evidence to the contrary the presumption was that Hurish and Brojendrabala was equally interested in the property.

The decision in the case of *Bissessur Bose v. Anund Mohun Ghose* (3) was relied on by the defendant Hart, but held inapplicable by the first Court.

The material portion of the judgment in that case was as follows:—

“This is a matter under s. 295 of the Code of Civil Procedure.

“The decree-holders were Bissessur Bose and Anund Mohun Ghose. Bissessur's decree was against the same judgment-debtors as Anund Mohun's decree, and besides those persons it was against one Shama Nath Banerjee. Section 295 requires that the assets under distribution should be “held for execution of decrees against the same judgment-debtor” in order to enable the holder of a decree, other than that actually executed, to participate in them. Consequently, as in the present case there are in one decree judgment-debtors who are no parties in the other decree, the holder of the latter decree cannot reap the benefit of s. 295.**** The order must therefore be set aside, and Bissessur Bose must be declared to be alone entitled to receive the assets realised in execution.”

Upon appeal the lower Appellate Court held that the decrees,

(1) I. L. R., 11 Cal., 718.

(2) I. L. R., 9 Cal., 920.

(3) Rule No. 774 of 1884, decided by *Prinsep and Macpherson, JJ.*, on 26th August 1884,

were not against the same judgment-debtor within the meaning of s. 295, and that there was no means by which the Court executing the decree could be called on to decide the various interests of judgment-debtors, when more than one, in the property sold.

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That Court also held that the case of *Shumbhoo Nath Poddar v. Luckynath Dey* (1) had no bearing on the facts in the present case, and that the suit was governed by the decision of Prinsep and Macpherson, JJ., in the unreported case already referred to. It accordingly held that the suit was not maintainable and dismissed it with costs.

The plaintiff now preferred this second appeal to the High Court upon the ground that the lower Court was wrong in refusing the plaintiff's claim to rateable distribution, and in holding that he had no cause of action, and that the suit was not maintainable.

Baboo *Sreenath Doss* and Baboo *Baikant Nath Doss*, for the appellant.

Baboo *Tarrucknath Sen*, for the respondents.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows :—

In this case it appears that the plaintiff's father obtained a decree against the defendant Hurish Chunder Ghose. The defendant Hart obtained a decree against the defendant Hurish Chunder Ghose and the defendant Brojendrabala Dasi, the widow and representative of the late Panchanun Ghose, and in execution of his decree sold certain property which belonged to the defendants in equal shares. The defendants Tara Prosunno Mookerjee and Srikrishno Biswas also held decrees against the defendants Hurish Chunder Ghose and Brojendrabala Dasi. The defendant Hart drew the proceeds of the sale in execution of his decree out of Court, the claims of the other judgment-creditors to share rateably being disallowed by the execution Court. The plaintiff then instituted the present suit under the penultimate clause of s. 295 of the Civil Procedure Code for the refund and rateable distribution of the assets realized in execution of Hart's decree. The Munsiff, on the authority of

(1) I. L. R., 9 Calc., 920.

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Shumbhoo Nath Poddar v. Luckynath Dey (1) gave the plaintiff a decree. On appeal the District Judge, relying on an unreported case (2), decided by Prinsep and Macpherson, JJ., held that the decrees were not against the same judgment-debtor within the meaning of s. 295 of the Civil Procedure Code and dismissed the suit. The plaintiff has appealed, and contends that his decree is against the same judgment-debtor as in the cases of the defendants Hart, Tara Prosunno, and Srikristo, although in the cases of these defendants there is an additional judgment-debtor.

The words of s. 295 are: "Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons." In the case of *Shumbhoo Nath Poddar v. Luckynath Dey* (1) decided by Garth, C.J., and Mitter, J., it was held that where property belonging to one judgment-debtor had been attached and sold, a person who held a decree against that judgment-debtor, and another person was entitled to come in and share rateably with the first attaching creditor in the proceeds of the sale. In the unreported case the facts were precisely the same as in the present case. The Court said: "Section 295 requires that the assets under distribution should be "held for execution of decrees against the same judgment-debtor" in order to enable the holder of a decree other than that actually executed to participate in them. Consequently, as in the present case there are in one decree judgment-debtors who are no parties in the other decree, the holder of the latter decree cannot reap the benefit of s. 295."

In the present case there is no difficulty in ascertaining the shares of the defendants Hurish Chunder and Brojendrabala. But we do not think a Court executing a decree has power to ascertain the shares of the judgment-debtors. In some cases it would be impossible to ascertain the shares of joint judgment-debtors without an inquiry and accounts, and a partition on winding up might be necessary. Such matters as these could

(1) I. L. R., 9 Calc., 920.

(2) Rule No. 774 of 1884.

not be inquired into in execution proceedings, but a regular suit would be necessary. And if an execution Court has no jurisdiction to ascertain the shares of joint judgment-debtors when the execution is complicated and involves inquiries, it cannot have jurisdiction merely because the question is a simple one. Nor could the shares be ascertained in such a suit as this which is simply for the refund and rateable distribution of assets alleged to have been paid to a person not entitled to receive them.

These conditions do not apply to such a case as that of *Shumbhoo Nath Poddar v. Luckynath Dey* (1) where it was not necessary to enter into any question as to shares. And we have the authority of Mitter, J., for saying that the Court did not intend in that case to decide that a person who has obtained a decree for money against a single judgment-debtor is entitled to come in and share rateably with a person who has obtained a decree against the same judgment-debtor and other persons.

We think, therefore, that the plaintiff is not entitled to share rateably in the assets realized by the defendant Hart in execution of his decree.

The appeal is dismissed with costs.

H. T. H.

Appeal dismissed.

Before Mr. Justice Prinsep and Mr. Justice Grant.

JHAROO AND OTHERS (SOME OF THE DEFENDANTS) v. RAJ OHUNDER DASS (PLAINTIFF).*

1885
August 27.

Lis pendens—Purchase of Property in which there is a decree in suit on a mortgage bond—Suit for possession against purchaser from mortgagor.

The plaintiff in 1877 obtained a decree on a mortgage bond in execution of which property belonging to his debtor was put up for sale and purchased by the plaintiff on 5th May 1878. The defendants had, in execution of a subsequent money decree against the same debtor, purchased the same property on the 1st April 1878. In a suit by the plaintiff for possession and mesne profits, *Held*, following the case of *Raj Kiassn Mookerjee v. Radha Madhub Haldar* (2) that the defendants were purchasers *pendente lite*, and were consequently bound by the proceedings in the plaintiff's suit on the mortgage bond.

* Appeal from Appellate Decree No. 639 of 1885, against the decree of Baboo Sham Chand Dhur, Officiating Second Subordinate Judge of Tipperah, dated the 12th of February 1885, reversing the decree of Baboo Behari Lal Banerji, Munsiff of Kusba, dated the 11th of December 1883.

(1) I. L. R., 9 Calc., 920.

(2) 21 W. R., 349.