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MAGANLAL PARBHURAM v. N. A. AZIZ HAJI KARIM AND SIX.

who pays it in or to any person who claims under him."

The case is clearly distinguishable from one in which defendant gives security for his appearance. Such security would be merely conditional for his appearance in Court and would not be ear-marked for the purposes if the suit.

PRATT, J.

Plaintiff was on this view clearly entitled to the declaration sought and to satisfy his decree from the money paid in towards his claim.

I set aside the findings and decrees of the lower Courts and grant plaintiff a decree as prayed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Maung Ba.

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July 28.

C.R.M.A. CHETTYAR FIRM
v.
K.R.S.V. CHETTYAR FIRM AND THREE.*

Civil Procedure Code (Act V of 1908), s. 73—"Same judgment-debtor," meaning of—Court to which application for execution should be made—Mode of application—Mere transfer of records to executing Court whether sufficient.

Held, that all the decree-holders (who have otherwise complied with the provisions of section 73 of the Civil Procedure Code), where there are common judgment-debtors in all the execution cases, are entitled to participate rateably in the distribution of the assets according to the interest of the respective judgment-debtors in the property sold. It is not necessary that all the judgment-debtors of all the decree-holders should be identical and also neither more nor less.

Held, also, that the requirements of the section are not complied with if no application is made to the Court that holds the assets and merely the records of the cases of decree-holders of another Court are forwarded to the former Court to which no decrees are transferred for execution and to which no applications for rateable distribution are made.

Chhotalal v. *Nabibhai*, 29 Bom. 528; *Gonesh Das* v. *Shiva Laksman*, 30 Cal. 583; *Krishnashankar* v. *Chandrashankar*, 5 Bom. 198; *Ramanathan Chettiar* v. *Subramania Sastrial*, 26 Mad. 179; *Sit Saing* v. *Maung Po Kaing*, 1 L.B.R. 121—*referred to.*

* Civil Revision No. 345 of 1927.

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C.R.M.A. CHETTYAR FIRM v. K.R.S.V. CHETTYAR FIRM AND THREE.

Thein Maung—for Applicants.

Chari—for 1st, 3rd and 4th Respondents.

MAUNG BA, J.—This application for revision arises out of Civil Execution No. 19 of 1925 of the District Court of Prome.

The decree-holder, C.R.M.A. Chettyar Firm, obtained a decree against Ma Shwe Yin, Ma Bibi and the legal representatives of their husbands, Meera Moideen and Muzaffar Rowther. In execution of that decree a rice-mill was attached and sold. The decree-holder objects to any rateable share being given to the four respondents, who are also Chettyar Firms, on two grounds (1) that their decrees are not against the same judgment-debtor and (2) that those decrees have not been transferred to the District Court, which holds the assets.

The mill is supposed to belong to the two deceased Mahommedans and their wives. In the case of the applicant his decree is against both the deceased persons and their wives. In the case of the 1st respondent, K.R.S.V. Chettyar Firm, he obtained a decree in the District Court only against Ma Bibi and the legal representatives of her husband Muzaffar Rowther. In the case of the 2nd respondent, A.P.S.V.R. Chettyar Firm, he obtained a decree only against the legal representatives of Meera Moideen. In the case of the 3rd respondent, N.M.R.M. Chettyar Firm, he obtained three decrees, (1) against both the widows and the legal representatives of Meera Moideen, (2) against Ma Bibi and her children as the legal representatives of Muzaffar Rowther; and (3) against Ma Shwe Yin, Ma Bibi and the latter's children as the legal representatives of Muzaffar Rowther. In the case of the 4th respondent, R.M.M.R.M. Chettyar Firm, he obtained a decree against Ma Shwe Yin,

Ma Bibi and the former's children as the legal representatives of Meera Moideen. All those decrees obtained by 2nd, 3rd and 4th respondents were obtained in the Subdivisional Court of Paungde. It is true that the decrees of those three respondents were not against all the judgment-debtors included in the decree obtained by the applicant.

The first question is whether the phrase "same judgment-debtor" can be applied to all the decrees obtained by the applicant and the four respondents. In my opinion it can be so applied. In this view I am fortified by the following authorities.

In the case of *Ramanathan Chettyar* v. *Subramania Sastrial and five others* (1), one decree was against the father alone and the other was against the father and son. The property sold was the ancestral property of the family of which the father and son were undivided members. The learned Chief Justice, Sir Arnold White, held that the decrees were against the "same judgment-debtor" for the purposes of section 295 (now section 73). That case was decided in 1902. In the following year the Calcutta High Court adopted the same view in the Full Bench case of *Gonesh Das Bagria* v. *Shiva Laksman Bhakat* (2). In that case **B** obtained a decree against three judgment-debtors, **X**, **Y** and **Z**, while **A** obtained a decree against **X** and **Y** only. The property sold was the joint property of all the three judgment-debtors. The Calcutta High Court even went further and held that in such a case a proportionate distribution of the assets according to the shares of the judgment-debtors in the property was permissible. Three years later the Bombay High Court adopted the same view in the case of

(1) (1902) 26 Mad. 179. (2) (1903) 30 Cal. 583.

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Chhotalal Harkishandas v. *Nabibhai Mianji and others* (1). It was a Bench ruling. The learned Judges followed the rulings of the Madras and Calcutta High Courts mentioned above.

In the present case there are common judgment-debtors in all the execution cases. So it would follow that all the decree-holders are entitled to participate rateably in the distribution of the assets according to the interest of the respective judgment-debtors in the property. This disposes of the first objection.

We now come to the next objection namely that the respondent-decree-holders are not entitled to any share on account of their failure to apply for execution of their decrees to the District Court of Prome, which held the assets. Section 73 is quite clear on the point. It lays down; "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 . . . ." The language is quite plain and the words "the Court" no doubt refer to the same Court described as "a Court" at the beginning of the sentence. In other words, for the decree-holders to become entitled to any share in the assets, they must have applied to the Court which holds the assets for execution of their decrees. This view has been adopted as early as 1881 in the case *Krishnashankar* v. *Chandrashankar* (2). That ruling was with reference to the old section, 295. In that section the words used were "have, prior to the realization, applied to the Court, by which such assets are held, for execution of decrees". So far as the question under discussion is concerned there has been no change in the law.

(1) (1904) 29 Bom. 528. (2) ( ) 5 Bom. 198.

The construction put by the learned Judges, who decided that case, was that only those decree-holders, who had actually applied for execution of their decrees to the Court holding the assets could share in the rateable distribution. This view was adopted by the late Sir Charles Fox in the case of *Sit Saing* v. *Maung Po Kaing* (1). In that case the plaintiff obtained a decree in the Subdivisional Court, while the defendants had obtained two decrees in the Township Court against the same persons. The Subdivisional Court realised some assets by sale of certain properties. Prior to the realisation the defendants applied to the Township Court for execution of the decrees by attachment and sale of the same properties and in their application they stated that the property had already been attached by the Subdivisional Court. They asked that their applications might be forwarded to the Subdivisional Court so that they might obtain a rateable share. The Township Court accordingly submitted the applications to the Subdivisional Court. The learned Judge held "that section 295, Civil Procedure Code requires that the persons seeking a rateable share shall, prior to the realization of the assets, have applied to the Court which holds the assets for execution of their decrees and under section 230 an application for execution of a decree can only be made to the Court which has passed the decree or to a Court to which the decree has been sent for execution under sections 223 and 224. The decrees of the Township Court had not been sent to the Subdivisional Court; consequently the latter Court had no jurisdiction to entertain the defendant's application and the order for rateable distribution was illegal." According to this construction it is

(1) (1901) 1 L.B.R. 121.

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essential that an application for execution has been made to the Court which holds the assets. To determine the rights of the respondents it is now necessary to decide whether the requirements of section 73 have been complied with by them.

In Civil Execution Case No. 8 of 1926 the application for execution was made to the Subdivisional Court. On the 18th June 1926, the Subdivisional Judge recorded this order :—It is forwarded to the Additional District Judge for rateable distribution as the rice-mill attached will be sold by auction on the 1st July 1926." The decree has not been transferred to the District Court and no application for execution has been made to that Court. I must therefore hold that the requirements of section 73 have not been complied with by the 4th respondent.

In Civil Execution No. 70 of 1925, the application for execution was made to the Subdivisional Court. On the 9th of March 1926, the Subdivisional Judge recorded this order :—" The decree-holder filed application to the effect that the attached property is under proclamation for sale in the District Court and asked me to send this case to the District Court for rateable distribution." In this case also the requirements have not been complied with.

In Civil Execution Case No. 6 of 1926, the application was made to the Subdivisional Court. On the 2nd June 1926, the Subdivisional Judge recorded this order :—" Put up with Civil Execution No. 8 of 1916 of the Subdivisional Judge, Paungde " and in that execution case the Subdivisional Judge on 10th July 1926 recorded this order :—" U Than Maung for Mr. Ahmed present, and says that the attached property will be sold on the 17th June 1926, in execution of a decree in the Additional District Judge's Court and asks me to send this case to

the Additional District Judge's Court for rateable distribution. I accordingly forward these cases to the Additional District Judge for rateable distribution." By 'these cases' the learned Judge meant Civil Execution Nos. 6, 7 and 8 instituted by the same decree-holders, N.M.R.M. Firm. In all these three cases also the requirements of section 73 have not been complied with.

It is urged on behalf of these respondents that the submission of the records by the Subdivisional Court should be considered to be equivalent to a transfer of the decree to the District Court; section 63 says that "where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realise such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or where there is no difference in grade between such Courts, the Court under whose decree the property was first attached." It is urged that under this section the District Court is the Court which shall receive or realise the assets and which shall determine any claim thereto and that this section will be in conflict with section 73. It is doubtful whether this argument is correct. If the language is strictly interpreted the phrase, 'any claim thereto' seems to refer to the claim to the property under attachment and not to the claim to the assets after realisation. In my opinion this section contemplates such a claim as is contemplated by Order XXI, Rule 50.

For the above reason I hold that in the case of respondents (2) to (4) they are not entitled to any rateable distribution and they should be excluded, and that in the case of the 1st respondent, as his decree was obtained in the same District Court and

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as he has made the application for execution to that Court, he is entitled to a share in the assets, although his decree is not against all the judgment-debtors against whom the applicant has obtained a decree. But as already pointed out in the earlier part of the judgment, his share must be determined according to the interests of his judgment-debtors in the rice-mill.

The order of the District Court is modified acccordingly and the applicant is entitled to his costs in this Court against respondents (2), (3) and (4). This 1st respondent is entitled to his costs in this Court against the applicant.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Darwood.

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July 29.

MAUNG PO SI AND ONE
v.
K.P.A.P. FIRM.*

Transfer of Property Act (IV of 1882), s. 82—Apportionment—Liability of purchaser of mortgaged house who dismantles it, where both land and house are under mortgage—When question of liability arises.

In a mortgage suit against the borrower who had mortgaged to the respondents his paddy land and garden with a house on it, the respondents joined the appellants as defendants alleging that the respondents had, subsequent to the mortgage, bought the house, had dismantled it and removed the materials, and so the mortgagees were entitled to a mortgage decree against them also. The trial Court made the usual preliminary mortgage decree against both, but there was no personal decree. The lower Appellate Court disallowed the appellants' appeal on the ground that the mortgagee cannot be compelled to apportion his claim, the appellants' contention being that if liable they were liable only proportionately to the extent of the value of house removed by them.

Held, that the appellants could not be made liable for the whole amount of the mortgage-debt, but the question of their personal and proportionate liability did not arise until the lands were sold, as they were not compelled to

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* Civil Second Appeal No. 627 of 1926.