

APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Mosely.

1940
 May 13.

S. B. DASS

v.

GHANSHAMDAS AND OTHERS.*

Rateable distribution, Order for—Appeal against order—Question between parties to the suit—Judgment-debtor not interested—Question solely between decree-holders—No appeal—Civil Procedure Code, ss. 47, 73.

Orders under s. 73 of the Civil Procedure Code are not *per se* appealable. They are only appealable if they fall also within the purview of s. 47 of the Code, *i.e.*, a question must arise between the parties to the suit in which the decree was passed.

An order determining the question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest does not fall within s. 47 of the Civil Procedure Code, and is not appealable.

Doctor for the appellant.

Hay for the respondent.

A preliminary objection to this appeal was that an order under s. 73 of the Civil Procedure Code determining the question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest is not appealable. A Bench of this Court (Mya Bu and Baguley JJ.) had decided this point in the case of *Aga M. Sherazee v. R.M.P.M. Chettyar Firm and four others*, Civil First Appeal No. 63 of 1936 from the order of this Court on the Original Side in Civil Execution No. 577 of 1934. In that case the plaintiff obtained a money decree against his debtor. By way of compromise the judgment-debtor deposited with the plaintiff's advocate the title deeds of his immovable property in Rangoon as security for the due payment of the decretal amount and in terms of a consent decree

* Civil First Appeal No. 117 of 1939 from the order of the District Court of Akyab in Civil Execution Case No. 8 of 1938.

he executed a security bond which was not registered. Some months after, the decree-holder applied for execution, as the decretal amount remained unpaid. He asked for the sale of the property mentioned in the bond, and the property was attached. Prior to the sale four other money decree-holders of the judgment-debtor (2nd, 3rd, 4th and 5th respondents in that appeal) who had also levied attachment on the same property applied for rateable distribution. The learned Judge on the Original Side allowed the application for rateable distribution holding that the decree itself did not create a security of the property in favour of the plaintiff and that the unregistered bond was of no legal effect. The learned Judge also disallowed the plaintiff's application for requiring the judgment-debtor to execute a valid security bond in respect of the property. The plaintiff appealed.

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MYA BU, J. (after setting out the facts summarized above continued).—A preliminary objection has been raised by the second, third, fourth and fifth respondents as to the maintainability of the appeal against the order affecting them. The only part of the order that affects them is the order for rateable distribution. They are not interested in the order so far as it relates to the dismissal of the application for calling upon the first respondent to execute a valid security bond.

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As regards the objection as to the maintainability of the appeal raised on behalf of the second, third, fourth and fifth respondents it is not disputed that the order affecting them is not a judgment within the meaning of Clause 13 of the Letters Patent of this Court. It is also not disputed that the order is not one of the appealable orders mentioned under Order 43 rule 1 of the Code of Civil Procedure. The learned advocate for the appellant, however, urges that the order amounts to a decree inasmuch as it decides a question falling within the purview of section 47 (1) of the Code of Civil Procedure. If this contention is sound it must be conceded that the order is appealable, but in order that the case may be brought within the purview of section 47 (1) of the Code of Civil Procedure there must be a question arising between

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the parties to the suit in which the decree in question was passed. It has, however, not been contended that the second, third, fourth and fifth respondents come within the description of parties to the suit within the meaning of section 47, but it is contended by the learned advocate for the appellant that inasmuch as the question concerning the rights of the second, third, fourth and fifth respondents for rateable distribution involves the question as to whether the property sold in execution had been made security in favour of the appellant which is a question affecting him and the first respondent, there exists a question between the parties to the suit which brings the matter between him and the other respondents within the purview of section 47 (1) of the Civil Procedure Code. In my opinion, this contention cannot be maintained. The first respondent had no practical interest whatever in the proceedings arising out of the applications of the second, third, fourth and fifth respondents for rateable distribution. In fact, he was not a party to the proceedings arising out of those applications. The Deputy Registrar passed the order allowing the applications of all these respondents on the 20th December 1935, and it was only after that the appellant filed an application for an order requiring the first respondent to execute and register the security bond contemplated by the decree. This application was dealt with by Mr. Justice Leach on the same occasion as the applications of the second, third, fourth and fifth respondents for rateable distribution; hence one composite order for both the matters, namely, (1) rateable distribution and (2) the application for requiring the first respondent to execute a valid registered security bond. In these circumstances it is perfectly clear that the first respondent was not a party to the proceedings relating to rateable distribution and no question arose between him and the decree-holder in such proceedings. *Sorabji Coovarji v. Kala Raghunath and another* (1) and *Shree Mahant Prayaga Doss Jee Varu v. Umade Raja Rajai Raja Damara Kumara Thimma Nayanim Bahadur Varu, Raja of Kalahasti and others* (2) are cases which deal with proceedings regarding rateable distribution in which substantial questions arose between the decree-holder and the judgment-debtor. In those cases it was held that an appeal would lie from the original order by virtue of section 47 (1) of the Code of Civil Procedure. It was found in those cases and the facts showed that definite questions affecting the judgment-debtor

(1) (1911) I.L.R. 36 Bom. 156. (2) (1915) I.L.R. 39 Mad. 570.

arose. The present case is clearly distinguishable from those cases. In my opinion, the appellant has no right of appeal against the second, third, fourth and fifth respondents from the order of the learned Judge on the Original Side concerning them.

As regards the dismissal of the appellant's application for an order requiring the first respondent to execute a valid security bond under the decree the learned advocate for the first respondent supports the order of the learned Judge on the merits. It is perfectly clear that the property in question had been sold and rateable distribution of the sale proceeds had even been ordered by the Deputy Registrar when this application was made. The purchaser at the sale had acquired title in the property, and in these circumstances it would be quite impracticable to create a security on the property in favour of the appellant. In dismissing the application of the appellant against the first respondent the learned Judge on the Original Side was rightly declining to make an order which would be quite infructuous.

For these reasons the appeal fails against all the respondents and it is dismissed with costs, advocate's fees two gold mohurs for each of the first, second and fifth respondents and two gold mohurs for the third and fourth respondents jointly.

BAGULEY, J.—I agree that this appeal must be dismissed.

It is, if I may be allowed to say so, rather unfortunate that the appeal was filed in its present form because it is really an appeal against two separate orders in which different parties are concerned. The learned Judge had before him two totally different and distinct matters. Application had been made by certain creditors who had attached the property sold for rateable distribution of the sale proceeds and in that matter the executing decree-holder and the other decree-holders were alone concerned. The matter was argued before the Deputy Registrar and he passed an order for rateable distribution. The party dissatisfied with this order asked for the matter to be determined by the Judge. In this matter the judgment-debtor was in no way concerned. It was purely a matter of academic interest to him. He had these various money decrees against him the sum total of which would be reduced by the sale proceeds of the property sold; but that was insufficient to satisfy even the claim of the executing decree-holder and the sum total of the money decrees would be the same whatever order was passed on the application for rateable distribution.

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In the same proceedings the executing decree-holder asked for an order to be passed against the judgment-debtor directing him to execute a security bond covering the property already sold. In this matter only the decree-holder and the judgment-debtor were interested. Finding two matters arising out of one case before him the learned Judge heard arguments and dealt with them both in one judgment (using the word in the sense in which it is used in the Code of Civil Procedure). The result of that judgment was that one order was passed for rateable distribution and another order was passed refusing the application made by the executing decree-holder that the judgment-debtor should execute a bond in his favour. It is against this "judgment" that the present appeal has been filed; but it is really one appeal against two separate orders. These two matters will have to be considered separately as a preliminary objection has been raised that no appeal lies.

It is admitted that the judgment appealed against is not a "judgment" within the meaning of Clause 13 of the Letters Patent as explained in *In re Dayabhai Jiwandas v. A.M.M. Murugappa Chettyar* (1). This being the case the appeal must be regarded as two appeals against two orders. The order for rateable distribution is unquestionably an order passed under section 73 of the Code of Civil Procedure, and orders under section 73 are not *per se* appealable. They are only appealable if they fall also within the purview of section 47. Section 47 refers to "All questions arising between the parties to the suit in which the decree was passed." It is argued that this is a question arising between the parties to the suit because its decision depends on a decision of whether the judgment-debtor had effectively charged the property sold in favour of the decree-holder. If this question had arisen between the parties to the suit undoubtedly under section 47 it would be appealable, but I am unable to see how it can be said to arise between the executing decree-holder and his judgment-debtor. It arose in consequence of the contest between the various decree-holders and the fact that it was of interest as between the parties to the original suit does not necessarily make it arise between the parties: it arose between the various decree-holders.

We have been referred to certain cases in which an order for rateable distribution was regarded as appealable under section 47 but these cases it seems to me can be distinguished.

In *Sorabji Coovarji v. Kala Raghunath* (1) the judgment-debtor was very interested in the order for rateable distribution because he had paid the money into Court to satisfy the claims of two creditors who had attached his property and by paying off those two creditors he would get his property released from attachment, the other creditors having merely applied for execution but had not attached his property. It was, therefore, of great interest to him for getting his property freed from attachment.

In *Venkataperumal Raja Bahadur Varu, Rajah of Karvetnagar v. W.A. Varadachariar* (2) the judgment-debtor was clearly interested in the order for rateable distribution because it was he himself who filed the appeal in the High Court.

On the other hand, in *Shidappa Laxmanna Agasar v. Gurusangaya Akhandaya Hiremath* (3) it was held that an order under section 73, Civil Procedure Code, determining the question of rateable distribution as between rival decree-holders in which the judgment-debtor had no interest does not fall under section 47, and the same principle is to be found in *Balmer Lawri & Co. v. Jadunath Banerjee* (4) in which it was held that an order refusing rateable distribution between two rival decree-holders which did not affect or interest the judgment-debtor was not appealable.

For these reasons I would hold that the order with regard to rateable distribution is not appealable in this case and for that reason that part of appeal must fail.

With regard to the order refusing to direct the judgment-debtor to execute a new security bond, that undoubtedly comes under section 47 and is appealable, but I can see no reason for allowing this portion of the appeal because I am entirely unable to see what good purpose could be served by directing the judgment-debtor to execute a bond mortgaging or giving a charge over certain property which is no longer his, his entire interest in it having been sold by an order of the Court in execution proceedings.

I agree, therefore, that this appeal must be dismissed and I also agree with the order for costs proposed by my brother Mya Bu.

MYA BU and MOSELY, JJ.—Mr. Hay objects that no appeal lies *vide* *Aga M. Sherazee v. R.M.P.M. Chettyar Firm* (5). It was held there that an order under section

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(1) (1911) I.L.R. 36 Bom. 156.

(3) (1930) I.L.R. 55 Bom. 473.

(2) (1915) I.L.R. 39 Mad. 570.

(4) (1914) I.L.R. 42 Cal. 1.

(5) A.I.R. (1937) Ran. 134.

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73 Civil Procedure Code determining the question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest does not fall under section 47 Civil Procedure Code, and is not appealable.

We are bound by that ruling. The facts here are indistinguishable.

This appeal is dismissed with costs, advocate's fee two gold mohurs in respect of each respondent = six gold mohurs in all.