costs. The appellants' costs of appeal to be paid by the respondents.

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RANCHORDÁS VITHALDÁS v. BÁI KÁSI.

Decree varied.

Appellants' solicitors:—Messrs. *Little, Smith, Frere and Nicholson.*

Respondents' solicitors:—Messrs *Mulji and Rághávji.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

NIMBA'JI TULSIRA'M AND ANOTHER, PLAINTIFFS, *v.* VÁDIA VENKATI AND OTHERS, DEFENDANTS.*

1892. *September 24.*

Execution—Civil Procedure Code (Act XIV of 1882), Sec. 295—Rateable distribution of sale-proceeds—Same judgment-debtors—Separate and joint judgment-debtors—Marshalling of assets between decree-holders—Holder of decree of Small Cause Court—Transfer of decree to High Court necessary.

The plaintiffs in this suit obtained a decree against all three defendants A, B and C. In execution of this decree they attached two sets of securities, (i) municipal bonds, the joint property of B and C; and (ii) Government loan notes, the property of C alone. These were sold by the Sheriff, but before they were so sold, the holders of decrees in two other High Court suits came in and applied to the High Court for execution of their decrees, which decrees were against C alone. These last-mentioned decree-holders now claimed to participate rateably with the plaintiffs in this suit in the realized proceeds of both the above-mentioned securities. The plaintiff in this suit contended that such decree-holders having decrees only against C, were not claiming against "the same judgment-debtors" as themselves within the meaning of section 295 of the Civil Procedure Code (XIV of 1882).

Held, that as regards the proceeds of the Government loan notes, the sole property of C, the plaintiffs' decree and the other two decrees were all decrees "against the same judgment-debtor," and that, therefore, as regards that fund, all three sets of decree-holders were equally entitled and must share therein rateably.

Held, further, that as regards the other fund, the proceeds of the property of B and C, only the plaintiffs in this suit were entitled thereto, since the other decree-holders had no decrees against B and C, and, therefore, not "against the same judgment-debtors" as was the decree of the plaintiffs.

Held, further, that the plaintiffs having two funds to proceed against, whilst the other decree-holders had but one of these two, the equitable principle of marshalling should be applied, and the plaintiffs required to satisfy themselves as

Suit No. 685 of 1890.

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far as possible out of the fund not available to the other decree-holders, before they had recourse to the fund common to all, and as regards the latter fund the plaintiffs should claim against the same as creditors only for the then unsatisfied balance of their debt rateably with the other decree-holders.

Shumbhoo Nath Podder v. *Luckynath Dey*(1) and *Deboki Nundun Sen* v. *Hart*(2) considered and followed.

Another holder of a decree—a Small Cause Court decree passed against all three debtors A, B and C—had previously to the said attachments by the Sheriff in this suit himself attached the same securities through the Small Cause Court. He did not, however, at any time get his decree transferred to the High Court. He now came in in these execution proceedings and claimed to share rateably in both funds on the same footing as the plaintiffs in this suit.

Held that, not having had his Small Cause Court decree transferred to the High Court before the realization of the said securities, or indeed at any time, he was not entitled to share in either fund.

Muttalgiri v. *Muttayyar*(3) followed.

APPLICATION under section 295 of the Civil Procedure Code (XIV of 1882) for rateable distribution of assets realized by sale of attached property.

The plaintiffs in this suit obtained a decree against all three defendants, Vádia Venkati, Bhomáji Shiváji and Jangam Dhurmáji, for a sum of Rs. 2,620-10-10. In execution of this decree they attached, *inter alia*, three debentures of the 5 per cent. Bombay municipal loan of the nominal value of Rs. 1,500, and Government promissory notes of the nominal value of Rs. 800, lying in the hands of the Municipal Commissioner of Bombay. The municipal bonds were held by the Municipality as security for a contract entered into with them by Bhomáji Shiváji and Jangam Dhurmáji, two of the defendants. The Government promissory notes had been deposited with the Municipal Commissioner by Jangam Dhurmáji as security for another contract which he alone had entered into with the said Municipality.

On the 20th July, 1892, the said municipal bonds and Government promissory notes were sold by the Sheriff and realized Rs. 1,850-3-1 and Rs. 957-6-0 respectively. Previously to such realization, *viz.*, on the 13th July, 1892, the decree-holders in

(1) I. L. R., 9 Calc., 920. (3) I. L. R., 12 Calc., 294.
(2) I. L. R., 6 Mad., 357.

two other suits, *viz.*, Suit No. 612 of 1890 and No. 692 of 1890, had applied to the High Court for execution of their decrees, which decrees were against the said Jangam Dhurmáji alone. Another holder of a decree against all three defendants, *viz.*, the plaintiff in Small Cause Court Suit No. $\frac{135}{9070}$, had, on the 21st June, 1892, obtained an order from the Small Cause Court attaching in the hands of the Municipal Commissioner the same securities as those above mentioned, and on the 9th July, 1892, such order had been returned to the Small Cause Court by the Municipal Commissioner with an intimation that the properties sought to be attached thereby had been handed over to the Sheriff of Bombay under the previously mentioned orders of the High Court.

The decree-holder in the last-mentioned Small Cause Court suit and the holders of the decrees in the two suits Nos. 612 of 1890 and 692 of 1890 now came in and claimed to share rateably with the plaintiffs in this suit in the proceeds realized by the sale of the said municipal bonds and Government promissory notes.

Carnac for the plaintiffs:—The plaintiff in the Small Cause Court suit has not "applied" to this Court for execution as provided by section 295, and, therefore, he cannot claim to share in either fund. The other decree-holders cannot claim to share, as their application is not against "the same judgment-debtors" as the plaintiffs' application—*Deboki Nundun Sen* v. *Hart*[1]. The plaintiffs' application is against three judgment-debtors; theirs is against only one of those three.

Bicknell for the decree-holder in the Small Cause Court suit No. $\frac{135}{9070}$:—This is the only Court which can realize this property —section 295, Civil Procedure Code. My client, therefore, is bound to come to this Court. He did apply to the Small Cause Court for execution, and actually attached this very property. It is not necessary that he should apply a second time to this Court. It was only at a very late stage, and very shortly before realization, that he knew that the matter was before this Court. He might not have known it till after realization. Could he have

(1) I. L. R., 12 Calc., 294.

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been said in that case to be too late, when he had actually attached the very property?

Anderson for decree-holders in suits Nos. 612 of 1890 and 692 of 1890:—I admit, that as regards the municipal bonds, the property of two of the three debtors, I cannot distinguish this case from *Deboki Nundun Sen* v. *Hart*(1). If that is good law, my clients will have no claim to share in that fund; but, as regards the proceeds of the Government loan notes, the property of Jangam alone, they are entitled to share in them rateably with the plaintiffs in this suit. Jangam is our sole judgment-debtor: he is also separately the judgment-debtor of the plaintiffs. We are both, therefore, as regards this fund, applying for execution against "the same judgment-debtor;" see *Shumbhoo Náth Poddar* v. *Luckynáth Dey*(2). I agree in contending that Mr. Bicknell's client cannot share, having made no application to this Court.

The only question remaining is as to the principle on which distribution should be made in such a case as this. The plaintiffs have open to them a fund, *viz.* Rs. 1,850-1-6, the proceeds of the municipal bonds, which we cannot share in: they have another fund available to them in which we both are sharers. I submit the equitable principle of marshalling should be applied, and the plaintiffs required to satisfy themselves out of the former fund first, and only be allowed to come on the second fund rateably with us for the then unsatisfied balance of their debt.

Carnac, in reply:—I object to this mode of distribution. The Code makes no provision for it; it simply says share "rateably." These other decree-holders have no voice whatever in the disposal of the municipal bonds.

FARRAN, J.:—As to Mr. Bicknell's client, I am sorry to have to decide that, in my opinion, he was too late. The question is covered by the decision in *Muttalgiri* v. *Muttayyar*(3). That case decides that when it is found that property attached by a lower Court is already, or thereafter becomes, subject to an attachment issued from a superior Court, the decree-holder in the lower Court must apply to that Court to transfer his application to the higher Court if he desires to secure the appropriation of the attached

(1) I. L. R., 12 Calc., 294. (2) I. L. R., 9 Calc., 920.
(3) I. L. R., 6 Mad., 357.

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property and its proceeds to the satisfaction of his decree. So in this case, as soon as Mr. Bicknell's client found that the High Court had attached the property, he should have applied for a transfer of his decree to the High Court, which he could have done before the realization by the Sheriff, and having done so he would have been entitled to share rateably in the proceeds realized. He did not do this; so I must disallow his claim.

As to the questions between the other decree-holders, the principles by which their rights are to be determined, as laid down in *Shumbhoo Nath Poddar* v. *Luckynath Dey*[1] and *Deboki Nundun Sen* v. *Hart*[2], seem to be these. A decree-holder holds a decree against A, B and C. The right conferred by it is like the right conferred by a joint and several contract. It is a joint decree against all. It is also, in effect, a separate decree against each. In so far as it is a joint decree against all, the holder can execute it against the joint property of A, B and C. In so far as it is a separate decree against each, he can execute it against the separate property of each. Another decree-holder holds a decree against, say, A alone, and claims to participate in the proceeds of property realized in execution of the decree obtained against A, B and C. It is plain that, if the property realized was the joint property of A, B and C, the decree-holder holding a decree against A alone is not entitled to do so. His decree is not against the same persons. If the property realized was the property of A alone, the decree-holder holding a decree against A alone is entitled to participate therein, for his decree is against the same person as the holder of a decree against A, B, and C holds a decree against, inasmuch as the latter decree, in addition to being a joint decree against A, B and C, is also, as I have said, a separate decree against A alone.

To apply these principles to the facts in this case. The municipal bonds were, it is said, the joint property of Bhomáji Shiváji and Jangam Dhurmáji. The holders of decrees against Jangam alone cannot participate in the proceeds of these side by side with the holder of a decree against these two, and a holder of a decree against three persons, of whom these are two, is in

(1) I. L. R., 9 Calc., 920. (2) I. L. R., 12 Calc., 294.

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the same position as if his decree were merely against the two. Only the decree-holder in Suit No. 685 of 1890,—that is, the plaintiffs in the present suit,—therefore can claim this fund, realizing, as it did, Rs. 1,850-3-1. The Government promissory notes admittedly belonged to Jangam Dhurmáji alone. All three decree-holders can claim to share in these, which are now represented by the sum of Rs. 957-6-0.

The only question which remains is as to the mode in which these funds should be distributed. The decree-holders, who have but one fund to go against, ask that the plaintiffs in this suit who have both funds to go against, should be required to go first against the fund which they alone can attach, and only share rateably in the fund common to all as creditors for the amount of the debt, which will then be unsatisfied,—in this case a small sum of some Rs. 300 or thereabouts. I am asked to order this on the general equitable principle of marshalling. Execution proceedings such as these are essentially proceedings in which equitable principles of fairness and equality should prevail, and I think I should make the order asked for, and require the plaintiffs to satisfy themselves out of the proceeds of the municipal bonds before they come in rateably with the other decree-holders, for the then unsatisfied balance of their decree, against the proceeds of Jangam Dhurmáji's Government promissory notes. The plaintiffs in this suit, No. 685 of 1890, to be allowed to add any costs of realization to their decree; in other respects each party to bear their own costs.

ORDER:—Disallow claim of Mr. Bicknell's client. Mr. Carnac's clients to take the Rs. 1,850-3-1 (less poundage). Mr. Carnac's clients and Mr. Anderson's clients, decree-holders in Nos. 612 of 1890 and 692 of 1890, to share rateably (after Mr. Carnac's clients have given credit as above) in the Rs. 957-6-0 (less poundage), each party paying their own costs.

Attorneys for the plaintiffs:—Messrs. *Chalk, Walker and Smetham.*

Attorneys for other claimants:—Messrs. *Bicknell and Merwánji.*