

APPELLATE JURISDICTION (α)

Civil Miscellaneous Special Appeal No. 170 of 1870.

HANINABALU SANNAPPA.....Appellant.

Mrs. COOK, widow of FRANCIS
O. COOK, and J. MILLER, Esq., } Respondents.
Administrator-General.

Plaintiff on the 15th June 1868 immediately after the death of his debtor, brought a suit against the debtor's widow (1st defendant) for recovery of the debt and, before judgment, obtained attachment and sale of property of the deceased, the sale proceeds being kept in deposit in the Court. These proceedings took place in June and July, and on the 15th August administration was granted to the Administrator-General, the widow not having taken out administration. On the 28th September the Administrator-General was, on plaintiff's application, made defendant in place of the widow and the suit proceeded against him to decree. Before plaintiff applied to execute this decree the amount of the sale proceeds was, by the direction of the Civil Judge, handed over to the Administrator-General; accordingly, on this ground plaintiff's application to the District Munsif for execution was rejected. He appealed unsuccessfully to the Civil Court. *Held*, on Special Appeal, that Section 33 of Act XXIV of 1867 took away plaintiff's right to payment otherwise than rateably with the other creditors.

1871.
August 12.
S. A. No.
1 of 1870.

THIS was a Special Appeal against the order of O. B. Irvine, the Civil Judge of Bellary, dated the 23rd February 1870, dismissing Miscellaneous Petition No. 106 of 1870, presented against the order of the Court of the District Munsif of Bellary passed on Miscellaneous Petition No. 506 of 1869.

Scharlieb, for the appellant, the plaintiff.

The Acting Advocate-General, for the 2nd respondent, the 2nd defendant.

The facts sufficiently appear in the following

JUDGMENT:—The question for determination in this appeal is whether the Civil Court has erred in dismissing the plaintiff's appeal from the order of the District Munsif's Court rejecting his application for satisfaction of a decree out of the sale proceeds of the deceased's debtor's property.

It appears that on the 15th June 1868, immediately after the death of his debtor, the plaintiff brought a suit against the debtor's widow (the 1st defendant) for the recovery of the debt and obtained therein before judgment the attachment and sale of property of the deceased; and the sale

proceeds were kept in deposit in the Court. These proceedings took place in June and July, and on the 15th of August administration of the deceased's estate was granted to the Administrator-General, administration not having been taken out by the widow. On the 28th September the Administrator-General was, on the application of the plaintiff, made defendant in the suit in place of the widow, and the suit was duly proceeded with against him to decree. Either before the decree or after it, and before the application for its execution, the amount of the sale proceeds was by the direction of the Civil Judge handed over to the Administrator-General, and this was the ground of the rejection of the plaintiff's application for execution by the District Munsif, against which the plaintiff appealed unsuccessfully to the Civil Court.

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170 of 1870.

The point on which the question turns is the right of the Administrator-General, under Act XXIV of 1867, to withhold the money and apply it rateably towards the discharge of the debt decreed to the plaintiff and the other debts due by the intestate. It is difficult to discover the ground of the widow's liability to the suit. The ground now put forward, that she had made herself executrix of her own wrong, does not appear to be supported by evidence in the suit. But in the present appeal we must take it that the suit, although not appear to be supported by evidence in the suit. But in the present appeal we must take it that the suit, although not well brought against the widow, was rightly upheld and the decree duly passed against the Administrator-General in his representative character as supplemental defendant. The case, then, must be dealt with as a suit brought against the Administrator-General.

Applying Section 33 of Act XXIV of 1867 to this conclusion, it is, we think, fatal to the plaintiff's claim to the sale proceeds. It enacts that in such a suit the plaintiff shall
 " not be entitled to have the decree (if any) enforced unless
 " upon proof by affidavit or otherwise that not less than one
 " calendar month previous to the institution of the suit he
 " had applied in writing to the Administrator-General, stating
 " the amount and other particulars of the claim, and support-
 " ing the same by such evidence as, under the circumstances
 " of the case, the Administrator-General was reasonably en-
 " titled to require, and that the Administrator-general had

1871. "refused or neglected to register the claim according to the
 August 12. "practice of his office. If in any such suit judgment is pro-
 f. S. A. No. "nounced in favor of the plaintiff, he shall nevertheless be
 70 of 1870. "only entitled to payment out of the assets of the deceased
 "pari passu with the other creditors."

It is unnecessary to consider whether the institution of the suit groundlessly against the widow alone, before administration was obtained by the Administrator-General, renders the condition as to proof inapplicable to the plaintiff. For even assuming the inapplicability of that condition, it is clear that the concluding provision of the section takes away his right to payment otherwise than rateably with other creditors. It follows that the sale proceeds could not have been legally ordered to be paid in satisfaction of the decree, and the plaintiff can now obtain payment from the Administrator-General of the amount which he is entitled to receive in due course.

For these reasons we think the orders of the Lower Courts against the plaintiff's application sustainable. It becomes unnecessary to say anything as to the Civil Judge's power to make the transfer of the sale proceeds to the Administrator-General under Section 61 of the Act. The Appeal must be dismissed and the appellant must pay one set of costs to the respondents,

Appeal dismissed.

APPELLATE JURISDICTION (a)

PETER PILLAI.....*Plaintiff.*
 KRISTNA AYYAN.....*Defendant.*

A. a judgment-creditor of the defendant, attached his property but took no further step. B. another judgment-creditor, subsequently attached and sold the property. *Held*, that the decree-holder who first attached the property of the judgment-debtor did not forfeit his prior right to payment under Section 270 of the Civil Procedure Code by delaying to obtain an order for the sale of the property upon his attachment.

1871.
 August 14.
 F. C. No. 30
 of 1871.

THIS was a case referred for the opinion of the High Court by A. J. Mangulam, the District Munsif of Tripunivoyal, in Small Cause Suit No. 536 of 1870.

In the execution of the decree in the above suit certain property of the defendant was attached on the application

(a) Present Scotland, C. J. and Innes, J.