

[458] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

PATEL NARANJI MORARJI (Original Applicant), Applicant v. HARIDAS NAVALRAM AND OTHERS (Original Opponents), Opponents.*

[29th August, 1893.]

APPELLATE CIVIL.

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Decree—Execution—Civil Procedure Code (XIV of 1882), ss. 285, 295—Concurrent decrees—Distribution of assets among several decree-holders—Sale in execution by inferior Court of property while under an attachment issued by superior Court—Practice—Procedure.

On the 9th October, 1891, A. obtained a decree against B. in the Court of the First Class Subordinate Judge of Surat. On the 13th October, 1891, C. also obtained a decree against B. in the Court of the Second Class Subordinate Judge of Surat and immediately, viz., on the 16th October, 1891, applied for execution. B.'s property was consequently attached on the 18th October, 1891. On the 7th July, 1892, an order for sale was made, and the proclamation of sale was issued on the 9th July, 1892. The 17th August was fixed as the date of the auction sale.

On the 23rd July, 1892, A. applied to the First Class Subordinate Judge for execution of his decree of the 9th October, 1891, and B.'s property (with respect to which the proclamation of sale had been already issued by the Second Class Subordinate Judge) was attached on the 14th August, 1892. Three days later, however, viz., on the 17th August, 1892, the property was sold under the decree of the Second Class Subordinate Judge.

A. then applied to the Second Class Subordinate Judge to set aside the sale on the ground that it was invalid under s. 285 (1) of the Civil Procedure Code (Act XIV of 1882), having been made while the attachment levied by the First Class Subordinate Judge was pending, and on the Second Class Subordinate Judge's refusal to do so, A. applied to the High Court under its extraordinary jurisdiction.

Held, that the sale was good.

[F., 19 B. 127 (129) ; R., 18 A. 348 (349) ; 22 B. 88 (93) ; 25 C. 46 (48) ; 13 C.P.L.R. 145 ; Cons., 19 B. 539 (543).]

APPLICATION under extraordinary jurisdiction of the High Court s. 622 of the Civil Procedure Code, (Act XIV of 1882) against an order passed by the Second Class Subordinate Judge of Surat.

[459] On the 9th October, 1891, the applicant, Patel Naranji Morarji, obtained a decree against Bai Parvati in the Court of the First Class Subordinate Judge of Surat.

On the 13th October, 1891, the opponents obtained a decree against Bai Parvati in the Court of the Second Class Subordinate Judge of Surat, and immediately, viz., on 16th October, 1891, applied for execution. Bai Parvati's property was consequently attached on the 18th October, 1891. On the 7th July, 1892, the Second Class Subordinate Judge made an order for sale in execution, and on the 9th July, 1892, the proclamation of sale was issued.

On the 9th January, 1892, the District Judge of Surat transferred the execution proceedings (probably at the instance of the applicant,

* Application No. 3 of 1893 under extraordinary jurisdiction.

(1) Section 285, Civil Procedure Code (XIV of 1882) :—

Where property not in the custody of any Court has been attached in execution of decrees of more Courts than one, the Court which shall receive or realize 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.

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Naranji Morarji) from the Court of the Second Class Subordinate Judge to that of the First Class Subordinate Judge and again re-transferred the proceedings to the Second Class Subordinate Judge in the beginning of July, 1892.

On the 23rd July, 1892, the applicant applied to the First Class Subordinate Judge for the execution of his decree of the 9th October, 1891, by the attachment and sale of Bai Parvati's property (with respect to which, as above stated, the Second Class Subordinate Judge had already issued the proclamation of sale), and on the 14th August, 1892, he attached the property.

In the meanwhile, however, *viz.*, on the 12th August, 1892, the Second Class Subordinate Judge issued the necessary warrant for the sale of the property, and fixed the 17th August, 1892, as the date of the auction sale. On the 13th August, 1892, the applicant applied to the Second Class Subordinate Judge for the postponement of the sale, but his application was rejected, and the property was sold on the day fixed, that is the 17th August, and was purchased by Parabhulal Bechar, opponent No. 4.

The property being thus sold during the pendency of the attachment levied by the First Class Subordinate Judge, the applicant applied to the Second Class Subordinate Judge, to set aside the sale. The Subordinate Judge rejected this application also, holding that the sale was valid, and that s. 285 of the Civil Procedure Code (Act XIV of 1882) was not applicable, [460] because the attachment levied by the First Class Subordinate Judge was not subsisting at the time the sale was ordered.

The applicant, thereupon, applied to the High Court under its extraordinary jurisdiction, and obtained a *rule nisi* calling upon the opponents to show cause why the order of the Second Class Subordinate Judge refusing to set aside the sale should not be reversed.

Kalabhai Lalubhai appeared for the applicant in support of the rule :—The point now raised relates to the construction of s. 285 of the Civil Procedure Code (XIV of 1882). The question is whether after the attachment of the property by the Court of the First Class Subordinate Judge, which is a Court of higher grade than that of the Second Class Subordinate Judge, the latter is competent to proceed to sell it. It is admitted that at the time of the sale by the Second Class Subordinate Judge, the attachment levied by the First Class Subordinate Judge was subsisting, though it was not in existence on the day the Second Class Subordinate Judge passed the order for sale, or on the day of proclamation of sale. We contend that the sale is the realisation of the property, and under s. 285 it was the higher Court only which had the power to sell.

What is the effect of the attachment, the order of sale, and the issue of the proclamation? They are all steps in the realization of assets in execution proceedings, but they do not amount to realization. The attachment does not divest the ownership. The ownership continues in the judgment-debtor till sale. The mere order for sale followed by the proclamation of sale does not extinguish his ownership in the property. Section 285 deals with cases of attachments by Courts of either the same grade or of different grades. In one case it provides for the realization to be made by the Court of higher grade and in the other by the Court that first seized the property. In s. 285 as well as in s. 295 the word used is "realize," and as the realization cannot be effected without sale, we submit that the term means that in the case of simultaneous seizure the sale shall be made by the superior Court when the Courts are of different

grades, and in the case of those that are of the same grade, by the Court that first attached the property.

[461] Under the former Code (VIII of 1859) the first attaching creditor had the preference. He was entitled to be fully satisfied out of the property of the debtor, leaving only the balance, if any, for distribution among those that followed him. The main object of the two sections in the present order is to avoid confusion and undue preference. The difference between the two sections is that s. 295 requires an application for execution to the Court which realized the assets to entitle the creditor to share in the distribution, while s. 285 needs no such application. Section 285 contemplates applications for execution in different courts and realization of assets by such Courts at the same time. It does not require, as under s. 295, a repetition of the same process to enable the creditor to share in the distribution. It leaves the proceedings, so far as they have gone, unaffected, and the Court of superior grade by virtue of that grade in one case and the first attaching Court by virtue of priority in the other become cognizant of the proceedings so far as the common property is concerned to complete the process of realization and distribution of assets.

In the present case the effect of the confirmation of the sale by the Second Class Subordinate Judge will be that we shall not get anything out of the assets realized by him, although we hold a decree of a Court of superior grade and although we attached the property in execution of our decree before the actual sale took place. The opponent will thereby get the preference which the code seeks to prevent. The rulings of the Madras and Allahabad High Courts are in our favour. The point has been directly raised in those Courts. *In the matter of the Petition of Badri Prasad v. Saran Lal* (1); this ruling was followed in *Aghore Nath v. Shama Sundari* (2); *Muttukaruppan Chetti v. Mutturamalinga Chetti* (3); the Bombay High Court also in *Nimbaji Tulsiram v. Vadia Venkati* (4).

The rulings of the Calcutta High Court are apparently in conflict with the rulings of the Allahabad and Madras High Courts—*Dwarka Nath Dass v. Banku Behari Bose* (5); *Bykant Nath Shaha v. Rajendro Narain Rai* (6).

[462] *Anderson* with *Motilal M. Munshi*, appeared for opponents Nos. 1, 2 and 3 to show cause.

Govardhanram M. Tripathi, appeared for opponent No. 4, auction-purchaser Parabhulal Bechar.

ORDER.

SARGENT, C. J.—The question in this case turns on the proper application of s. 285 of the Civil Procedure Code, the practical importance of which arises from its necessary connexion with s. 295 of the Civil Procedure Code, which provides for the distribution of the assets realized in the execution of a decree amongst the several decree-holders who had, prior to such realization, applied to the Court by which such assets are held for execution of such decrees against the same judgment-debtor.

The decisions in *In the matter of the petition of Badri Prasad v. Saran Lal* (1); *Muttukaruppan Chetti v. Mutturamalinga Chetti* (3); *Bykant Nath Shaha v. Rajendro Narain Rai* (6), and *Dwarka Nath Dass v. Banku Behari Bose* (5) show that there is a difference of opinion as to the effect of s. 285 of the Civil Procedure Code, between the Allahabad and Madras High Courts

(1) 4 A. 359.

(2) 5 A. 615.

(3) 7 M. 47.

(4) 16 B. 683.

(5) 19 C. 651.

(6) 12 C. 333.

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on the one side and the High Court of Calcutta on the other. In the cases before the Allahabad and Calcutta High Courts there were sales in both the Courts which had passed the decrees in pursuance of concurrent attachments in those Courts. The Allahabad High Court held that the sale under those circumstances by the wrong Court as determined by s. 285 was null and void. The latter Court held that such a sale by the Munsif's Court, not having been objected to, was not void, as "it was perfectly regular so far as the facts were known to the parties concerned" and also, as the High Court assumed, to the inferior Court itself which ordered the sale; but the Court suggested that the Subordinate Judge might have sent for the proceeds of the sale by the Munsif's Court.

In *Muttakaruppan Chetti v. Mutturamalinga Chetti* (1) the circumstances were the same as here: the inferior Court had ordered the sale and issued proclamation before the property was attached in the [463] superior Court; but the property having been subsequently sold by the Court, the High Court held, in deciding upon the claim of two rival purchasers, that the sale by the inferior Court was null and void. Without expressing any opinion on the effect of s. 285 under the circumstances in the cases before the Allahabad and Calcutta High Courts we think that neither the language of the section nor the object with which it may be supposed to have been introduced, *viz.*, to prevent confusion in execution proceedings, requires us or makes it convenient to hold that the effect of the section, under the circumstances of the present case, is to render the sale by the Second Class Subordinate Judge a nullity; it having been the result of an order of sale and proclamation which were perfectly valid when they were made by that Judge on the 7th and 9th July respectively. The District Judge, it is true, had transferred on the 9th January, 1892 (it is not clear on whose application) the execution proceedings from the Second Class Subordinate Judge to the First Class Subordinate Judge's Court as was done in *Krishna Velaji Marwadi v. Bhanu Mansaram* (2) (Application No. 217 of 1892 in the extraordinary jurisdiction) which recently came under our consideration. But in the beginning of July, 1892, the proceedings were transferred by the District Court to the Second Class Subordinate Judge's Court. The result is that the applicant had no right to ask the Second Class Subordinate Judge to set aside the sale as made without jurisdiction, although possibly he might have applied to the District Judge to transfer the proceeds realized by the sale to the First Class Subordinate Judge's Court.

We must, therefore, discharge the rule with costs; but we think it right to take this opportunity of expressing our opinion that the Civil Procedure Code should be amended so as to remove all doubt as to the proper application of ss. 285 and 295 to the different cases which are constantly arising in practice in the execution of concurrent decrees.

Rule discharged.

(1) 7 M. 47.

(2) P. J. (1893), p. 258; 18 B. 61.