APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911. *September* 11.

SORABJI COOVARJI (ORIGINAL DEFENDANT), APPELLANT, *v.* KALA RAGHUNATH AND ANOTHER (ORIGINAL PLAINTIFF AND AUCTION PURCHASER), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sections 47, 73, Order XXI, Rule 55—Decree—Execution—Attachment—Application for execution without issuing attachment—Satisfaction of the attaching judgment-creditor's decree by payment into Court—Withdrawal of attachment—Order by Court for rateable distribution and further sale—Order illegal—Money paid into Court for one purpose is not assets liable to rateable distribution—Question in execution—Appeal.

At the instance of two judgment-creditors the immoveable property of the judgment-debtor was attached and his other judgment-creditors merely put in applications for execution without issuing attachment. On the date fixed for the sale of the attached property, that is, on the 22nd September 1909, the decrees of the two attaching judgment-creditors were satisfied by payment of the decretal amounts in Court and the effect was the withdrawal of the attachment under Order XXI, Rule 55 of the Civil Procedure Code (Act V of 1908). On the next day after the payment into Court, an *ex parte* application was made to the Court and, according to the prayer in the application, the Court ordered rateable distribution of the money paid into Court and further sale of the properties which had been attached towards further satisfaction of the claims of the judgment-creditors.

Held, reversing the order, that by virtue of the payment of the 22nd September 1909 the attachment of the property came to an end, and there being no attachment, there could be no order for further sale of the properties. The monies which were paid in to satisfy the attaching creditors' decrees and to raise the attachment could not be treated as assets by the Court and as such distributable among other judgment-creditors who had merely applied for execution.

Vibudhapriya Tirthaswami v. *Yusuf Sahib*(1), referred to.

Money paid into Court for a particular purpose, as for example, under Order XXI, Rule 55 of the Civil Procedure Code (Act V of 1908), could not be treated as assets distributable under section 73 of the Code. The "assets" referred to in the section were assets held in the process of execution.

The question involved in the appeal was a question in execution between the parties to decrees. Therefore it fell under the provisions of section 47 of the Civil Procedure Code (Act V of 1908) and the order passed by the lower Court was appealable.

SECOND appeal against the decision of G. D. Madgavkar, District Judge of Surat, confirming the order passed by

* Second Appeal No. 694 of 1910.

(1) (1905) 28 Mad. 380.

Naginlal V. Desai, Subordinate Judge of Olpad, in an execution proceeding.

One Sorabji Coovarji was indebted to several creditors. Two of the creditors, namely Kala Raghunath and Bhaga Parabhu, obtained decrees against him and in execution attached his immoveable property. Just about that time thirty-two other creditors, who had obtained decrees against Sorabji Coovarji, applied for execution of their decrees but no attachment was asked for. On the date fixed for the sale of the attached property, that is, on the 22nd September 1909, the decretal amounts of the two attaching judgment-creditors were paid into Court, and the Nazir of the Court passed receipts for the same. On the 23rd September 1909 the other decree-holders, whose applications for execution were pending, applied that the amount paid into Court should be treated as assets and should be distributed rateably amongst all the decree-holders. The Court granted the application and directed that the property which already had been attached should be further sold to satisfy the claims of the judgment-creditors.

Against the said order Sorabji Coovarji appealed to the District Court at Surat on the 27th September 1909, and while the appeal was pending his property which had been attached was sold on the 26th January 1910. On the 21st February 1910 he applied that the sale should not be confirmed, but his application was dismissed on the 14th April 1910. Against the said order of dismissal he appealed to the District Court which having confirmed the said order on the 30th June 1910, he preferred a second appeal, No. 694 of 1910.

While the said second appeal was pending in the High Court, the appeal which Sorabji Coovarji had presented to the District Court on the 27th September 1909, was decided by that Court on the 30th June 1911 and the appeal was dismissed.

T. R. Desai for the appellant (defendant).

D. G. Dalvi for the respondents (plaintiff and auction purchaser) :—We take a preliminary objection. The order

1911.

SORABJI COOVARJI v. KALA RAGHUNATH.

appealed against being passed under Order XXI, Rules 90 and 92 of the Civil Procedure Code, is not appealable: *Gopi Koeri* v. *Gopi Lal*[1], *Sheodhyan* v. *Bholanath*[2]. The addition of words "or fraud" in Rule 90 shows that the legislature intended to include all similar cases under this Rule.

Section 47 of the Civil Procedure Code does not apply. The auction purchaser, who is joined as respondent 2 in the present second appeal, was neither a party to the suit, nor his representative in interest: *Maganlal Mulji* v. *Doshi Mulji Bhaichand*[3]. Assuming that section 47 applies, we submit that where the legislature provides two remedies, one, a general and another specific, the latter excludes the operation of the former.

T. R. Desai for the appellant (defendant):—We submit that the order is appealable. It falls under section 47 of the Civil Procedure Code and not under Order XXI, Rule 90. No doubt the effect of our application, if granted, will be to set aside the sale, but that itself is not conclusive. Rule 90 applies when the sale is sought to be set aside on the ground of fraud or material irregularity and not when the sale is bad as being without jurisdiction and absolutely void. Our contention is that after the tender of money on the 22nd September 1909, the Court had no jurisdiction to proceed with the said two darkhasts. Thus the question is between the same judgment-debtor and decree-holder. Therefore section 47 applies and the order is appealable.

Upon the merits of the case we contend that the proceedings in execution after the 22nd September 1909 were without jurisdiction The amounts paid in Court satisfied the decrees of the two attaching creditors and receipts for the amounts were passed by the Nazir. Therefore the Court should have proceeded under Order XXI, Rule 55 of the Civil Procedure Code which put an end to the attachment. Though there was no attachment at the instance of the other decree-holders, and though they were not parties to the decrees under which

(1) (1894) 21 Cal. 799. (2) (1899) 21 All. 311
(3) (1901) 25 Bom. 631 at p. 635.

the attachments were levied, the lower Court treated the amounts deposited in Court as assets for the satisfaction of the claims of all decree-holders, and ordered further sale under the same attachment which was not then in existence. This was wrong. The Court had no jurisdiction to continue the attachment or proceed with the two darkhasts after the amounts recoverable thereunder were paid up. The judgment-debtor was not bound to tender the amounts due to the other decree-holders who had not attached the property. The amounts were tendered specifically for the satisfaction of the decrees of the two attaching creditors. Therefore the amounts could not be treated as assets within the meaning of section 73 of the Civil Procedure Code. The attachment having thus legally come to an end, further sale by the Court without a fresh attachment was bad and could not stand. It has been held by a Full Bench of the Allahabad High Court that a regularly perfected attachment is an essential preliminary to sales in execution of simple money decrees and where there was no such attachment, any sale that might have taken place was not only voidable but *de facto* void: *Mahadeo Dubey* v. *Bhola Nath Dichit*[1]. Such a sale must be set aside without any inquiry as to substantial injury: *Ram Chand* v. *Pitam Mal*[2], *Bakhshi Nand Kishore* v. *Malak Chand*[3]. It may be argued that the first attachment should enure for the benefit of the other decree-holders, but it has been held that the discharge of the judgment-debt of the creditor who had levied attachment, renders the attachment inoperative with respect to all the creditors: *Kunhi Moossa* v. *Makki*[4], *Sorabji Edulji Warden* v. *Govind Ramji*[5].

The term "assets" refers to assets realized by some process in execution.

The fact that the money was paid into Court in satisfaction of the attaching creditors' debts cannot bring it under section 73

(1) (1882) 5 All. 86.
(2) (1888) 10 All. 506.
(3) (1885) 7 All. 289.
(4) (1899) 23 Mad. 478.
(5) (1891) 16 Bom. 91 at p. 109.

1911.

SORABJI COOVARJI v. KALA RAGHUNATH.

of the Civil Procedure Code: *Vibudhapriya Tirthaswami* v. *Yusuf Sahib*[1].

We, therefore, submit that the proceedings in execution after the 22nd September 1909 were bad in law and should be set aside.

D. G. Dalvi for the respondents (plaintiff and auction purchaser):—The subsequent sale was valid and the amount deposited in Court was rightly held to be assets under section 73 of the Code. Order XXI, Rule 55, should be read with sections 73 and 64 of the Code. Attachment is levied for the benefit of the decree-holder to prevent private alienation before sale so that the interest of a third party should not come in: *Kishory Mohun Roy* v. *Mahomed Mujaffar Hossein*[2]. Sale without attachment is a mere irregularity and not a nullity. The earlier rulings of the Allahabad High Court are bad in view of the subsequent decision of the same Court in *Sheodhyan* v. *Bholanath*[3] and of the Calcutta High Court in *Kokil Singh* v. *Edal Singh*[4]. Order XXI, Rule 55, must be construed with the help of section 13, clause (2) of the General Clauses Act. The word "amount" in clause (1) and "decree" in clause (2) of Rule 55 should be construed to mean "amounts" and "decrees". The other thirty-two decree-holders had put in their darkhasts and they were joined with the two attaching decree-holders by the endorsements of the Court on their applications. Unless they were paid the attachment could not be withdrawn. Hence the money paid by the judgment-debtor into Court was paid to all the decree-holders and the attachment was continued with the necessary alterations. Respondent 2 was a *bonâ fide* purchaser who was not aware of the defect in the auction sale and as against such *bonâ fide* purchaser the sale cannot be set aside unless it was absolutely without jurisdiction: *Guru Prasad Sahu* v. *Mussamat Binda Bibi*[5], *Yellappa* v. *Ramchandra*[6].

(1) (1905) 28 Mad. 380.
(2) (1890) 18 Cal. 188.
(3) (1899) 21 All. 311.
(4) (1904) 31 Cal. 385 at p. 391.
(5) (1872) 9 Beng. L. R. 180.
(6) (1896) 21 Bom. 463.

We submit that section 73 of the Civil Procedure Code applies. The words "held by Court" in the section are new. The words in the corresponding section 295 of the old Code were "realized by sale or otherwise in execution". The change in the language was intended to bring within the operation of section 73 monies howsoever received: *Sorabji Edulji Warden* v. *Govind Ramji*[1], *Mohunt Megh Lall Pooree* v. *Shib Pershad Madi*[2], *Manilal Umedram* v. *Nanabhai Maneklal*[3].

The words "shall be deemed to be withdrawn" in Order XXI, Rule 55 are a statutory fiction: *Emperor* v. *Kashia Antoo*[4]. The object of the introduction of the fiction was to enable the judgment-debtor, if necessary, to alienate the property by private sale as soon as the money is paid into Court. The object was not to invalidate any subsequent sale without fresh attachment.

Further, no attempt was made to prove substantial injury to the judgment-debtor by the omission to levy fresh attachment. The lower Court has found as a fact that no injury was caused to the judgment-debtor.

SCOTT, C. J.:—This is an appeal by the appellant from a judgment passed by the District Judge with reference to certain execution proceedings against him.

Two creditors had obtained decrees and attached certain immoveable property of the appellant, and other creditors had obtained decrees but had merely put in applications for execution without issuing attachment. The 22nd of September 1909 was the date fixed by the Court for the sale of the attached property, and upon that date a third person, at the instance of the appellant, came to the Court with sufficient monies to satisfy in full the decretal claims of the two attaching creditors. The money was accepted by the Nazir of the Court and a receipt therefor was given to the person making the payment. The payment so made was made according to the provisions

(1) (1891) 16 Bom. 91 at p. 109.
(2) (1881) 7 Cal. 34.
(3) (1903) 28 Bom. 264.
(4) (1907) 10 Bom. L. R. 26.

1911.

SORABJI COOVARJI v. KALA RAGHUNATH.

of Order XXI, Rule 55, which says that where the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court the attachment shall be deemed to be withdrawn.

Upon this payment being made the appellant considered himself free from any danger, for the moment, of the sale in execution of his immoveable property, but on the following day, the 23rd of September, an *ex parte* application was made to the Court for distribution of the money paid for the purpose of satisfying the claims of the attaching creditors, and it was urged that the money was assets which were distributable rateably among all the creditors who had applied for execution.

On the 27th September 1909, the Judge assented to the contention of the applicants and ordered rateable distribution of the monies so paid into Court and sale of further properties which had been attached towards further satisfaction of the claims of the judgment-creditors.

Against this order an appeal was preferred to the District Court by the appellant, but long before it came on for hearing the sale of the other properties had taken place. The sale was held on the 26th of January 1910.

On the 21st of February 1910, the appellant applied that the sale should not be confirmed but his application was dismissed on the 14th of April 1910.

From that order of dismissal the appellant appealed to the District Judge who, on the 30th of June 1910, dismissed the appeal:

In June 1911, the appeal against the order of the 27th of September 1909 came on before the District Court, but, as the question of the confirmation of the sale had already been decided by that Court adversely to the appellant, no further proceedings were taken on the appeal against the order of 27th of September, and the appellant comes to this Court in appeal against the order of the 30th of June 1910.

It was objected at the outset that this was a case in respect of which no second appeal lay.

We are of opinion, however, that it is a question in execution between the parties to decrees and therefore it falls under the provisions of section 47 of the Code and is appealable to this Court.

The main ground upon which the pleader for the appellant has based his argument is that by virtue of the payment on the 22nd of September 1909 the attachments upon the property must be deemed to be withdrawn, and that if there was no attachment upon the property the Court was not justified in ordering a further sale of the properties, nor was it justified in treating the monies which had been paid in for the purpose of satisfying the attaching creditors' decrees and raising the attachment as assets held by the Court which were distributable among other judgment-creditors who had merely applied for execution.

We think that the appellant is right in both contentions. Property can only be brought to sale after it has been duly attached, and if the attachment came to an end upon the payment into Court on the 22nd of September 1909, the property was not duly attached at the time of the sale in January 1910. We think this is clear from the terms of Rule 55, Order XXI; but if further authority is required we may refer to the judgment of the Madras High Court in *Vibudhapriya Tirthaswami* v. *Yusuf Sahib*[1].

The question remains whether the monies paid into Court for a particular purpose can be treated as assets distributable under section 73 of the Code. That section provides that "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 for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons." In the reference to "the costs of

(1) (1905) 28 Mad. 380.

1911.

SORABJI CCOVARJI v. KALA RAGHUNATH.

realization" we have an indication that the legislature contemplated that the assets referred to should be assets held in the process of execution. If we were to hold that money paid into Court under Order XXI, Rule 55, was assets held by the Court within the meaning of section 73, we should be only nullifying the provisions of Rule 55; for, there would be no inducement to any judgment-debtor to procure a payment into Court of the amount of the claim of his attaching creditor if the money could at once be absorbed by rateable distribution amongst a number of other creditors.

For these reasons, we reverse the order of the lower appellate Court, set aside the sale, and remand the darkhast to the lower Court for disposal according to law.

The appellant will have his costs in this Court and the two lower Courts.

Order reversed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911.
September 26

VELCHAND CHHAGANLAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* A. FLAGG AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Contract Act (IX of 1872), section 74—Loan—Default in payment—Enhanced interest—Interest calculated in anticipation added to principal—Penalty—Relief against penalty.

The defendant received Rs. 2,440 on a bond which he executed for Rs. 5,500 in the plaintiff's favour. The balance of the amount of the bond was made up of interest calculated upon the sum of Rs. 6,000 for 39 months at the rate of 1½ per cent. per mensem added in advance. The amount was made re-payable in monthly instalments of Rs. 50 for the first 12 months and after that of Rs. 100 for another 26 months and the balance at the end of the 39th month. In case of default in payment of any instalment, the whole amount of the bond became due at once; but if the plaintiff waited longer the defendant agreed to pay interest at 5 per cent. per month till payment. There was default in payment; and the plaintiff sued to recover the amount of the bond together with interest at 5 per cent. per month. The Sub-

* First Appeal No. 187 of 1910.