
RAHEEM v. YOOSOOF LEBBE.

D. C., Colombo, 15,363.

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Seizure of money deposited in Court—Claims for concurrence—Rights of special mortgagees—Civil Procedure Code, ss. 232 and 352—Power of Collective Court to over-rule its own decision.

The provision in section 352 of the Civil Procedure Code that where assets have been realized by a sale in execution of a decree and more persons than one have prior to the realization applied to the Court in which such assets are in deposit for execution of decrees for money against the same judgment-debtor, the assets shall be divided rateably among all such persons, only affects cases where the competition is between holders of money decrees.

Therefore, where three money decree-holders competed for a sum of money brought into Court, and one of them did not appear to have had a decree in his favour at the time the assets were realized by sale,—

Held, that such a decree-holder was not entitled to concurrence under section 352 of the Civil Procedure Code.

Reading section 352 with section 232, the intention of the Legislature appears to be to preserve the preferential rights of special mortgagees.

LAYARD, C.J.—I am doubtful whether the Collective Court has the power to over-rule a judgment of the Collective Court.

UPON a writ of execution issued at the instance of the plaintiff in this case certain movable property belonging to the defendant was sold by the Fiscal and a sum of money levied and brought into Court. The plaintiff in suit No. 15,234, who also held a writ against the defendant, claimed concurrence with the plaintiff in the present case. After the Fiscal had realized the money brought into Court plaintiff in suit No. 16,345 obtained a decree against the defendant and caused the money in deposit to

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be seized. Thereupon the writ-holder No. 15,234 moved for and obtained a notice on the writ-holder No. 16,345 to show cause why the amount in deposit should not be divided between himself and the plaintiff in the present case, to the exclusion of the writ-holder No. 16,345.

This motion and the motion of the writ-holder No. 16,345 for concurrence with the present plaintiff and the writ-holder No. 15,234 were discussed before the learned District Judge (Mr. D. F. Browne) on the same day.

The District Judge held as follows:—" It appears to me that the fund now in Courts is not ' property ' under section 232 of the Civil Procedure Code, but ' assets ' realized by sale under section 352, and also that plaintiff in 16,345 has not duly established by proof that he had applied for execution of his decree before the Fiscal seized and sold under the writ in this action I rule that the plaintiff in 15,234 is entitled to his motion with costs against the plaintiff in 16,345. "

The plaintiff in 16,345 appealed.

Bawa, for appellant.

F. de Saram, for respondent.

The cases cited at the argument (which took place on the 5th December, 1902) appear in the judgment of the Chief Justice.

Cur. adv. vult.

9th December, 1902. LAYARD, C.J.—

A sum of Rs. 859 is in deposit in this case, being amount realized by the sale of certain property of the defendant which had been sold in execution under a writ against him. After such sale the amount mentioned was attached by the appellant. The first respondent, a judgment-creditor of the defendant in another case, who had previously claimed concurrence with the plaintiff in this case, noticed the appellant to show cause why the said sum should not be divided proportionately between himself and the plaintiff in the present case, to the exclusion of the appellant. The appellant himself moved for concurrence with the first respondent and the plaintiff in this action.

The motion of the first respondent for concurrence to the exclusion of the appellant and that of the appellant for concurrence with the first respondent and the plaintiff in this action were discussed before the District Judge on the same day, and the Judge made order on the 28th July, 1902, allowing the first respondent's application.

The appellant has argued before us that the learned District Judge was wrong, and that in respect of the money deposited in

Court the appellant was entitled to concurrence with the first respondent and the plaintiff in this action.

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The sum in Court was realized by sale in execution of a decree of the property of the execution-debtor. Admittedly, at the time of such realization the appellant had not applied for the execution of a decree; he had not even obtained such a decree against the execution-debtor.

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It has been argued that, under the provisions of section 232 of the Civil Procedure Code, the appellant was entitled to concurrence, even though he had not obtained a judgment or applied for a writ of execution against the judgment-debtor. Undoubtedly, under the Roman-Dutch Law the appellant would have been entitled on proof of his debt to concurrence, even though he had not obtained a judgment against the execution-debtor.

The Collective Court, however, decided in the case of *Konamalai v. Siva Kolunthu* (9 S. C. C. 203) that a creditor, since the passing of the Civil Procedure Code, is not entitled to concurrence unless he has obtained a decree against the judgment-debtor prior to the realization of the property of the judgment-debtor by sale in execution of a decree against him, that Court being of opinion that the Roman-Dutch Law rules as to concurrence had been superseded by the provisions of section 352 of the Civil Procedure Code. With reference to claims in concurrence, that judgment has always been followed for the last nineteen years.

The appellant's counsel has, however, referred us to the judgment of Chief Justice Bonser in the case of *Velliappa Chetty v. Pitcha Maula* (4 N. L. R. 312) in support of his argument that the appellant's right must be determined by the law as it existed at the date of the passing of the Civil Procedure Code, and that section 352 of the Civil Procedure Code has not effected the change which the Supreme Court held in 9 S. C. C. 203 it had. Chief Justice Bonser in that judgment was not dealing with the case of a claim for concurrence, but with the rights of a special mortgagee of movables, and he there held that section 352 of the Civil Procedure Code had not the effect of repealing the rights of a special mortgagee of movables to preference in the proceeds of the sale of those movables, although such sale had been carried out under execution of a decree. This Court had previously come to the same conclusion (see the case of *Meera Saibu v. Muttu Chetty*, reported in 3 C. L. R. 37). Mr. Justice Withers in that case drew a distinction between the case of a mortgagee-creditor and the holder of an ordinary money decree, and pointed out that the decision in 9 S. C. C. was only an authority that the old Roman-Dutch Law rules as to claims in concurrence have been superseded

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by section 352 of the Civil Procedure Code, and that section 232 conserved to a mortgagee-creditor his claim to priority. Chief Justice Bonser in his judgment in the above-mentioned case (reported in 4 N. L. R.) also stated that, it seemed to him, "section 352 would be given its legitimate force and effect by referring it to cases where there is competition between holders of ordinary money decrees," but held that section 352 did not affect the rights of special mortgagees.

The law, as laid down by the above-cited cases, appears to be that section 352 only affects cases where there is competition between holders of ordinary money decrees, and that sections 232 and 352 read together indicate the intention of the Legislature to preserve the preferential rights of special mortgagees. It has been suggested by appellant's counsel that we should reserve this case for a Full Court, so that the judgment of the Collective Court above referred to may be over-ruled. I am doubtful as to whether the Collective Court has power to do so. I am confident however, that it would be both undesirable and inexpedient for this Court to in any way interfere with a ruling which has been followed for so many years, and I am not prepared to reserve this case for a Full Court. I would dismiss this appeal with costs.

MONCREIFF, J.—

I am of the same opinion. Mr. Bawa argued that, in spite of the provisions of section 352 of the Civil Procedure Code, his client might, under section 232, seize the money in Court, and on satisfying the Court of the justice of his claim obtain concurrence.

Section 232 deals with the "mode" of seizing property "sought to be seized and sold or otherwise realized" in satisfaction of a decree, which is in the custody of a Court or public officer. According to the explanation, the property may be money in the hands of the Government Agent to the credit of an action or a party to an action. And the Court is to determine any question of priority or title between the judgment-creditor and any other person (except the judgment-debtor) claiming under an attachment, assignment, or otherwise. This may fit the appellant's case; but the provision is subject to section 352, which enacts, in my opinion, that the assets realized are only distributable rateably, among creditors for simple money debts, to those who, having decrees for money against the same debtor, applied for execution before realization.