

(1935) 02 MAD CK 0024
In the Madras High Court

Km. Kr. Km. Kuppan Chettiar and Others	APPELLANT
Vs	
Kuttia Koundan and Others	RESPONDENT

Date of Decision : 28-02-1935

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 73

Citation : 158 Ind. Cas. 1 : (1935) 42 LW 205 : (1935) 69 MLJ 121

Hon'ble Judges : Venkatasubba Rao, J

Bench : Division Bench

Judgement

Venkatasubba Rao, J.—The question that arises is, whether proviso (c) to Section 73 of the CPC applied. A decree was obtained by the

first Respondent's predecessor and by virtue of that decree, a charge was created in respect of the judgment-debtor's property. It is stated,

though in my opinion it is an unnecessary detail, that the suit filed by him was to enforce his unpaid vendor's lien. The first respondent brought the

property to sale, but before the realisation of the assets, the petitioner in this Court, the rival decree-holder applied for rateable distribution. The

lower Court has, after carefully considering the question, negatived his claim.

2. Mr. R. Gopalaswami Aiyangar for the petitioner contends that proviso (c) applies where the charge is a pre-existing one i.e., where it exists

independent of the decree and not where as in the present instance, it is created by the decree itself. There is no warrant in the words of the

Section for this limited construction; on the contrary, there is no reason why a decree which for the first time creates a charge, should be excluded

from the operation of the proviso. The relevant words are, "a decree ordering its sale (the sale of Immovable property) for the discharge of an

incumbrance thereon"". These words are quite general and apply to both kinds of decrees.

3. Secondly, it is argued that the first respondent having attached the property and brought it to sale, he should be deemed to have waived his right

to treat the decree as one creating a charge. There is no force in this contention; to have attached the property was a superfluous and indeed a

wrong step, but, that does not mean, that an error in regard to the procedure adopted deprives party of his substantive rights.

4. In the result, I hold that the lower Court's order negating the petitioner's right to rateable distribution is right. The Civil Revision Petition fails

and is dismissed with costs.