

(1935) 11 MAD CK 0049
In the Madras High Court

S.V.R.M.A.R. Ramanathan Chettiar by authorised agent
Harihara Aiyar

APPELLANT

Vs

Rao Sahib A.S. Alaganan Chettiar and Others

RESPONDENT

Date of Decision : 28-11-1935

Acts Referred:

Citation : 163 Ind. Cas. 209 : (1936) 70 MLJ 683

Hon'ble Judges : Pandrang Row, J

Bench : Division Bench

Judgement

Pandrang Row, J.—This is an appeal from the decree of the District Judge of Madura dated 23rd December 1930 confirming with a slight modification the decree of the First Additional Subordinate Judge of Madura dated 9th September 1929 in O.S. No. 135 of 1927, a suit for refund of money drawn from Court by the first defendant in the suit by way of rateable distribution. The first defendant had obtained two decrees, whereas the plaintiff had obtained one decree against one and the same judgment-debtors. The plaintiff's decree was in O.S. No. 1 of 1922 and the first defendant's decrees were in O.S. Nos. 12 and 67 of 1924. The first defendant is the appellant in this second appeal. He applied to execute the decree in O.S. No. 12 of 1924 in E.P. No. 102 of 1924 on first September 1924. It was returned and later on re-presented on 10th October, 1924, There had been an application by the defendants 2 to 4, who were the judgment-debtors, for stay of execution proceedings and that was dismissed on 8th October 1924. Thereupon there was an order for arrest and it would appear that the second defendant was actually arrested and brought to Court in custody on 25th October, 1924. He was, however, released and at his request given six months time in furnishing security for paying the decree-debt. That] order was passed on 19th December 1924, and the order also contained the following words : "Petition is dismissed", In the meantime there had been an application by the plaintiff for the execution of his decree and certain property belonging to the judgment-debtors was brought to sale. Permission to bid was granted on 24th November, 1924, and it is stated that permission to set off was also allowed

though when it was allowed and by what order is not very clear. In view of the fact that at the time when permission to bid was granted,] namely, on 24th November, 1924, there was the execution." application by the other decree-holder, namely, the appellant, pending in the same Court, it is, to say the least, extremely unlikely that the court would have granted permission to set off, for no set off is granted when there are rival decree-holders proceeding simultaneously against the same judgment-debtors in execution. In any case, any set off granted could only be subject to the provisions of Section 73 of the CPC as is declared by Order 21, Rules 72. In other words, any set off granted of which the decree-holder might take advantage can be; only subject to the right to rateable distribution given by Section 73. The sale actually took place on 19th January 1925 and no amount was deposited by the decree-holder who was himself the purchaser. Prior to the sale there was another application by the appellant for the execution of the decree in O.S. No. 12 of 1924, namely, E.P. No. 6 of 1925 which was presented on. 15th January, 1925. This application was for attachment of the properties of the judgment-debtors of which there had already been an attachment in execution of the decree obtained by the plaintiff. Though in this application it was recited that there had been a previous application, namely, E.P. No. 102 of 1924 and that the second defendant who had been arrested in course of that execution had been released on security, the fact that six months" time had been given was not mentioned; there was an order for attachment passed thereon on 17th January, that is to say, two days before the sale. Subsequent to the sale, that is to say on 22nd January there was an application for rateable distribution by the appellant in respect of his dues under the decree in O.S. No. 12 of 1924. Some days later, I namely, on 14th February 1925, he filed an application to execute the other decree obtained by him and also asked for rateable distribution. On both these applications it was ordered that the plaintiff should deposit the amount that was due as rateable distribution to the appellant and the amount so deposited was drawn from Court by the appellant. The present suit is for the refund of that amount.

2. The principal point for determination in this second appeal is whether E.P. No. 102 of 1924 entitles the appellant to rateable distribution. It is contended that that application was not pending but had been disposed of when the sale took place and when the assets were realised by the Court. No doubt there was a formal order to the effect that the petition is dismissed on that petition on 19th December 1924, that is to say, before the sale. It is clear, however, to my mind that that order of dismissal was not a judicial order, but only an order for administrative or statistical purposes. By merely giving time to the judgment-debtors the Court cannot legally or validly dispose of the execution petition finally. The giving of time merely postpones the issue of process by the Court against the person or property of the judgment-debtor and does not in any way destroy or suspend the right of the decree-holder to apply for execution, nor is it sufficient to dispose of the petition for execution. That petition must therefore be deemed to have been pending in spite of the grant of time to the judgment-

debtors and in spite of the order dismissing it. There is, in my opinion, no reason for arriving at the conclusion that the giving of time has the effect in law of depriving the decree-holder's right to rateable distribution. It could not have been the intention of the Legislature to take away or destroy the right to get a rateable distribution whenever the Court thinks fit to postpone execution or to give time to the judgment debtors to pay the decree amount. It is one thing to grant an indulgence to the judgment debtor; it is another thing altogether to take away an important right of the decree-holder. The policy of Section 73 CPC is to see that the assets realised in course of execution by one decree-holder are rateably and equitably distributed between all the decree-holders who are diligently prosecuting the execution of their decrees. If, as I have found, E.P. No. 102 of 1924 was pending in spite of the order of dismissal thereof, it follows that there was a pending application for execution at the time of the sale and the appellant is clearly entitled to rateable distribution : His right to rateable distribution is not limited in these circumstances to the decree referred to in E.P. No. 102 of 1924, because whenever there is a pending application for ; execution, the applicant in which would be entitled to rateable distribution, there cannot be any receipt or realisation of assets by the Court unless the decree-holder purchaser's rateable share is determined and the balance is deposited by him. The rule according to which in an ordinary case where no question of rateable distribution can arise and a set off has been allowed, the date of sale is to be regarded as the date on which the assets are realised cannot apply to a case where there is a valid claim to rateable distribution. There can be no set off except subject to the right of rateable distribution and the amount for which set off could be claimed by the decree-holder purchaser is not determined on the date of sale but has to be determined later on in the presence of the rival decree-holder. It is clear to my mind that in a case like the present the assets cannot be deemed to have been realised by the Court till the amount was actually deposited under orders of the Court. There could have been no valid set off allowed on the date of sale. It follows from this that even as regards the other I decree, namely, in O.S. No. 67 of 1924, the application for " rateable distribution which was presented before the amount was deposited in Court was a valid application and was validly granted. In view of what I have said above, it becomes unnecessary to consider whether E.P. No. 6 of 1925 was a valid application which would also entitle the appellant to rateable distribution. The appeal succeeds and it follows that the decrees of the Courts below must be set aside and there must be a decree dismissing the plaintiff's suit with costs in all the three courts to be paid by the plaintiff.

3. (Leave to appeal is asked for, but I am not prepared to grant it).