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MIRANDO *v.* KIDURU MOHAMADU.

D. C., Negombo, 4,041.

Concurrence between judgment-creditors—Civil Procedure Code, ss. 272, 350, and 352—Decrees of different courts.

A, having obtained judgment against B in the District Court of Chilaw, claimed concurrence as to the price of the property of B sold by the Fiscal under a writ of execution sued out by C from the District Court of Negombo against the same debtor.

C opposed A's claim on the ground (1) that it came too late because, upon an order of credit allowed by the District Court of Negombo, he had purchased B's property at the Fiscal's sale, and (2) that section 352 of the Civil Procedure Code did not apply to decrees of different Courts.

Held that, as the sale to C was still unconfirmed and no order as to set off made under section 272 of the Civil Procedure Code, and as section 350 contemplates decree-holders of different Courts, A was entitled to concurrence, and for that purpose C was ordered to bring into Court the amount of money for which he had obtained credit.

THIS was an appeal against an order of the District Court of Negombo dismissing the appellant's claim for concurrence in the proceeds realized under a writ of execution issued by the District Court of Negombo.

It appeared that the defendant in the present action was also the defendant in action No. 2,545 of the District Court of Chilaw; that the plaintiffs in both cases were unsecured creditors; that writs of execution were issued out in both cases and certain property seized under each writ; that the sale of the property fixed for the 12th February, 1904, under writ 2,545 of the District Court of Chilaw was postponed in consequence of a claim preferred by a certain person; that that claim was disallowed; and that in the meanwhile the plaintiff in the present case had the property put up for sale under his writ and became the purchaser of it, having been allowed an order of credit. The plaintiff in D. C., Chilaw, 2,545, moved for and obtained from the District Court of Negombo a notice on the purchaser to bring into Court the amount for which he had received credit, in order that the money might be divided *pro ratâ* between the two decree-holders.

The plaintiff in the present case opposed the claim for concurrence on the ground that the money, having already got into his possession, was beyond the control of the Court, and that section 352 of the Civil Procedure Code did not apply to decrees of different Courts.

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The District Judge, Mr. F. Bartlett, held as follows:—

"As to the first point, I gather from the judgment of Clarence, A.C.J., in *1 S. C. R., p. 160*, that the point at which the purchase money of a plaintiff bidding at a Fiscal's sale gets home has not been settled. In the case of a purchase by a plaintiff the purchase amount is never actually deposited in Court. The transaction is merely a paper one, and it appears to me that it is incomplete until the Court has confirmed the sale. Till that point I would hold, in the absence of further authority, that the money does not get home to the plaintiff.

"On the second ground, section 295 of the Indian Code may be taken as practically the same as section 352 of the Ceylon Code. In *I. L. R. 4, Bombay, p. 472*, it was held that concurrence under section 295 did not apply to decrees of different Courts; and in *I. L. R. 5, Bombay, p. 198*, the Chief Justice, discussing the last case, remarked on the portion of the reasoning of the learned Judge of that Court which this Court adopted and on which it acted, as follows: 'The words in section 295 'more persons than one' must, I think, be taken to mean more decree-holders than one of the same Court, and do not include outsiders or decree-holders of other Courts ..... This construction is warranted by the words of section 295. The words are, 'have prior to the realization applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor.' These words, clearly indicate that those decree-holders only could share in the rateable distribution who have actually applied for execution of their decrees to the Court holding the assets.

"Here the Court holding the assets is the District Court of Negombo. To this Court the petitioner (the plaintiff in 2,545, D. C., Chilaw) has made no application prior to the realization. He had no status for doing so. The case is on all fours with the two Bombay cases referred to, and following their authority I hold that the petitioner cannot claim concurrence. His application is dismissed with costs."

The petitioner appealed. The case came on for argument on the 20th June, 1904, before Middleton, J., and Sampayo, A.J.

H. J. C. Pereira, for appellant.

H. Jayawardene, for respondent.

Cur. adv. vult.

21st July, 1904. SAMPAYO, A.J.—

The petitioner, appellant, is the judgment-creditor in D. C., Chilaw, No. 2,545, and the defendant and judgment-debtor in this case is also the defendant and judgment-debtor in the

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Chilaw case. Writs of execution in both cases were, apparently about the same time, issued to the Fiscal of the North-Western Province, who seized under both writs certain lands situated in the District of Kurunegala, the sale under petitioner's writ being fixed for the 12th February, and the sale under plaintiff's writ for the 20th February, 1904. A day before the former date a claim to the lands was made in the petitioner's execution proceedings by a third party, who, however, failed to appear at the claim inquiry on 12th March, 1904, with the result that the claim was dismissed. In the meantime the sale under plaintiff's writ took place on the 20th February, 1904, the plaintiff himself becoming purchaser and obtaining credit from the Fiscal for the amount of his judgment debt in pursuance of an order of Court to that effect. Why the third party claimed the lands as seized under petitioner's writ only and not as seized under plaintiff's writ also, and how the Fiscal came to sell the property while the claim was still undisposed of, does not appear. The petitioner impeaches the claim as a bogus claim made with the intention of delaying the petitioner and enabling the plaintiff to realize the property for his own sole benefit, and to my mind there are good grounds for this suggestion. However, the sale did take place and was reported to the Negombo Court in this case, the Fiscal depositing in Court the balance purchase money. The petitioner as judgment-creditor in the Chilaw case then came into this case and applied that the plaintiff be ordered to bring into Court the amount for which he had obtained credit, and that the money realized by the sale of the property be rateably divided between the petitioner and plaintiff.

The application was opposed on two grounds. The first objection was based on an argument that the plaintiff having already obtained credit, the application was too late, but the objection was rightly over-ruled by the District Judge, as the sale was still unconfirmed and no order as to set off had been made under section 272 of the Civil Procedure Code (*Perumal Chetty v. Perera, 2 Browne, 1;* and *Sadayappa Chetty v. Siedle, 2 Browne, 3*). The District Judge, however, disallowed the application on the second objection taken, viz., that under section 352 of the Civil Procedure Code only a holder of a decree of the same Court as holds the assets and not of a different Court is entitled to claim in concurrence. The petitioner has appealed from this order of the District Judge, and under the circumstances above stated he appears to me to be entitled to consideration, unless we are absolutely compelled by law to deny him any relief.

The words of section 352 are " whenever assets are realized by sale or otherwise in execution of a decree, and more persons than

one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons."

This section corresponds to section 295 of the Indian Procedure Code, which has been construed in the Indian Courts as requiring that the rival claimants to the proceeds of sale should be holders of decrees of the same Court or of decrees to execute which application is made to the same Court. See the case cited to us of *Krishnashankar v. Chandra Shankar* (*I. L. R. 5, Bombay, 198*). The provision as so read has a meaning in India which it has not in Ceylon. For there a decree may be sent for execution from one Court to another, and may be executed either by the Court which passed it or by the Court to which it is sent for execution (see sections 223 and 224 of the Indian Code), and so the provision of section 295 as to more persons than one "applying to the Court by which the assets are held *for execution of decrees*" becomes intelligible and significant. But we have no provision in Ceylon for the transfer of decrees for execution from one Court to another and, consequently, for the application for execution to any Court other than the Court which passes the decree, and if we are compelled to give the same strict meaning to section 352 of our Code as has been given to section 295 of the Indian Code, it seems to me that much injustice would be done to judgment-creditors in Ceylon. But I do not think we are so compelled. In the first place, I think our rules of procedure should be construed and applied with reference to our substantive law, which in this matter is the Roman-Dutch Law. Now, under the Roman-Dutch Law, the creditors are entitled to claim in concurrence the proceeds of sale of the common debtor's property, whether they have obtained judgments in the same Court or not. It is true that this Court has decided (*Konamalai v. Sivakulanthu, 9 S. C. C. 203*) that since the enactment of the Code, by reason of section 352, claimants must qualify themselves (1) by obtaining decrees and (2) by applying for execution prior to the realization of the assets, and we must therefore hold that the Roman-Dutch Law has been to that extent modified by the Code. But must it also be held that the Roman-Dutch Law has been further modified to the extent of requiring that the claimant should have obtained his decree in the same Court as that which holds the assets? I think not. If such were the intention of the Code, section 352 would, instead of leaving that requirement to be inferred, have contained much plainer language to show such a

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material alteration in the rights of creditors to concurrence under the Roman-Dutch Law. I say inferred, because it is not expressly so provided in section 352, but, since there is no provision for the transfer of decrees from one Court to another for execution, we are expected to conclude that when section 352 spoke of "applying to the Court by which such assets are held for execution of decrees," it meant to refer to decrees of the same Court. I am not disposed to go that length and to take so much away from the substantive rights of a creditor under the Roman-Dutch Law. I think that no violence will be done to the provision of section 352 if we read the expression "for execution of decrees" as meaning "for satisfaction of decrees," which would include the case of application for payment of money realized by one Court in satisfaction of decrees of other Courts. I may add that, even since the enactment of the Code, it has been the constant practice, notwithstanding section 352, for persons holding decrees of different Courts to be allowed to claim in concurrence assets realized by one Court, and as an illustration of this I may refer to the case *Soysa v. Wirakoon* (*2 C. L. R. 178*).

Moreover, so far as I can see, there is nothing in the Indian Code corresponding to section 350 of our Code. That section *inter alia*, requires the Court, before making an order for the payment of money realized by execution, to give notice to "all persons whose claims shall have been notified to the Court," to hear and adjudicate upon such claims, and to make such order "as the justice of the case may require." Now, who are the persons whose claims are notified to the Court? Surely, this does not mean merely holders of decrees of the same Court. These decree-holders need not notify their claims at all, for the Court necessarily would already have notice of their claims. Further, notifying claims is something different from applying to the Court for execution. To my mind this section contemplates claims by holders of decrees of Courts other than the Court by which the assets have been realized and are held, and as "the justice of the case" clearly so requires I would allow the petitioner, who has fulfilled the requirements laid down in the decision in *9 S. C. C. 203*, to come into this case under section 350 and to prosecute his claim to the proceeds of sale.

In my opinion the order appealed against should be set aside with costs in both Courts, and the plaintiff should be ordered to bring into Court the amount of money for which he obtained credit from the Fiscal, and the Court should be directed to hear and adjudicate upon the claim made by the petitioner-appellant.

MIDDLETON, J.—

I agree with the order proposed by my brother. Assuming that the Roman-Dutch Law as to non-preferent creditors sharing concurrently in the assets of their common debtor is the substantive law in Ceylon, it has been to a certain extent limited by the Full Court decision reported in 9 *S. C. C. 203*, but not, I think, altogether repealed by section 352 as the Judges in that case would appear to think.

Section 352 has no doubt had the effect given to it by that judgment, but as execution in Ceylon can only be granted by the Court issuing the decree I feel constrained to say that, in my opinion, the section means that only decree-holders of the same Court can participate as therein laid down upon fulfilling the conditions of the section, but that their right to a rateable division is an absolute one.

Under section 352 the assets must be held by the Court originally ordering execution, which must be the Court issuing the decree, or they would not get them; and the person applying must have a decree of that Court, or he cannot apply to it for execution. The inference therefore is that only decree-holders of the same Court can participate under that section. Section 351 is the section under which the present case should have been dealt with, but there is no evidence to show whether the property was first seized under the appellant's or the respondent's decree.

If it was seized first under the appellant's decree the Fiscal was right in reporting the case under section 241 when the claim was made to the Chilaw Court.

It seems to me, however, that he might well have reported it to the Negombo Court also; and I am surprised that he proceeded with the sale at all under the circumstances.

There still, however, remains section 350, the last two paragraphs of which appear to be applicable to such a case as this.

The first of these paragraphs must have reference to claims other than those of co-parties, as the preceding paragraph orders that notice must be given to them before payment out of Court.

Conceivably, the claimants contemplated there may be decree-holders of others Courts, or registered bill of sale holders, upon whose claims order is to be made as the justice of the case requires.

The appellant here did make a claim to the Negombo Court on the 18th March, 1904, by petition and affidavit, and I think that he is entitled to have notice served on him under that last mentioned paragraph and to an adjudication of the Court upon his claim upon the facts.

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DEMMER *v.* GUNAWARDANA.

D. C., Galle, 6,978.

Appeal petition—Presentment to the secretary—Civil Procedure Code, s. 754.

If a petition of appeal is in order and purports to be signed by the appellant's proctor, it should be received by the secretary.

It is not necessary for the proctor himself to personally hand it to the secretary.

IN this action for malicious prosecution a decree was entered for plaintiff on 27th July, 1903. Mr. N. D. Abeyasingha was proctor for defendant. On 7th August the following entry was made in the journal minutes:—

"A petition of appeal on behalf of the defendant is presented to the secretary by a proctor's clerk. The secretary submits to me for instructions whether the petition of appeal should be accepted.

"I refused to accept the petition of appeal for the reason recorded by me in a memorandum, which, together with the petition of appeal, is returned to the party who tendered."

H. Jayawardene applied to the Supreme Court on 17th August for an order on the District Judge to receive the defendant's petition of appeal.

H. Jayawardene, for appellant.—The District Judge declined to forward the petition on the ground that it was not tendered by the proctor who represented the client, but by another man a proctor's clerk. It matters not who hands the petition to the secretary. It is signed by the Proctor, Mr. N. D. Abeyasingha, and is in order under section 755 of the Civil Procedure Code. The order of refusal professes to be made under section 754, and the Judge relies upon the case reported in *2 C. L. R. 118*. The petition referred to in that case was sent by post, and was held to be bad. That was before the present Code. Delivery by post is good under the present Code. [Middleton, J.—What is the practice?] The proctor signs the petition and tenders it. There is no special meaning to the word "present" occurring in section 754, and I know of no authority contrary to the practice.

17th August, 1903. MIDDLETON, J.—

In this case it would appear that the petition of appeal was tendered to the Secretary of the District Court of Galle on a certain day by the clerk of the proctor who was concerned for the

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appellant. The secretary submitted the question to the District Judge, whether it should be received by the Court under section 754 of the Civil Procedure Code. The matter having been considered by the District Judge, he directed that the petition of appeal should not be received, basing his decision apparently on the analogy of a case reported in *2 C. L. R. 118* in reference to criminal cases. It would appear that the petition in question was duly signed by the proctor concerned, and purported to be in order as the petition of the appellant.

In my opinion it is not necessary for the proctor himself manually to present the petition to the secretary, nor has the word " present " in the second paragraph of that section that meaning. If the petition is in order and purports to be signed by the proctor, with whose signature the secretary of the Court in almost every case would be acquainted, it should be received, although the proctor himself did not personally hand it over.

I think this petition should be received as and from the date on which it was tendered to the Secretary of the District Court by the clerk of the proctor; the prescribed time for furnishing security to commence to run from the date of the return of this record to the District Court.

GRENIER, A.J.—I agree.