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August 19.

Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Middleton.

LETCHIMANEN CHETTY *v.* ABDUL RAHEMAN.

Ex parte KANNASAMY, Applicant (Appellant).

D. C., Colombo, 27,271.

Concurrence, when allowed—Application for execution of decree—Realization of assets—Set-off—Civil Procedure Code, ss. 272, 350, and 352.

A judgment-creditor is not entitled to claim concurrence under section 352 of the Civil Procedure Code, unless, prior to realization, he has applied to the Court by which the assets are held for execution of his decree.

A person who claims to be interested in the proceeds of a sale in execution must give notice of his claim under section 350 of the Civil Procedure Code to the Court from which execution issues and not to the Fiscal.

APPEAL by the intervenient whose claim to concurrence under section 352 of the Civil Procedure Code was disallowed by the Court. The facts are fully set out in the judgment of the District Judge (H. A. Loos, Esq.), which was as follows :—

"The plaintiff in this case obtained judgment against the defendant on August 26, 1908, and on August 28 he applied for execution of the decree. On September 3, 1908, writ was issued, and certain movable property of the first defendant was seized in his boutique at Dehiowita. On September 14, 1908, a claim was made to the property seized by one Mohamado Haniffa. After inquiry that claim was disallowed, and the claimant has instituted an action under section 247 of the Civil Procedure Code, and summons was served on the plaintiff in this case in January last.

"On September 16, 1908, the plaintiff had applied for permission to bid for and purchase the property seized, and for credit to be allowed him to the extent of his claim in the event of his becoming the purchaser of any of the property so seized at its sale by the Fiscal.

"The property was sold on November 6 and 7, 1908, and the plaintiff purchased some of it, and was allowed credit to the extent of Rs. 535·15. A total sum of Rs. 678·58 was realized by the sale of the property, but the Fiscal's charges swallowed up the balance of Rs. 143·43 apparently.

"On November 24, 1908, the plaintiff's proctor moved, in terms of section 272 of the Code, that the said sum of Rs. 535·15 be set off against the amount due to plaintiff on the decree, and that satisfaction of judgment be entered to the extent of Rs. 535·15, and that application was allowed.

"It would appear that the plaintiff in C. R., Colombo, case No. 11,152, had also obtained a judgment against the first defendant in that Court on September 30, 1908, had applied for execution of

his decree on October 30, and writ was issued on November 2, 1908. The writ apparently reached the Deputy Fiscal of Kegalla on November 5, and the Deputy Fiscal of Avisawella on November 6, 1908, as appears from the progress report of that Deputy Fiscal, and as also appears from that report a part of the goods seized by the plaintiff in the present case had been sold already before the writ of the plaintiff in C. R., Colombo, case No. 11,152, reached that Deputy Fiscal.

"On December 11, 1908, the proctor for plaintiff in C. R., Colombo, case No. 11,152, moved, after notice to the present plaintiff's proctor, that the plaintiff be directed to bring into Court the sum of Rs. 535·15 to be divided rateably between himself and the plaintiff in C. R., Colombo, case No. 11,152.

"No prohibitory notice was received by this Court from the Fiscal in execution of the writ of the plaintiff in C. R., Colombo, case No. 11,152, and there was nothing before this Court on November 24, 1908, when it made order under section 272 of the Code setting off the purchase money against an equivalent proportion of the decree and entering up satisfaction of the decree *pro tanto*, to indicate that there was any other party interested or entitled to be heard before allocating the money to the plaintiff alone, and so far as appeared there was no such party. It appears to me, therefore, that it cannot be said that the order of November 24, 1908, was not duly made, and the purchase money must be regarded as having been finally adjudged to the decree-holder and placed beyond the further control of this Court, as laid down by the Supreme Court in the case of *Oduma Lebbe v. Sahib.*[1]

"It was argued, however, that the writ of the plaintiff in C. R., Colombo, case No. 11,152, having been in the hands of the Fiscal at the time of the sale of the property by him under the writ of the present plaintiff, the order of November 24, 1908, must be subject to the provisions of section 352 of the Code, and that accordingly plaintiff in C. R., Colombo, case No. 11,152, was entitled to ask that the present plaintiff be ordered to bring into Court a rateable amount of the purchase money.

"It is clear, however, from the progress report of the Deputy Fiscal of Avisawella that the writ of the plaintiff in C. R., Colombo, case No. 11,152, was not in his hands at the time of the sale of a portion of the property—what portion there is nothing to show—and as regards that portion, there is no question that the plaintiff in C. R., Colombo, case No. 11,152, cannot claim concurrence.

"It does not appear to be absolutely clear that the provisions of section 352 of the Code would apply in the present case at all, for that section contemplates a rateable division of assets realized by sale or otherwise in execution of a decree only among such persons as have prior to realization of such assets applied to the Court by

[1] *(1906) 1 Appeal Court Reports 109.*

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which such assets are held for execution of decrees for money against the same judgment-debtor. In this instance the assets are held by this Court, and admittedly no application was made to this Court, prior to the realization of the assets, for execution of his decree by the plaintiff in C. R., Colombo, case No. 11,152. A strict construction of the section in question would appear to indicate that it is not competent for a plaintiff in a Court of Requests case to claim concurrence with a plaintiff in a District Court case in the way in which the plaintiff in C. R., Colombo, case No. 11,152, seeks to do in respect of assets realized by a District Court.

"In addition to the above reasons, it appears to me that this application of the plaintiff in C. R., Colombo, case No. 11,152, cannot be allowed, for, as stated above, the claimant, whose claim in respect of the property sold was rejected, has instituted an action under section 247, and it is not impossible that his action may succeed, and that the present plaintiff may have to refund to him the sum of Rs. 515·35, and any such application as that now made by the plaintiff in C. R., Colombo, case No. 11,152, must, in my opinion, necessarily be disallowed pending the decision of the claimant's action under section 247.

"The application is disallowed with costs."

The applicant appealed.

Sampayo, K.C. (*F. M. de Saram* with him), for the appellant.

H. A. Jayewardene, for the respondent.

(*Mirando v. Kiduru Mohamadu*[1] was referred to in the course of the argument.)

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The appellant cannot succeed under section 352, because he did not apply to the Court by which the assets were held, *i.e.*, the District Court, before the realization by sale in execution of the respondent's decree. And I do not think he can succeed under section 350. The debtor's goods were seized by the Fiscal under the respondent's writ; and on November 6, before they were all sold, the Fiscal received notice from the appellant's proctor requesting that the goods seized under the respondent's writ may also be seized under the appellant's writ. After the receipt of that notice the goods were sold and the proceeds were paid into the District Court, and were in effect paid to the respondent by the order of the District Court made on November 24. At that date no notice had been received by the District Court of the appellant's claim, and I think that it was the duty of the appellant and not of the Fiscal to give notice to the District Court under section 350. In my opinion the order of the District Court is right. The appeal is dismissed with costs.

MIDDLETON J. concurred.

Appeal dismissed.

[1] (*1904*) *7 N. L. R. 208.*