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CIVIL RULE.

Before Mookerjee and Beachcroft JJ.

BALMER LAWRIE & Co.

v.

JADUNATH BANERJEE.*

1914

April 6.

Rateable Distribution—Practice and Procedure—Decree—Civil Procedure Code (Act V of 1908) ss. 47, 73—Civil Procedure Code (Act XIV of 1882) s. 295—Appeal.

An order, refusing rateable distribution made under s. 73 of the Code of Civil Procedure (Act V of 1908) between two rival decree-holders, which does not affect or interest the judgment-debtor, is an *order* in execution proceedings but is not a *decree*, as all the conditions enumerated in s. 47 of that Code are not present, and consequently is not appealable.

Jagadish Chandra Shaha v. *Kripanath Shaha* (1) followed.

Sorabji Coovarji v. *Kala Raghunath* (2) distinguished.

It is essential for the application of s. 73 of the Code of Civil Procedure that the decrees should have been *passed* against the *same* judgment-debtor.

RULE obtained by Messrs. Balmer Lawrie & Co., the petitioners.

The petitioners had got a decree against D. Mukherjee & Co. in the Small Cause Court, Calcutta,

* Civil Rule No. 132 of 1914, against the order of Latu Behari Bose, Subordinate Judge of 24-Parganas, dated Jan. 27, 1914.

(1) (1908) I. L. R. 36 Calc. 130. (2) (1911) I. L. R. 36 Bom. 156.

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for a sum of Rs. 1,505 including costs. And in execution thereof in that Court got satisfaction to the extent of Rs. 500 only, rateably along with other creditors, from a sum of Rs. 1,200 sent to the Small Cause Court, Calcutta, by the Chairman of the Calcutta Municipal Corporation alleging that that was the only sum payable by the said Municipality to D. Mukherjee & Co.

Thereafter, it appears, that Jadunath Banerjee, the decree-holder opposite-party, executed his decree against D. Mukherjee & Co. in the 3rd Court of the Subordinate Judge, Alipore, in execution case No. 79 of 1913 and attached two Government promissory notes Nos. 099497 and 131160 of the 3½ per cent. loan of 1842-43 for Rs. 500 and Rs. 200 respectively, and also any money due from the said Corporation to D. Mukherjee & Co. The said Chairman then sent to the Subordinate Judge the aforesaid Government promissory notes and a cheque for Rs. 523-7-8 representing the judgment-debtor's dues from the said Corporation on accounts subsequently taken, all of which were still lying with him unrealised, and also mentioned the fact of there having been previous attachments from the Small Cause Court, Calcutta, of D. Mukherjee & Co.'s dues by a number of creditors, as well as the fact that the said Chairman had sent Rs. 1,200 to the Small Cause Court, Calcutta.

Thereupon the 3rd Court of the Subordinate Judge, Alipore., sent to the petitioner notice of the execution case No. 79 of 1913. And they entered appearance, took time, and finally on the 15th January 1914 after having transferred the decree from the Small Cause Court, Calcutta, to the 3rd Court of the Subordinate Judge, Alipore, filed a petition for execution praying for attachment of the aforesaid Government promissory notes and cheque, and rateable distribution along

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with other creditors after realisation. On the 27th January 1914, the learned Subordinate Judge, after hearing the parties, rejected the petitioner's application holding that they were not entitled to get rateable distribution. Hence they moved the High Court and obtained this Rule.

Babu Biraj Mohan Majumdar, for the opposite party. I have a preliminary objection to take, namely, that as there is an appeal from an order refusing rateable distribution, no Rule should have been granted under s. 115 of the Code of Civil Procedure: vide *Sorabji Coovarji* v. *Kala Raghunath* (1).

[MOOKERJEE J. How do you say there is an appeal?]

As the question is between parties to the suit, the order should fall under s. 47 of the Civil Procedure Code, and hence there is an appeal.

"Assets" in the present section has the ordinary meaning attached to the word and therefore the "assets" of the judgment-debtor in the present case were received by the executing Court on the day on which the promissory notes and the cheque for Rs. 523 were sent by the Secretary, Municipal Corporation, to the Court. This was long before the petitioners applied for rateable distribution, and hence they are out of time.

[BEACHCROFT J. Have the promissory notes been endorsed over to the opposite party, and has the cheque been cashed?]

[*Babu Sajani Kanta Sinha*, for the petitioner. No, the cheque has not been cashed, but the Government promissory notes have been endorsed over to the opposite party Jadunath on the very day on which this rule was issued by your Lordships. There appears to have been an undue haste about it.]

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They are entitled to the money and they have taken it. At any rate the order for rateable distribution was passed in December.

[BEACHCROFT J. How could that be? How could the Court have distributed the Government promissory notes without selling them? Suppose the property was immoveable property instead of Government promissory notes.]

At any rate, the decree was not against the same judgment-debtors. One was against the firm and the other against Dasarathi Mukherjee.

Babu Sajani Kanta Sinha, in support of the Rule. The Rule is in order. No appeal lies from an order under section 73 refusing rateable distribution. It is not an order under section 47, the question not being between the decree-holder and the judgment-debtor but between different decree-holders against the same judgment-debtor. The case of *Sorabji Coovarji* v. *Kala Raghunath*(1) is distinguishable. There the question was whether the sale held of the properties of the judgment-debtor, in spite of the payment of the whole of the decretal amount for which the properties had been attached, was valid or not. This was a question undoubtedly between the judgment-debtor and the executing creditor. The case here is entirely different. Hence the ruling is quite inapplicable.

"Assets" to be held by a Court must be realised before they are assets within the meaning of section 73 of the new Code or section 295 of the old Code. There can be no distribution of the properties of a judgment-debtor amongst creditors before they are "realised;" and "realisation" has been held to mean "converted into cash or such form as to be available for immediate distribution": *Ramanathan Chettiar*

(1) (1908) I. L. R. 36 Bom. 156.

v. *Subramania Sastrial* (1), *Hafiz Mahomed* v. *Damodar Pramanick* (2).

[MOOKERJEE J. But the old section 295 has been considerably changed. In the old Code, the words were, when "assets are *realised*", whereas in the new Code, they are, "assets are *held*." Therefore the real question is about the meaning of "assets."]

No doubt "assets" in the broad sense of the word would mean property of a person that can be made liable for his debts, but this must be taken with the word *held, i.e.*, held in such a form as can immediately be distributed to the creditors in satisfaction of a decree for money.

[MOOKERJEE J. Your contention is that it must be converted into cash.]

Yes, or some form which is equivalent to cash.

[MOOKERJEE J. What is that?]

Currency notes or some such thing.

[MOOKERJEE J. Suppose the assets brought into Court are paddy. Is that something available for immediate distribution?]

No, the decree sought to be executed must be one for money and therefore the satisfaction must be in money. This is the import of the decisions in *Ramanatham* v. *Subramania* (1) and *Hafiz* v. *Damodar*.(2)

[MOOKERJEE J. Those are cases under the old Code. Have you got any case decided after the passing of the new Act?]

Yes: *Arimuthu Chetty* v. *Vyapuripandaram* (3) It is a decision of a single Judge of the Madras High Court and shows that Mr. Justice Abdur Rahim thought that "assets" under the new Code must be realised before they can be held by a Court. The

(1) (1902) I. L. R. 26 Mad. 179. (2) (1891) I. L. R. 18 Calc. 242.
(3) (1911) I. L. R. 35 Mad. 588.

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Government promissory notes and the cheque are negotiable instruments and there are special provisions in the Civil Procedure Code for their realisation: *see* Order XXI rules 51 and 76. The Government promissory notes and the cheque were brought into Court, but there was something more to be done under Order XXI, rule 76. The endorsement of the Government promissory notes over to one of the decree-holders is illegal, at any rate irregular. Hence the Court below never realised the property brought into Court under attachment. So it did not hold the assets within the meaning of section 73 before the application for execution and rateable distribution by my client. Therefore, the order complained of is wrong.

As for the decrees not being against the same judgment-debtor, Dasarathi Mukherjee is the sole partner of D. Mukherjee & Co., at any rate is a partner who is personally liable for the debts of the Company, therefore the contention of my learned friend is groundless. The real test is, whether the person, whose money is sought by different creditors under different decrees for money, is liable under each of the decrees: *Gonesh Das Bagria* v. *Shiva Lakshman Bhakat* (1).

[MOOKERJEE J. But the word "passed" is an addition in the new Code.]

No doubt, but it is an addition necessary under the new framing of the section. It does not affect the sense of the old section 295 with regard to the judgment-debtor. A decree against A, B and C, jointly and severally is a decree passed equally against A, B and C. Therefore, a decree against D. Mukherjee and Co. is a decree passed against Dasarathi Mukherjee as well as against any other member of the firm, if any.

(1) (1903) I. L. R. 30 Calc. 583.

MOOKERJEE AND BEACHCROFT JJ. This Rule is directed against an order by which the Subordinate Judge has refused an application for rateable distribution under section 73 of the Code of Civil Procedure of 1908. The opposite party obtained a decree for money against his judgment-debtor by name Dasarathi Mukherjee, while the petitioner obtained a decree for money against D. Mukherjee & Company, a firm of which Dasarathi Mukherjee was a partner. At the instance of the decree-holder opposite party, the Municipal Corporation of Calcutta, which held two Government securities and a sum of money payable to Dasarathi Mukherjee, placed the properties at the disposal of the lower Court for satisfaction of the decree held by him. During the pendency of a proceeding for rateable distribution as between the opposite party and the other execution creditors of Dasarathi Mukherjee, at whose instance the properties in the custody of the Corporation had been attached through the Calcutta Small Cause Court, the present petitioner, on the 15th January 1914, made an application for rateable distribution. This application has been refused by the Subordinate Judge on the ground that it was made after the receipt of the assets by the Court. The question for consideration is, whether this order has been rightly made.

A preliminary objection has been taken to the Rule on the ground that the order of the Subordinate Judge was in essence made under section 47 of the Code and was appealable as a decree. In support of this view, reference has been made to the case of *Sorabji Coovarji* v. *Kala Raghunath* (1). That case, however, is clearly distinguishable. There the decree-holders had attached the property of their common

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judgment-debtor. Other execution creditors of the judgment-debtor applied for rateable distribution of the assets which might be realised by sale of the property. The judgment-debtor brought into Court a sum sufficient to satisfy the two decree-holders at whose instance the property had been attached. Thereupon the other decree-holder applied for rateable distribution of the sum so deposited, and the Court, without notice to the judgment-debtor, allowed this application. The result was that there was not a sufficient sum left to the credit of the decree-holders, at whose instance the attachment had been effected, to satisfy their dues, and the Court accordingly directed that the property attached be sold in order that their decrees might be satisfied in full. The judgment-debtor appealed against this order, on the ground that no rateable distribution was permissible under the law in respect of the money brought by him into Court, and that as the sum deposited was sufficient to satisfy the decrees held by the two execution creditors who had taken out processes of attachment, their decrees must be deemed in law to have been satisfied, so that there was no execution proceeding left in which an order for rateable distribution might be made. An objection that the appeal was incompetent as the question raised was not within the scope of section 47, was overruled on the ground that the question did arise between parties to the decree. It is not necessary for our present purpose to decide whether, in circumstances like these, the question which arose not merely between the rival decree-holders but also between the judgment-debtor on the one hand and the decree-holders on the other, could be deemed to fall within the scope of section 47. But it is plain that, in the case before us, the question which calls for decision is not within the scope of

that section. This is not a question which arises between the parties to the suit in which the decree under execution was passed; it is on the other hand a question between two rival decree-holders, which does not affect or interest the judgment-debtor. An order made under section 73 is an order in execution proceedings but is not a decree unless all the conditions enumerated in section 47 are present: *Jagadish* v. *Kripa Nath*(1). We must consequently hold that the order of the Subordinate Judge is not appealable and overrule the preliminary objection.

As regards the merits, it is plain that the petitioner is not entitled to succeed. Section 73 provides that where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons. It is essential for the application of the section that the decrees should have been passed against the same judgment-debtor. This has been made clear beyond possibility of dispute by the introduction of the word "passed" which did not find a place in section 295 of the Code of 1882. But, as already stated, the decree held by the opposite party, in execution of which the properties have been brought into Court, was passed against Dasarathi Mukherjee, while the decree held by the petitioner was obtained against the firm of which Dasarathi Mukherjee was a partner, and is not shown to be capable of execution against him individually. Consequently, the two decrees cannot be deemed to have been passed against the same judgment-debtor, and it

(1) (1908) I. L. R. 36 Calc. 130.

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is thus needless to consider whether *Gonesh Das* v. *Shiva Lakshman* (1) has been affected by section 73 of the Code of 1908 which reproduces section 295 of the Code of 1882 in an altered form. In this view, it is also unnecessary to discuss the question, whether the application for rateable distribution by the petitioners was made before the assets had been received by the Court below.

The result is that the Rule is discharged with costs to the decree-holder (and not to the judgment-debtor) opposite party.

G. S. *Rule discharged.*

(1) (1903) I. L. R. 30 Calc. 583.

APPELLATE CIVIL.

Before Woodroffe and Carnduff JJ.

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April 8.

ANNAPURNA DASEE

v.

NALINI MOHAN DAS.*

Succession Certificate—Succession Certificate Act (VII of 1889), s. 4.—"Debt," meaning of—Part of debt, if certificate can be granted in respect of—Appeal.

A certificate under the Succession Certificate Act can be granted in respect of a part only of a debt due to the deceased.

The word "debt" is a comprehensive term, which should receive a liberal construction.

Re Ghansham Das (1), and *Mahomed Abdul Hossain* v. *Sarifan* (2), approved and followed.

Akbar Khan v. *Bilkisara Begam* (3), considered.

*Appeal from Order No. 328 of 1913, from the order of M. Smither, District Judge of Dacca, dated June 23, 1913.

(1) (1893) All. W. N. 84. (2) (1911) 16 C. W. N. 231.

(3) (1901) All. W. N. 125.