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TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA v. CHANDRA KANTA GHOSH.

In the result their Lordships are of opinion that the appeal should be allowed with costs here and below and they will humbly advise His Majesty accordingly.

J. V. W. *Appeal allowed.*

Solicitors for the appellants: *Morgan, Price & Co.*

Solicitors for the respondent: *W. W. Box & Co.*

ORIGINAL CIVIL.

Before Rankin J.

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Aug. 19.

NOOR MAHOMED DAWOOD

v.

BILASIRAM THAKURSIDASS.*

Execution of Decree—Practice—Rateable distribution—Money paid to Sheriff in execution of a decree—High Court (Original Side) Rules, Chapter XVII, r. 24—Civil Procedure Code (Act V of 1908) s. 73, O. XXI, r. 55.

On an application by a judgment-creditor for execution of a decree, money was paid by the judgment-debtor to the Sheriff, who paid it into Court. Two other creditors, who had previously applied for execution, had part of their claim and the costs of execution respectively unpaid and asked for rateable distribution of the assets :—

Held, that the money so lying in Court was assets available for rateable distribution.

Held, further, that the right to rateable distribution is limited to the amount due under the decree and does not apply to costs of a previous application for execution.

Sorabji Cooverji v. *Kala Raghunath* (1) dissented from.

Harai Saha v. *Faizlur Rahaman* (2) referred to.

* Ordinary Original Civil Jurisdiction.

(1) (1911) I. L. R. 36 Bom. 156. (2) (1913) I. L. R. 40 Calc. 619.

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NOOR MAHOMED DAWOOD v. BILASIRAM THAKURSIDASS.

CHAMBER APPLICATION.

On 24th January 1919, Noor Mahomed Dawood, a firm, obtained an award against the firm of Bilasiram Thakursidass. The award was filed in Court on 10th February 1919. On 25th February, Noor Mahomed Dawood transferred their interest under the award to Hariram Sitaram and they applied for execution. Notice of execution under O. XXI, r. 16 of the Code of Civil Procedure was served upon the judgment-debtor and he paid the money to the Sheriff, who paid it into Court to the credit of the matter, under High Court Rules, Chapter XVII, r. 24.

Previous to this the judgment-debtor had two other awards against him in favour of Ram Chandra Chowthmull and Gopiram Bhotica respectively. These awards had been filed in Court and applications for execution made on them. Before the present application the claim of Gopiram Bhotica had been satisfied but the costs of execution remained unpaid and part of the claim of Ram Chandra Chowthmull had been satisfied but the interest included in the award remained unpaid. This application was by Hariram Sitaram for withdrawal of Rs. 3,398-1-9, which was lying in Court out of the money paid by the execution-debtor, after paying the Sheriff's poundage and Accountant-General's fees. Ram Chandra Chowthmull and Gopiram Bhotica opposed the application and asked for rateable distribution of the assets under section 73 of the Code of Civil Procedure.

Mr. S. N. Banerjee for the applicant Hariram Sitaram. The money now in Court was paid by the judgment-debtor to the Sheriff for a particular purpose under O. XXI, r. 55 *i.e.*, to meet the claim of the applicant, and cannot be treated as 'assets' within the meaning of s. 73 of the Code of Civil Procedure:

Sorabji Cooverji v. *Kala Raghunath* (1), *Bithal Das* v. *Nand Kishore* (2).

Mr. J N. Datta (Attorney) for Ram Chandra Chowthmull.

Mr. N. K. Dutt (Attorney) for Gopiram Bhotica.

Cur. adv. vult.

RANKIN J. This is an application by Hariram Sitaram as assignee of a firm called Noor Mahomed Dawood which, on the 24th January 1919, obtained an award against Bilasiram Thakursidass, the execution debtors. I will refer to the assignee as the present execution creditor. The award was for Rs. 3,229 with certain interest and it became enforceable as if it were a decree on the 10th February 1919, having been filed in Court on that date. The execution creditor's assignment is dated 25th February 1919. In the previous year the execution debtors had had two other awards made against them in favour of Ram Chandra Chowthmull and Gopiram Bhotica respectively. These awards had been filed in Court and applications for execution had been made to the Court thereunder in July and August 1918. Both of these applications were for attachment of the moveable property of the execution debtors. It does not appear that under either of these applications attachment was in fact made, but in any case no attachment thereunder was subsisting at the date of the proceedings, hereinafter mentioned, taken by the present execution creditor By that time the claim of Gopiram Bhotica on their award had been satisfied, but the "costs of execution" had not, and have not yet, as I am informed, been paid. As regards the claim of Ram Chandra Chowthmull, this, it is alleged, has been satisfied only in part, the interest included in the award not having been paid.

(1) (1911) I. L. R. 36 Bom. 156. (2) (1900) I. L. R. 23 All. 106.

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Proceedings to enforce his award of the 24th January 1919 were taken by the present execution creditor as follows:—On the 25th March 1919 he applied for execution by attachment of moveables. The warrant of attachment was issued on the 12th April and on the 30th April a gross amount of Rs. 3,584-1 was paid to the Sheriff by the attorney of the execution debtors. Sheriff's poundage and charges (Rs. 134-9) and Accountant-General's fees or stamps (Rs. 17) reduced this sum to Rs. 3,432-8 and when on the 31st May the money was paid by the Sheriff into Court under the rules of the High Court, Ch. XVII, r. 24, it shrank still further by Rs. 34-5-3, the Accountant-General's commission, and the amount that lies in Court to the credit of the cause is Rs. 3,398-1-9.

The application now made by the present execution creditor is to have that sum paid out to him in full. Gopiram Bhotica and Ram Chandra Chowthmull by their attorneys appear on notice and ask for rateable distribution under section 73 of the Civil Procedure Code.

I think that the claim of Gopiram Bhotica fails *in limine*. The word "thereof" in section 73 refers to the previous words "of decrees" and at all events unless prior to the receipt of assets there has been an order made expressing in terms that the costs of the application for execution are to be added to the amount of the decree, I do not think there can be a right to rateable distribution in respect of these. The addition to be made in the warrant under rule 17 of Chapter XVII of the High Court Rules of a sum for costs of execution over and above "the amount due and payable under the decree" does not bring that sum within the language of section 73. Nor, as I think, within its spirit or intention. If an attachment is withdrawn although the terms of rule 20 are

not satisfied, or if it is not proceeded with in view of a payment after application has been made for execution, the decree-holder may have a right to an order for costs of execution. But rateable distribution was never meant to be and should not be allowed to become a snowball system beyond necessity. When the decree has been satisfied, the decree-holder must gather any other snow for himself. *Dormientibus non vigilantibus* is not a principle and section 73 has not made it one.

The applicant as against Ram Chandra Chowthmull has no such answer on the facts. He relies upon the Bombay case of *Sorabji Coovarji* v. *Kala Raghunath* (1) and says that the fund in Court was paid for a particular purpose under Order XXI, r. 55, viz., to release his attachment, and is not "assets" within the meaning of section 73. I do not find that this decision has been formally dissented from by this Court, but it is true that our rules, and as I am informed on enquiry, our practice, are based upon a contrary assumption. Thus the Sheriff instead of paying such moneys direct to the attaching creditor is required to pay it into Court and commission is deducted from it accordingly.

My own view on the matter is contrary to the Bombay decision. The words of the Code have been changed from "whenever assets are realised by sale or otherwise in execution of a decree" to "where assets are held by a Court." I cannot think it sound to hold that because the later words "after deducting the costs of realisation" have been allowed to remain, the word "assets" must be taken to mean "assets held in the process of execution" in such a narrow sense as would be equivalent to the former words. The words "sale or otherwise" covered every case

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and if "held" is to be interpreted by "realisation" in the sense indicated in the Bombay case the Legislature has gone out of its way to effect nothing. The word "assets" in the former Code did not import what is now contended for, as is proved by the fact that express words were added to convey the qualification. "Realisation" imports only that the Court has got the assets and got them in a distributable or payable form. That this should ever take place without some costs is a contingency too remote to require insurance even by the expenditure of the words "if any." The very language of Order XXI. rule 55 (*a*) shows that cases of the class now in question are not so noticeably free from such considerations as to ground an inference from words in section 73 which remain unaltered, that other words deliberately omitted are still intended but as part of the connotation of the same word "assets" which never imported this before.

I agree, however, that the larger language of the present Code is still to be controlled by the consideration that section 73 is a section in Part II which treats of execution. It is equally true that rule 55 is one of a series of rules (41-57) dealing with attachment of property which come into O. XXI as part of this subject of "Execution of Decrees and Orders". If for example a defendant is made to pay into Court the amount of the plaintiff's claim as a condition of getting an adjournment, it does not follow from my reading of section 73 that other creditors could claim to share. Nor could they under O. XXI, r. 52 where funds in Court are themselves the subject matter of the execution.

I see no support in these considerations or in the section or the rule for a theory grounded upon the "voluntariness" of the payment into Court. This is,

I think, out of place as regards payments, into Court under stress of execution. Such payments, if made to the decree-holder, may and indeed must be regarded as accord and satisfaction made by the parties, thus bringing the decree to the position of a satisfied decree. But if made into Court under Order XXI, they cannot without anomaly be treated otherwise than as the results of an execution would be treated. The debtor is allowed to arrive at the same result by means less distressing to him but there is no difference in the result, because the debtor chooses the more convenient means. The money, paid with whatever motive, if paid to the Court, is paid upon terms of the Code whatever they may be. These terms, as I read section 73, have been laid down so that distinctions in the form in which execution has been had, in the precise extent to which execution has been allowed to run, in the exact source or genesis of the fund in Court, are now no part of the definition of the assets that are subject to distribution rateably. The object of the new Code in using larger language [*Harai Shaha* v. *Faizlur Rahaman* (1)] can only be to avoid anomaly. To introduce a distinction on the strength of the voluntariness of the payment or the purpose of the debtor, is I think to cut down the language and intention of the Code upon a principle which is inapplicable to the subject matter and which if applicable is very difficult to imply.

Rateable distribution under the Code clearly applies where one decree-holder takes out execution, and others, though they have applied for it, do not. Any warrant for execution must be limited—certainly in the first instance—to the debt and execution costs of the particular creditor who takes it out. It must always be possible to end that particular execution

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for the moment, by meeting that debt only plus its own attendant costs, just as it must always be possible to renew it, if new claimants have come in to share in time. In these respects I see no difference in the Code and I see no difference in justice or convenience whether from debtor's or creditor's standpoint between proceeds of sale and money paid to avoid sale. The debtor can get rid of the active creditor for good and for certain by paying him direct. He can stop his process by paying to the Sheriff or into Court, but with no certainty of permanent peace for later or more idle creditors can claim to share. In either case these other creditors may proceed to execution on their own account.

Order XXI, rule 55 is addressed only to a provision that attachment shall come to an end without further order in certain plain but very different cases. It does not pretend to point to any method by which a judgment-debtor to several different people can dispose satisfactorily of all his troubles. The most that it says is that if it is desired to terminate an attachment, this can be done in certain ways. Whether it is worth doing in any given case is another matter.

Clauses (*a*) and (*b*) are necessary on any view of the law. They are required in the class of cases under discussion to prevent any attachment going on for a single moment riderless, *i.e.*, without a responsible attaching creditor—after the records of the Court no longer show the decree unsatisfied. Rule 56 of Order XXI is only facultative, and though it suggests no trouble as to rateable distribution I cannot control the language of section 73 by inference from this. It may be that the decisions in this Court and the rules which have followed them, to the effect that payment to the Sheriff is a payment to the Court and that the Sheriff must pay the money into Court, are

not contemplated by the Code. It may be that such a payment as took place in this case might come under the first part of cl. (*b*) of r. 55 but the decision of Harington J. (Execution case 49 of 1908) and Rule 24 of Ch. XVII of our High Court Rules require these assets to be held by the Court and in fact they are so held.

Having regard to the fact that the view which I take is the view which underlies the rules of this Court, I propose to act upon it, not out of any lack of respect for learned Judges, who are much more likely to be right than I am, but to obviate a change of practice and perhaps some alterations in our rules which might again have to be undone.

Ram Chandra Chowthmull must put the facts as to the existing balance of his claim on affidavit in a formal manner and support them with the relevant documents. If Gopiram Bhotica desire to proceed further with this matter, they must do likewise. I adjourn this summons for one week for this purpose, no order to be drawn up in the meantime.

Aug. 27. Order for payment out of Rs. 72 to Ram Chandra Chowthmull—balance to applicant. Applicant to have costs against execution-debtor added to his claim. Counsel certified.

N. G.

Attorneys for the applicant: *Sanderson & Co.*

Attorneys for Bilasiram Thakursidass: *Pugh & Co.*

Attorney for Ram Chandra Chowthmull: *J. N. Datta.*

Attorney for Gopiram Bhotica: *N. C. Bose.*