CIVIL REVISION.

Before R. C. Mitter J.

SURENDRA KUMAR GUHA

v.

JAMINEE KUMAR GUHA*.

1936

June, 29; *July*, 7.

Sale in execution—Money decree against common judgment-debtor—Attachments by Courts of different or same grade—Principles of distribution—Rateable distribution—Code of Civil Procedure (Act V of 1908), ss. 63, 73.

The common feature of the scope of ss. 63 and 73 of the Code of Civil Procedure is the fair distribution of the proceeds of the sale in execution of money decrees of properties of common judgment-debtor among the executing judgment-creditors, certain conditions being fulfilled by the latter. And the fundamental distinction is that the funds available for distribution under s. 73 among those creditors are the entire funds realised or received by the executing Court, whereas the funds available for distribution under s. 63 are the proceeds of the common property attached by the judgment-creditors. The fact of the attachment of the identical property by the several judgment-creditors brings into operation s. 63.

The principle underlying s. 63 is the principle of convenience, of avoiding multiplicity of proceedings and of fair distribution, and not the principle of exclusion.

In the case of attachments of the same property of a common judgment-debtor being made by different decree-holders in different Courts, the distribution of the sale-proceeds of the attached property among the attaching creditors is to be made: (*a*) in the cases of the attachments being made by Courts of different grades, by the superior Court, and (*b*) in the cases of all the attachments being made by Courts of same grade, by the Court which first attached the said property. In all the cases it is the duty of the Court of inferior grade or the Court of same grade which had attached last of all, as the case may be, but has sold the property to send the sale-proceeds for distribution to the Court of superior grade, or if all the Courts be of the same grade, to the Court which first attached the property.

*Civil Revision, No. 157 of 1936, against the order of Rajendra Chandra Bhattacharjya, Second Munsif of Feni (Noakhali), dated Nov. 28, 1935.

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Obhoy Churn Coondoo v. *Golam Ali* (1); *Bykant Nath Shaha* v. *Rajendro Narain Rai* (2); *Clark* v. *Alexander* (3); *Har Bhagat Das Marwari* v. *Anandaram Marwari* (4); *Bhugwan Chunder Kritiratna* v. *Chundra Mala Gupta* (5); *Nilkanta Rai* v. *Gosto Behari Chatterjee* (6); *Shidappa Laxmanna Agasar* v. *Gurusangya Akhandaya Hiremath* (7); *Arimuthu Chetty* v. *Vyapuripandaram* (8); *Narasimhachariar* v. *Krishnamachariar* (9); *Sarju Ram Sahu* v. *Partap Narain* (10); *Kwai Tong Kee* v. *Lim Chaung Ghee* (11) and *Gourgopal De Sarkar* v. *Kamalkalika Datta* (12) referred to.

CIVIL RULE obtained by the petitioner.

The material facts of the case and the arguments in the Rule appear from the judgment.

Nani Gopal Das for the petitioner.

Rajendra Chandra Guha and *Amiya K. Sen* for the opposite party.

A. Quasem for the Deputy Registrar.

Cur. adv. vult.

R. C. MITTER J. The petitioner instituted a suit for recovery of money against opposite parties Nos. 2 to 8 in the Second Court of the Munsif at Feni, being money Suit No. 501 of 1934. Some immovable property of the said opposite parties was attached before judgment on March 19, 1934, on his application. He obtained his decree on September 4, 1934, and on February 4, 1935, applied for execution of his decree in that Court (Money Execution Case No. 32 of 1935).

The opposite Party No. 1 also obtained a money-decree against the said opposite parties Nos. 2 to 8 in a suit instituted by him in the first Court of the Munsif at Feni and on November 19, 1934, applied

(1) (1881) I. L. R. 7 Cal. 410.
(2) (1885) I. L. R. 12 Cal. 333.
(3) (1893) I. L. R. 21 Cal. 200.
(4) (1897) 2 C. W. N. 126.
(5) (1902) I. L. R. 29 Cal. 773.
(6) (1917) I. L. R. 46 Cal. 64.
(7) (1930) I. L. R. 55 Bom. 473.
(8) (1911) I. L. R. 35 Mad. 588.
(9) [1914] A. I. R. (Mad.) 454.
(10) (1933) I. L. R. 55 All. 622.
(11) (1928) I. L. R. 6 Ran. 131.
(12) (1933) I. L. R. 61 Cal. 240.

in that Court for execution (Money Execution Case No. 445 of 1934). The properties which had been attached before judgment by the petitioner were attached by the First Court of the Munsif at Feni on December 20, 1934. In the sale proclamation issued by that Court, March 11, 1935, was the date fixed for sale. On March 8, 1935, the petitioner made an application to the Second Court of the Munsif at Feni, in which Court his application for execution was pending. In that application he stated that the opposite Party No. 1 was executing his decree for money against the same judgment-debtors in the First Court and that March 11, 1935, had been fixed for sale. He prayed for rateable distribution. On that application the Second Court passed an order on the same date requiring petitioner "to show papers "that the judgment-debtors were the same". The next day the petitioner satisfied the Court that the judgment-debtors were the same and on that the Court (Second Court of the Munsif at Feni) passed order No. 5 dated March 9, 1935, in these terms :—

Heard pleader. Prayer for rateable distribution of the assets to be fetched at the sale of the above Money Execution Case No. 445 of 1934 is allowed. Send a copy of this order to the local First Court for favour of passing necessary orders for rateable distribution. The claim of this case is Rs. 270-4-0.

On March 18, 1935, the Second Court passed the following order :—

(Order No. 6.) Put up on April 27, 1935, for rateable distribution with the Money Execution Case No. 445 of 1934 of the local First Court.

The first mentioned order (No. 5) reached the First Court on March 11, 1935, but before its arrival that Court had allowed by its order No. 6, dated March 11, 1935, the decree-holder (opposite party No. 1) to bid at the sale, but on receipt of the said order it passed on the same date Order No. 7 which is in these terms :—

Received the copy of Order No. 5, dated March 9, 1935, passed in Money Execution Case No. 32 of 1935 of the local Second Court. It appears that

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the decree-holder of the above execution case prayed for rateable distribution of the assets to be fetched at the sale of immovables. The *nâzir* is accordingly directed to realize the purchase money in cash, so as to have the same rateably distributed between the decree-holders of both the cases.

Opposite party No. 1 did not proceed with the sale of lot No. 1. The sale of the other lots by the First Court could not be held on the 11th or 12th March but it was held on March 13, 1935. Opposite party No. 1 purchased one lot and the rest were purchased by a stranger, Sudheer Kumar Bhaumik. Earnest money of twenty-five per cent. was deposited on that date, and the balance in April, within thirty days of the sale. An application to set aside the sale was made but was dismissed on September 23, 1935. Thereafter the purchaser failed to deposit the landlord's transfer fee in respect of lot No. 5 with the result that the sales of lots 2 to 4, 6, 7 and 8 were confirmed and the First Court passed an order on September 26, 1935, stating that the petitioner would get by way of rateable distribution the sum of Rs. 131-5-9. The said sum of money was placed to his credit and the Second Court was informed by the First Court. Opposite party No. 1 thereafter filed on September 26, 1935, in the Second Court an objection to the claim for rateable distribution which had been made by the petitioner in the Court and had already been allowed. On November 28, 1935, the Second Court allowed this objection and recalled its Order No. 5, dated March 9, 1935. It held that: (a) it had no jurisdiction to order rateable distribution as the assets were held not by it, but by the First Court, and (b) that the petitioner had no right to rateable distribution as he had not made an application for execution of his decree to the First Court which held the assets. It is against this order that the petitioner has moved this Court. He maintains that Order No. 5, dated March 9, 1935, is the correct order and prayed for its restoration.

The question involved depends upon the interpretation of ss. 63 and 73 of the Code of Civil Procedure. There is a mass of case-law on the subject

and the High Courts have taken divergent views, and, as I read the case-law, there is sharp conflict of opinion in the decisions of the Madras and Bombay High Courts, but so far as this Court is concerned, except for one or two decisions, a well-marked, definite and consistent course has been taken. Before reviewing the important decisions of the different High Courts, it is necessary that the precise scope of ss. 63 and 73 should be examined.

At the outset one fundamental identity and one fundamental distinction are apparent. The scope of both the sections is the fair distribution of the proceeds of sale among the judgment-creditors of the common judgment-debtor, certain conditions being fulfilled by the former. That is the common feature. But the fundamental distinction is that the fund available for distribution under s. 73 among those creditors is the entire fund realised or received by the executing Court. (I am not considering the proviso which may be left out of consideration for the present purpose.) The funds available for distribution under s. 63 are the proceeds of common property attached by the judgment-creditors. It is the fact of attachment and attachment of the identical properties by the several judgment-creditors that bring into operation s. 63. To make the point clear, the following two illustrations are helpful: (I) A, who has a decree for payment of money against J, executes his decree in the Court of a particular Subordinate Judge and sells the judgment-debtors' properties X, Y and Z. If other persons, B, C and D who have decrees for payment of money against the same judgment-debtors apply for execution of their decrees in the Court of the said Subordinate Judge before the receipt of the proceeds of the sale of X, Y and Z, the whole of the proceeds of the sale will have to be rateably distributed amongst A, B, C and D under s. 73. B, C and D need not have proceeded further beyond making their application for execution in that Court. (II) A, who has a decree for payment of money against J, executes his decree in

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the Court of a particular Subordinate Judge and attaches and sells properties X, Y and Z, the proceeds of which are received by that Court. B, C and D who have decrees for payment of money against J, proceed to execute their respective decrees in other Courts, say the First, Second and Third Court of the Munsif of a particular place, and attach respectively X, Y and Z. These attachments are effected before the sale-proceeds are received by the Subordinate Judge. They do not apply for execution of their decrees in the Court of the Subordinate Judge nor are their executions transferred to that Court before the receipt of assets by that Court, but they bring the fact of the attachments to the notice of the Subordinate Judge. The entire proceeds of the sale of X, Y and Z cannot be distributed by the Subordinate Judge amongst A, B, C and D rateably under s. 63, but the proceeds of the sale of X has to be distributed rateably between A and B, those of Y between A and C, and those of Z between A and D. This view which I am taking of the scope of s. 63 has been advanced by Abdur Rahim J. in *Arimuthu Chetty* v. *Vyapuripandaram* (1). The relevant passage in the judgment is at p. 590 and runs as follows :—

> What the decree-holder of the Munsif's Court is entitled to, when there is no transfer of his decree to the District Court, is not a *general* execution of his decree by the District Court or rateable distribution in *all the assets* of the judgment-debtor received by the District Court, but only to share *by virtue of his attachment in the proceeds of the attached property realised.* To a relief so limited, it appears to me to be not essential that the decree of the Munsif's Court should have been previously transferred to the District Court, though this view runs counter to the observations in *Muttalagiri* v. *Muttayyar* (2) as to the need of transfer.

Section 63 contemplates the case where attachments of the same property have been made by different Courts at the instance of the different decree-holders of the common judgment-debtor and provides for the distribution among them of the proceeds of the attached property by one of such Courts only.

(1) (1911) I. L. R. 35 Mad. 588. (2) (1883) I. L. R. 6 Mad. 357.

The principle underlying it is the principle of convenience, the principle of avoiding multiplicity of proceedings, the principle of fair distribution and not the principle of exclusion. The distribution is to be made by the superior Court, and if all the Courts be of the same grade, the distribution is to be made by the Court which first attached the property. Any other view of s. 63 would make the position manifestly unjust. A person obtains a decree for money over Rs. 5,000 in the Court of the Subordinate Judge, applies for execution there and attaches a property. Another person obtains a decree for money against the same judgment-debtor for Rs. 500 in a Munsif's Court, applies for execution there and attaches the same property. The Munsif, being unaware of the attachment effected by the Subordinate Judge, sells the property before the Subordinate Judge could put it up for sale. The sale by the Munsif would be a valid one. If s. 73 is to be regarded as the only section for rateable distribution, the person who obtained the decree for over Rs. 5,000 in the Subordinate Judge's Court would not be able to claim rateable distribution, if the terms of s. 73 be strictly construed and s. 63 be not looked into, because he would not, as has been pointed out in the cases of *Nilkanta Rai* v. *Gosto Behari Chatterjee* (1) and *Deerappa Mallappa Hubli* v *Chanbasappa Rachappa Veeli* (2), be able to apply for execution of his decree n the Munsif's Court, by reason of the limited pecuniary jurisdiction of the Munsif.

Cases of such sales by Courts of inferior grades, where the property was under attachment effected by a Court of superior grade or where the Courts are of the same grade, by the Court which attached later in point of time, had come before the Courts when the Code of 1882 was in force. A provision corresponding to sub-s. (2) of s. 63 was not in s. 285 of the Code of 1882. So far as this High Court is concerned, it has consistently held that such sales are valid,

(1) 1917) I. L. R. 46 Cal. 64. (2) (1925) L. L. R. 49 Bom. 655.

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but this Court has pointed out that in such cases it is the duty of the Court of inferior grade or the Court of same grade which had attached last of all, as the case may be, to send the sale-proceeds to the Court of superior grade for distribution, or if all the Courts be of the same grade, to the Court which first attached the property. This was pointed out first by Pontifex J. in the case of *Obhoy Churn Coondoo* v. *Golam Ali* (1) and this principle has been almost consistently followed in this Court, which has held that the Court of superior grade or of the same grade which had first attached the property, as the case may be, is to distribute the sale-proceeds amongst all the attaching decree-holders: *Bykant Nath Shaha* v. *Rajendro Narain Rai* (2); *Clark* v. *Alexander* (3); *Har Bhagat Das Marwari* v. *Anandaram Marwari* (4); *Bhugwan Chunder Kritiratna* v. *Chundra Mala Gupta* (5); *Nilkanta Rai* v. *Gosto Behari Chatterjee* (6). The Bombay and Madras High Courts which in the matter of distribution of sale-proceeds in such cases had taken different views have ultimately veered round to the same position: *Shidappa Laxmanna Agasar* v. *Gurusangaya Akhandaya Hiremath* (7); *Arimuthu Chetty* v. *Vyapuripandaram* (8); *Narasimhachariar* v. *Krishnamachariar* (9). See also *Sarju Ram Sahu* v. *Partap Narain* (10), where most of the earlier cases are noticed. When such assets are not sent by the Court holding the sale to the Court which is given the right to distribute the same under the provisions of s. 63, there is a difference of opinion in the matter of procedure only. This Court and the Bombay High Court have held that the District Judge is to be moved for asking the Court holding the sale to send the sale-proceeds to the proper Court but some of the other High Courts have held that the Court of superior grade or the Court which first attached the property as the case may be, can of its own

(1) (1881) I. L. R. 7 Cal. 410 (413).
(2) (1885) I. L. R. 12 Cal. 333.
(3) (1893) I. L. R. 21 Cal. 200.
(4) (1897) 2 C. W. N. 126.
(5) (1902) I. L. R. 29 Cal. 773.
(6) (1917) I. L. R. 46 Cal. 64.
(7) (1930) I. L. R. 55 Bom. 473.
(8) (1911) I. L. R. 35 Mad. 588.
(9) [1914] A. I. R. (Mad.) 454.
(10) (1933) I. L. R. 55 All. 622.

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motion, make the requisition. So far as the case before me is concerned it makes no difference because I can direct, as was done in *Nilkanta Rai's* case (1), that the sale-proceeds be sent by the First Court of the Munsif at Feni to the Second Court of the Munsif of that place and direct the last mentioned Court to distribute the sale-proceeds rateably among the petitioner and the opposite party No. 1. In my judgment the correct principle in such cases has been formulated by Wallis J. in the case of *Narasimhachariar* v. *Krishnamachariar* (2) in the following passage:—

> What, however, where the attachments are in different Courts and the property is received or realised by the Court of the highest grade under s. 63? In such a case there is no receipt at all by the other Courts unless the receipt by the Court of highest grade can be deemed to be a receipt by the other creditors as well. (The word "creditors" in the report is obviously a slip for the word 'Courts'.)
>
> In my opinion this is the correct view and it is only for purposes of convenience that the highest Court is made the collecting Court and the Court to adjudicate on claims and objections, and the property received or realised must be deemed to have been received or realised by or on behalf of all the Courts in which there have been attachments in execution of money-decrees prior to the actual receipt of assets. If this be so, then the decree-holders in the other Courts are entitled to rateable distribution under the very terms of s. 73.

It is in this view that it can be said, as has been said in *Kwai Tong Kee* v. *Lim Chaung Ghee* (3) and *Gourgopal De Sarkar* v. *Kamalkalika Datta* (4), that s. 73 must be read in conjunction with s. 63.

I accordingly make the Rule absolute, set aside the order complained of and restore the Order No. 5 of the Munsif, Second Court, Feni, dated March 9, 1935. The sale-proceeds are to be sent by the First Court of the Munsif at Feni to Second Court of the Munsif of that place, in order that the last mentioned Court may make the rateable distribution among the petitioner and opposite party No. 1. The petitioner will have his costs of this Court and of the Court below from opposite party No. 1. Hearing fee 1 gold *mohur*.

Rule absolute.

A. K. D.

(1) (1917) I. L. R. 46 Cal. 64.

(2) [1914] A. I. R. (Mad.) 454.

(3) (1928) I. L. R. 6 Ran. 131.

(4) (1933) I. L. R. 61 Cal. 240.