interests. Here the Assistant Agent found that the plaintiff was absent at the hearing of Original Suit No. 16 without due cause. It would be extremely undesirable to allow such a person to prove, under the guise of an allegation of fraud, that the claim of the defendant was unsupportable and the finding of the Court wrong. We allow the petition and direct the Agent to review his decree in the light of this judgment. The respondent will pay the petitioner's costs in this Court.

ORIGINAL CIVIL.

Before Mr. Justice Bakewell.

1913. February 4.

SUIKEENA KATUM SAHIBA (PLAINTIFF),

v.

HAJEE MAHOMED ABDUL AZEEZ BADSHA SAHIB BAHADUR (PARTNER OF THE FIRM OF MESSRS. HAJEE MAHOMED BADSHA SAHIB & CO., MADRAS, DEFENDANT (JUDGMENT-DEBTOR).*

Ratable distribution—Rival decree-holders—Right of one to impeach another's decree only in suit and not in execution—Civil Procedure Code (Act IX of 1908), sec. 73, applicability of—Order XXI, rule 52, enquiry under.

Where several decree-holders against the same judgment-debtor apply for satisfaction of their decrees out of the same fund, any one of them is entitled to show that his rival's decree is a fraudulent or sham one but it is not open for him to do so in execution proceedings.

Sudindra v. *Budan* (1886) I.L.R., 9 Mad., 80, followed.

Section 73, Civil Procedure Code, is applicable only if an application for *execution* of the decree in the prescribed form had already been made, *before* the receipt of the assets and the fund out of which rateable distribution is asked for is one *realised* in execution.

Where holders of decrees of several Courts apply for satisfaction of their decrees, out of a fund in the custody of a court, the proper order governing their respective titles or priorities is Order XXI, rule 52, Civil Procedure Code; and they are entitled to share it ratably as in the case of administration of the estate of a deceased person or of an insolvent; as attachment does not under the present law give any priority to the first attaching creditor, but only prevents alienation.

Soobul Chunder Law v. *Russick Law Mitter* (1888) I.L.R., 15 Calc., 202 at p. 209, followed.

The shares due to holders of decrees of other Courts than the one which has the custody of the fund are to be distributed only according to the orders of those courts.

* Civil Suit No. 237 of 1908.

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C. P. Ramaswami Ayyar for the plaintiff in Civil Suit No. 315 of 1911.

S. Alasingaracharlyar for Latchiminarayana Tawker, plaintiff in Small Cause Suit No. 12787 of 1912 and attaching creditor herein and for Heera Lal Sowcar, plaintiff in Small Cause Suit No. 11931 of 1912 and attaching creditor herein.

S. Guruswami Chetti for the plaintiff.

A. E. Rencontre for the defendant.

The defendants in Civil Suits Nos. 315 of 1911 and 381 of 1912 did not appear in person.

The facts of the case appear in the judgment below.

BAKEWELL, J. JUDGMENT.—Four applications have been made by four judgment-creditors of the plaintiff in this suit for payment to them of a fund to the credit of the suit, which was paid into Court by the defendant in satisfaction of the decree.

The dates of the decrees of the several creditors and of attachments of the fund are as follows :—

26th October 1911, attachment before judgment in Suit No. 315 of 1911 ;

15th October 1912, decree ;

6th November 1912, decree in Suit No. 381 of 1912 ;

9th November 1912, attachment ;

30th August 1912, decree in Suit No. 11931 of 1912 on the file of Court of Small Causes of Madras ;

12th September 1912, attachment ;

16th September 1912, decree in Suit No. 12787 of 1912 of the same Court ;

27th September 1912, attachment.

It has been argued firstly that the applicants are entitled to adduce evidence that the decrees obtained by their rivals are fraudulent and void, and secondly, that their respective attachments are entitled to priority.

On the first point, two decisions *In re Sunder Dass*(1) and *Chhaganlal* v. *Fazaráli*(2) and an unreported judgment of SPENCER, J., in *Narayanan* v. *Karuppan Chetty*(3) were cited. In the first case, the Calcutta High Court held that the Lower Court rightly directed an inquiry whether the assignee of a decree held it *benami* for the judgment-debtor, and was therefore not

(1) (1885) I.L.R., 11 Calc., 42. (2) (1889) I.L.R., 13 Bom., 154.
(3) Civil Revision Petition No. 727 of 1910.

entitled to share in the distribution of assets under section 295 of the Code of Civil Procedure, 1882. This is entirely different from an inquiry whether the decree itself is fraudulent and void as against creditors, but undoubtedly the learned Judges held that the Court was bound to see whether the claimants under that section were *bonâ fide* or merely sham decree-holders; and this ruling was followed by the Bombay High Court in the second case, where the decree itself was alleged to be fraudulent.

It has, however, been already laid down by this Court in *Sudindra* v. *Budan*(1) that the question whether a decree was obtained by fraud or collusion is not one which relates to the execution of the decree and can only be raised by a separate suit; and this decision was not apparently referred to in the case before SPENCER, J., who merely followed the cases already mentioned.

In the present case, this Court is not executing the two decrees of the Court of Small Causes, which have not been transferred to this Court for execution, and for this reason they do not fall within section 47 of the Code. None of the applicants is party to the suits in which the decrees which they impugn were passed, nor to the suit to the credit of which the fund in question stands; nor can any of them be said to be the representative of the judgment-debtor in these suits, unless an unsecured creditor can be said to be the representative of his debtor in any matter which may affect the ability of the latter to pay his debts.

I think it is clear that the question now sought to be raised does not fall within section 47, and that, if the applicants desire to set aside any of these decrees, they must institute proceedings for that purpose.

I have also come to the conclusion that section 73 of the Code corresponding to section 295 of the Code of 1882 under which the cases cited were decided, does not apply to the present case; but I may point out that their Lordships of the Privy Council, in *Shankar Sarup* v. *Mejo Mal*(2) appear to regard an order under that section as an order of course, and the appropriate method of adjudication upon the rights of the parties to be a suit under sub-section (2).

It is also obvious that various difficulties of jurisdiction and otherwise might arise if the decrees of other courts were allowed

(1) (1886) I.L.R., 9 Mad., 80. (2) (1901) I.L.R., 23 All., 313 at p. 322 (P.C.).

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BAKEWELL, J.

to be challenged in informal proceedings of this kind, in which those decrees cannot be actually set aside.

In order to take advantage of the provisions of section 73 of the Code, a judgment-creditor must have made application to the Court by which assets of the judgment-debtor are held for the execution of his decree, and under Order XXI, rule 10, such an application must be in the prescribed form. Secondly, the application must have been made before the receipt of those assets by the Court. Now it is clear that the holders of the decrees of the Court of Small Causes have not strictly complied with the first condition, because their applications are by Judge's summons for payment out of Court, nor has any of the applicants complied with the second condition, because the assets in question were received by the Court before any of them applied for execution. The employment in section 73, of the word "assets" instead of property of the debtor, and the references to the costs of realisation and to the sale of property subject to an incumbrance, appear to me to show that the section contemplates the case where property of a judgment-debtor has been realised in execution, and that it is not therefore applicable to the present case.

For these reasons, I think that the provisions applicable to this case are contained in Order XXI, rule 52, which deals with the attachment of a fund in the custody of a court, and the determination of the rights of rival claimants thereto.

This procedure is analogous to the English practice, under which a charging order upon a fund in Court can be obtained by a judgment-creditor, together with a stop order restraining any dealing with the fund without notice to him (Rules of the Supreme Court Order 46). By Statute, the creditor is then entitled to the same remedies as if a charge had been made in his favour by the judgment-debtor; and where there are several creditors, they will rank in the same manner as any other incumbrancers of a fund. (See Edwards on Execution, pages 345–46.)

Under the English Common Law, as modified by section 16 of the Statute of Frauds, a judgment-debtor's goods are bound from the time the writ of *fi fa* is delivered to the Sheriff; accordingly, the Sheriff is bound to give priority to each writ, and must apply the proceeds of the debtor's goods, in the order in which the writs come to his hands. (See Edwards on Execution, pages 113—117.) This principle was followed in the

Code of Civil Procedure, 1859, section 270, as regards the first attachment, but was modified with respect to any surplus by a provision for the rateable distribution thereof amongst other persons who had taken out execution (section 271). That Code did not apply to the Supreme Courts, whose officer, the Sheriff, would doubtless be in the same position as an English Sheriff and administer the same law, though I am not aware of any direct authority on the point.

The previous law has now been replaced by the provisions of the Code of Civil Procedure which applies to all Civil Courts and it cannot now be contended that an attachment by an officer of Court confers any priority upon the attaching creditor. [Section 64 of the Code of 1908; *Frederick Peacock* v. *Madan Gopal*(1) and *Sankaralinga Reddi* v. *Kandasami Tevan*(2).] Much less can it be contended that an order of the Court under rule 52 confers any priority upon the person at whose instance the order was passed, since it amounts at most to an injunction restraining any dealing with the fund (See form No. 21, Appendix E of the first schedule of the Code) and merely renders any payment to the judgment-debtor, contrary to the attachment thereby effected, void as against all claims enforceable under the attachment, including claims for the rateable distribution of assets (section 64).

For these reasons, I am of opinion that none of the applicants has established any priority by virtue of his attachment, and that the fund in Court must be distributed on the principle followed by the Court in the administration of the assets of a deceased person or an insolvent, that is, rateably amongst the creditors who have put in claims thereto. [See *Soobul Chunder Law* v. *Russick Lall Mitter*(3).]

There remains a question as to the procedure to be followed with respect to the payment of the shares of the holders of decrees of the Court of Small Causes, who have applied for payment to them directly. It is, I think, obvious that this cannot be done, because this Court cannot record satisfaction of those decrees, which may moreover be themselves attached or already satisfied. The case has been provided for by rule 180 of the Civil Rules of Practice, 1902, but not by the rules of this Court

(1) (1902) I.L.R., 29 Calc., 428. (2) (1907) I.L.R., 30 Mad., 416.
(3) (1888) I.L.R., 15 Calc., 202 at p. 209.

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or the Court of Small Causes, and it is not clear what is the proper procedure. The shares of these creditors must therefore be carried to separate accounts entitled in the matter of their respective decrees, and be subject to the order of the Court of Small Causes of Madras.

The application of Hajee Mahomed Sait Shirajee is not correctly entitled, because it should have been made in Suit No. 237 of 1908, to the credit of which the fund stands; since, however, no objection has been raised, I direct the application to be amended by entitling it in that suit.

The shares of the judgment-debtors in suits Nos. 315 of 1911 and 381 of 1912 will be paid to the credit of those suits.

The plaintiff in this suit is a Muhammadan woman, and several of the decrees against her appear to have been made by consent; having regard to these facts and the allegations made against each other by the several applicants, and in order to give them an opportunity of establishing those allegations in other proceedings, I direct that this order be not issued by the Registrar for ten days.

Each party will add the costs of his application to his decree amount.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1913. February 19 and March 5.

MOTTAYAPPAN *alias* SELAMBA GOUNDAN (PLAINTIFF), APPELLANT,

v.

PALANI GOUNDAN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 92, provs. 1 and 3—Sale-deed—Property, vesting of—Oral evidence contrary to its tenor, admissibility of—Document operative at once—Evidence as to vesting of property at a future time, inadmissible—Rule of English Law, different.

An executant of an instrument (which was not a sham document but intended to operate at once), cannot be permitted to set up or prove that the instrument, which according to its tenor vested the property in the grantee at once, was in reality intended to vest it only at a future time or after the death of the executant.

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* Second Appeal No. 731 of 1912.