

REVISIONAL CIVIL

Before Mr. Justice Kisch

1933
March, 28

SARJU RAM SAHU (APPLICANT) *v.* PARTAP NARAIN
AND OTHERS (OPPOSITE PARTIES)*

Civil Procedure Code, sections 63 and 73—Rateable distribution—Property attached by a superior as well as an inferior court—Sale by superior court—Application for rateable distribution made to the superior court without getting the decree transferred to it or applying for execution—Rateable distribution allowed.

Assets were realised in the court of a Subordinate Judge by the sale of property which had been attached in execution of a decree of that court. Other persons, who held decrees of the Munsif's court, had also attached the same property in execution of their decrees, but under section 63 of the Civil Procedure Code the sale had to be held by the superior court, and they applied in the court of the Subordinate Judge, before assets had been realised, for a rateable distribution. They however, had not got their decrees transferred to the court of the Subordinate Judge nor had they made any formal application for execution in that court. *Held* that the holders of the decrees of the inferior court were entitled, under section 73 read with section 63 of the Civil Procedure Code, to a rateable distribution without getting their decrees transferred to the superior court or formally applying for execution in that court.

Mr. *Harnandan Prasad*, for the applicant.

Mr. *Shiva Prasad Sinha*, for the opposite parties.

KISCH, J. :—These are decree-holder's applications directed against an order of the Subordinate Judge of Basti, allowing the opposite parties rateable distribution.

The applicant Sarju Ram Sahu had obtained a decree against his judgment-debtor in the court of the Subordinate Judge. On the 7th of February, 1930, he attached certain property belonging to the judgment-debtor and this property was eventually sold and the proceeds deposited in the Subordinate Judge's court.

The opposite parties had also obtained decrees against the same judgment-debtor in the court of the Munsif and had attached the same property on the 15th of February, 1930. As under section 63 of the Code of Civil Procedure, where the property has been attached in execution of decrees of several courts the property must be realised by the court of the highest grade, the decree-holders in the Munsif's court applied to the Subordinate Judge's court that they be given a rateable share out of the sale proceeds of the property attached by them. They did not get their decrees transferred to the court of the Subordinate Judge, nor did they make any formal application for execution in that court. The applicant contested the right of the opposite parties to rateable distribution, on the ground that it was necessary for them to apply for execution in the Subordinate Judge's court before they could be allowed rateable distribution under section 73 of the Code of Civil Procedure. On the other hand the opposite parties contended that it was sufficient in the circumstances for them to make an application to the Subordinate Judge's court to share in the proceeds of the attached property.

The learned Subordinate Judge considered a number of authorities cited before him in support of the contentions of the parties. He noted that there was no reported case of this Court on the point and that certain other High Courts that have had occasion to consider the question have taken divergent views. He preferred to follow the authorities cited on behalf of the opposite parties which appeared to him to be in accordance with the dictates of equity. He accordingly allowed rateable distribution to the opposite parties.

In this Court the learned counsel for the applicant has contended that, unless the decree is transferred to the court in which the assets are realised and unless there is an application for execution of the decree in that court, no rateable distribution can be allowed in favour of a decree-holder who has obtained a decree

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against the same judgment-debtor and attached the same property in a court of lower grade. He relies on the authorities cited in the judgment of the court below in support of this proposition.

The Madras High Court has taken the view that the decree obtained in the court of lower grade must be transferred to the court in which the assets of the judgment-debtor are realised and that the decree-holder must make an application for execution in that court, before he can obtain a rateable share in such assets under section 73 of the Code of Civil Procedure: *Chella Narasiah v. Sontan Obbayya* (1) and *Nanjunda Chettiar v. Nallakaruppan Chettiar* (2). The Bombay High Court has taken a similar view: *Nimbaji Tulsiram v. Vadia Venkati* (3). All these were cases decided by a single Judge. On the other hand the Calcutta High Court has held that holders of decrees of inferior courts, whereof execution has been stopped by the superior court under section 63 of the Code of Civil Procedure, are entitled to apply to the latter for rateable distribution under section 63 read with section 73 of the Code without any further application: *Clark v. Alexander* (4) and *Girindra Nath Ray v. Kedar Nath Bidyanta* (5). The same view has been taken by the Rangoon High Court in *Kwai Tong Kee v. Lim Chaung Ghee* (6) and *M. T. T. K. M. M. N. Chettyar Firm v. K. P. A. N. M. Firm* (7), and by the court of the Judicial Commissioner, Nagpur, in *R. S. Kholkute v. Tukaram Kunbi* (8). *Girindra Nath Ray v. Kedar Nath Bidyanta* (5) and *Kwai Tong Kee v. Lim Chaung Ghee* (6) were decided by a Bench of two Judges. Thus the weight of authority appears to be distinctly in favour of the opposite parties. In *Girindra Nath Ray v. Kedar Nath Bidyanta* (5) a large number of previous decisions of the Calcutta High Court

(1) (1913) 21 Indian Cases, 869.

(3) (1892) I. L. R., 16 Bom., 683.

(5) (1924) 29 C. W. N., 575.

(7) (1929) 120 Indian Cases, 693.

(2) A. I. R., 1928 Mad., 496.

(4) (1893) I. L. R., 21 Cal., 200.

(6) (1928) 110 Indian Cases, 744.

(8) (1928) 110, Indian Cases, 524

were reviewed and *Ramjas Agarwala v. Guru Charan Sen* (1), a case relied upon by the learned counsel for the applicant, was expressly dissented from.

Speaking for myself, and with due respect, I entirely agree with the view of the law laid down in *Girindra Nath Ray v. Kedar Nath Bidyanta* (2). I may add that the decision of the court below having done substantial justice between the parties, I should in any case have been disinclined to interfere in revision. The application is accordingly dismissed with costs.

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Before Mr. Justice Niamat-ullah

SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT) *v.* MADHURI DAS NARAIN DAS (PLAIN-
TIF)*

1933
March, 30

Railways Act (IX of 1890), section 72—Risk-note Form B—“Misconduct”—Wrong consignment number entered in railway receipt—Right of consignee to “open delivery”—Delay in making delivery—Loss caused by prices falling during such delay—Liability of railway.

A consignment of ghee was marked as No. 93, but by some mistake of the railway clerk the number entered in the railway receipt was 23. When the consignee went to take delivery he was offered the canisters marked No. 93, but as the number did not tally with that entered on the railway receipt he was doubtful whether these were the right goods, and demanded an “open delivery”, i.e. that the canisters should be opened and their contents examined by him before accepting delivery. As it was beyond the authority of the local railway officials to give an “open delivery” they transmitted the consignee’s request to higher authorities, and after some days a higher official arrived and gave the open delivery, and the contents were found to be right. During this interval, however, the market prices of ghee had gone down considerably, and the consignee sued the railway for damages for the loss resulting from this fall in prices. The question arose whether the railway was protected against such a claim by the terms of risk-note Form B, under which the consignment had been booked.

Held, that the loss complained of by the plaintiff was not

* Civil Revision No. 751 of 1932.

(1) (1909) 14 C. W. N., 396.

(2) (1924) 29 C. W. N., 575.