

1939

HAR  
GOVIND  
PRASAD  
v.  
MUSAMMAT  
MAHRAJ  
KUMAR  
AND  
OTHERS

Ziaul Hasan  
and  
Yorke, J.J.

application under the Encumbered Estates Act were to be set aside in view of the provisions of section 7 of the Encumbered Estates Act, and therefore the decree and the debt which were intended to be satisfied by that transfer continued to subsist. In that particular case the order of transfer was differently worded from the present case and something might have been founded on that fact. We are however of opinion that this is a point which does not arise for decision in the present case in view of our finding on the first point argued before us, and we therefore make no pronouncement upon it.

In view of our finding on the first point argued we hold that the claim of Hargobind Prasad under section 11 of the Encumbered Estates Act was rightly dismissed. There is no force in the present appeal which accordingly fails and is dismissed with costs.

*Appeal dismissed.*

## REVISIONAL CIVIL

*Before Mr. Justice Ziaul Hasan and Mr. Justice R. L. Yorke*

1939  
December, 1

LYALLPUR BANK, LIMITED (IN LIQUIDATION) THROUGH ITS OFFICIAL LIQUIDATORS (APPLICANT) v. RAM JI DAS, DECEASED, THROUGH HIS SONS KARAM CHAND AND OTHERS (OPPOSITE-PARTY)\*

*Civil Procedure Code (Act V of 1908), sections 73 and 115—Companies Act (XIX of 1930), section 186—Rateable distribution—Order under section 186, Indian Companies Act, whether decree—Person holding order under section 186, whether entitled to rateable distribution—Revision whether lies when other remedy open to party—Order under section 73, C.P.C. whether judicial order—Revision against order under section 73, whether lies.*

An order under section 186 of the Indian Companies Act cannot be regarded as a decree within the meaning of section 73,

\*Section 115 Application no. 153 of 1936, for revision of the order of Raghubar Dayal, Esq., I.C.S., District Judge of Unao, dated the 6th August, 1936.

C. P. C. and so a person holding such an order is not entitled to rateable distribution.

*Modern Chemical Works, Limited v. Manmohan Nath Dar* (1), *A reference under section 28 of Act No. VII of 1870* (2), and *Mohan Lal Lal Chand v. Bhiwraj Devichand* (3), relied on. *In the matter of the Indian Companies Act* (4), and *Tharya Ram v. Popat Ram* (5), distinguished.

It is not and should not be an invariable rule that revision should not be entertained whenever there is another remedy open to a party, for there seems to be no warrant for this either in section 115 or in any other provision of the Code of Civil Procedure. *Har Narain Sethi v. Bird & Co.* (6), *Birendra Bikram Singh v. Basdeo* (7), *Mst. Hurmoozi Begum v. Mst. Aysha* (8), *Chivau-kula Sheetharamayya v. Mulpuru Rathamma* (9), *Venkataraman v. Mahalingayyan* (10), *Ram Saran Das v. Amar Nath* (11), and *Behari Lal v. Ale Nabi* (12), not followed. *Lila v. Mahange* (13), *Mst. Bhagwanti v. Sant Singh* (14), *Bachu Lal v. Ram Din* (15), and *Konchadu Dalayya v. Malla Sundara Narayana* (16), relied on.

An order passed by a Court under section 73, Civil Procedure Code is a judicial order and a revision can lie against it. *Shankar Sarup v. Mejo Mal* (17), distinguished. *Salai Muhammad Haji Ibrahim & Co. v. Ayyar Nadar* (18), and *S. A. S. Chettyar Firm v. S. V. A. R. A. Firm* (19), relied on.

Messrs. *Ram Bharosey Lal*, *Rai Bahadur Ram Prasad Varma* and *S. N. Srivastava*, for the applicant.

Messrs. *M. Wasim*, *H. K. Ghosh*, *L. S. Misra*, *M. P. Srivastava*, *Ghulam Hasan*, *Kashi Prasad Saksena*, *G. N. Mukherji*, and *M. M. Gour*, for the opposite-parties.

ZIAUL HASAN and YORKE, JJ.:—These are applications for revision under section 115, C. P. C. against an order of the learned District Judge of Unao, dated the

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|-----------------------------------|--------------------------------------|
| (1) (1935) A.I.R., Lahore, 975.   | (2) (1895) I.L.R., 17 All., 238.     |
| (3) (1934) A.I.R., Nagpur, 243.   | (4) (1927) A.I.R., Madras, 271.      |
| (5) (1918) 47 I.C., 997.          | (6) (1936) I.L.R., 12 Luck., 19.     |
| (7) (1936) I.L.R., 12 Luck., 52.  | (8) (1920) 5 Patna Law Journal, 415. |
| (9) (1935) A.I.R., Madras, 399.   | (10) (1886) I.L.R., 9 Madras, 508.   |
| (11) (1935) A.I.R., Lahore, 971.  | (12) (1936) A.L.J., 559.             |
| (13) (1931) I.L.R., 54 All., 183. | (14) (1939) A.I.R., Lahore, 52.      |
| (15) (1938) A.L.J., 1118.         | (16) (1935) I.L.R., 59 Madras, 303.  |
| (17) (1901) L.R., 28 I.A., 203.   | (18) (1927) A.I.R., Mad., 944.       |
|                                   | (19) (1928) I.L.R., 6 Rangoon, 382.  |

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6th August, 1936, awarding rateable distribution of assets under section 73, C. P. C.

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The facts leading up to the present applications are as follows.

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Jairam Das, father of Shanti Lal, opposite-party no. 19 in application no. 153, obtained a decree for profits of a Sugar Mill against Jagannath Prasad and Nihai Chand from the Court of the Civil Judge of Unao, on the 28th March, 1933. In 1934 his son Shanti Lal sued the same persons for profits of the mill relating to subsequent years. This suit was referred to certain arbitrators residing in the Punjab who were given authority to go behind the previous decree obtained by Jairam Das and to decide the disputes between the parties afresh. On the 4th December, 1935, the arbitrators delivered their award holding that if the defendants deposit to the credit of Shanti Lal a sum of Rs.49,166 in Court on or before the 15th January, 1936, they would be relieved of interest and costs of Shanti Lal. This amount was tendered to the Court of the Civil Judge, Unao, on the 15th January, 1936, but as on that date the learned Civil Judge was on leave, the money was deposited in the Court of the District Judge. On the same date the award of the arbitrators was made a rule of Court.

It appears that Jairam Das was indebted to various persons under decrees and orders of different courts. One of his creditors was the Lyallpur Bank, Limited (in liquidation), applicant in application no. 153 of 1936, and another was Ramji Das, applicant in application no. 191, who is now dead and is represented by Dwarka Das and four others. The other creditors to whom rateable assets were awarded by the learned District Judge, are opposite-parties in the application before us. As one of the creditors of Jairam Das was the Secretary of State for India in Council, the learned District Judge held that his debt had priority over all the other debts. He ordered that after the claim of

the Secretary of State was fully satisfied out of the amount in deposit the balance should be rateably distributed among the various creditors excluding the Lyallpur Bank. With regard to the Bank he held that as the Bank held only an order under section 186 of the Indian Companies Act, it could not be said to hold a decree within the meaning of section 73 of the Code of Civil Procedure. Ramji Das claimed to be entitled to have the entire amount of his decree paid out of the deposit but this claim was overruled by the learned Judge who held him entitled only to a rateable share.

Application no. 153 has been brought by the Lyallpur Bank against the dismissal of its claim and application no. 191 has been filed by Ramji Das against the finding of the learned Judge that he is entitled only to rateable share of the assets. The other creditors have submitted to the order of the learned Judge.

The learned Counsel for Messrs. Bird & Co., opposite-party no. 13 in the Lyallpur Bank's application has raised a preliminary objection against both the applications on the ground that no revision lies against the order in question.

His first ground is that the order passed by the learned District Judge is an administrative and not a judicial order so as to be subject to revision under section 115, C. P. C. For this proposition learned counsel relies on the case of *Shankar Sarup v. Mejo Mal* (1) but all that was held in that case was that an order under section 295 of the (old) Code of Civil Procedure for the distribution of the price of property sold in execution amongst the decree-holders is a step in an execution proceeding and does not import a conclusive adjudication as to rights of priority. The learned counsel relies on the following remark of their Lordships at page 209:

"The scheme of section 295 is rather to enable the Judge as a matter of administration to distribute the price according to what seem at the time to be the rights of parties,

(1) (1901) L.R., 28 I.A., 203.

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without this distribution importing a conclusive adjudication on those rights, which may be subsequently readjusted by a suit such as the present."

This does not in our opinion mean that an order passed by a Court under section 73, C. P. C. is (not) a judicial order and we entirely agree with the remark of RAMESAM, J. in *Salai Muhammad Haji Ibrahim & Co. v. Ayyar Nadar* (1), that—

"There is a fallacy in passing from the noun to the adjective in this manner."

As pointed out by the learned Judge, all the orders of Courts under the Indian Succession Act, the Probate and Administrative Act, etc. relating to the administration of the assets of deceased persons are in a sense administrative but it cannot reasonably be contended that they are not judicial orders. We are supported in this view by *S. A. S. Chettyar Firm v. S. V. A. R. A. Firm* (2), also.

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The next contention of the learned counsel is that there was no failure on the part of the District Judge to exercise jurisdiction vested in him by law nor the exercise of that jurisdiction in an illegal or irregular manner and he has referred us to some cases in which it was held that a High Court is not justified in exercising its revisional powers merely on the ground that the order passed by the court below seems to be erroneous. We think however that so far at least as the Lyallpur Bank is concerned, if it be held that the Bank is entitled to a rateable share of the assets, it must also be held that the learned Judge failed to exercise jurisdiction that was vested in him by law.

The third argument is that this Court's jurisdiction under section 115, C. P. C., is discretionary and that it should not be exercised in favour of persons who have, under section 73(2), C. P. C., a remedy by way of suit. In support of the contention that revision should not be allowed where there is another remedy open to the applicant, reliance has been placed on the cases

(1) (1927) A.I.R., Mad., 944.

(2) (1928) I.L.R., 6 Ran., 582.

of *Har Narain Sethi v. Bird & Co.* (1), *Birendra Bikram Singh v. Basdeo* (2), *Mst. Hurmoozi Begum v. Mst. Aysha* (3); *Chivau-kula Sheetharamayya v. Mulpura Rathamma* (4) *Venkataraman v. Mahalingayyan* (5), *Ram Saran Das v. Amar Nath* (6) and *Behari Lal v. Ale Nabi* (7). These cases no doubt support the learned counsel's contention to a certain extent, but with all respect we think that it is not and should not be an invariable rule that revision should not be entertained whenever there is another remedy open to the party, for there seems to be no warrant for this either in section 115 or in any other provision of the Code of Civil Procedure. In *Lila v. Mahange* (8) it was held that it cannot be laid down as a general proposition that the High Court has no power of interference at all and should not interfere where there is another remedy by way of a suit open to the applicant. In *Mst. Bhagwanti v. Sant Singh* (9), the Lahore High Court also held that there is no inflexible rule that the High Court will not interfere in revision when other remedy is open by way of a suit and that the High Court even in such cases can interfere in revision to avoid multiplicity of litigation and hardship to the parties. In the case of *Bachu Lal v. Ram Din* (10) the High Court at Allahabad again held that the power of the High Court to interfere in revision with an order passed under Order XXI, rule 58, C. P. C., is not precluded by the fact that a remedy by way of a suit is open to the applicant under rule 63. The case of *Konchadu Dalayya v. Malla Sundara Narayana* (11) was a case under section 73, C. P. C. and it was held that where the High Court is satisfied that the lower court has proceeded on a clear misapprehension of section 73 of the Code, it is not justified in

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(1) (1936) I.L.R., 12 Luck., 19.

(2) (1936) I.L.R., 12 Luck., 52.

(3) (1920) 5 Patna Law Journal, 415.

(4) (1935) A.I.R., Mad., 399.

(5) (1886) I.L.R., 9 Mad., 508.

(6) (1935) A.I.R., Lahore, 971.

(7) (1936) A.L.J., 559.

(8) (1931) I.L.R., 54 All., 183.

(9) (1939) A.I.R., Lahore, 52.

(10) (1938) A.L.J., 1118.

(11) (1935) LL.R., 59 Mad., 303.

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driving the petitioner to a separate suit merely on the ground that that remedy is also open to him. We are therefore of opinion that the mere fact that a remedy by way of a suit is open to the applicants in the present case should not lead us to hold that the applications for revision are not entertainable. We accordingly over-rule the preliminary objection.

Coming now to the merits of the applications, we take up the application of the Lyallpur Bank first. It appears that an order under section 186 of the Indian Companies Act was obtained against Jairam Das by the Lyallpur Bank from the Court of the District Judge, Lahore, on the 27th March, 1935. On the 10th January, 1936, an application for execution of the order was made to the District Judge, Lahore and proceedings were subsequently transferred to Unao in this province. The learned District Judge was of opinion that an order under section 186 of the Indian Companies Act cannot be regarded as a decree within the meaning of section 73, C. P. C. We have carefully considered the arguments advanced on behalf of the Lyallpur Bank against this finding but are unable to hold that the finding of the learned Judge was wrong. The learned counsel has relied on the cases of *In the matter of the Indian Companies Act* (1), and *Tharya Ram v. Popat Ram* (2), but neither of these cases supports the contention that an order passed under section 186 of the Indian Companies Act can be deemed to be a decree within the meaning of section 73, C. P. C. In the first of these cases the Official Liquidator had applied directly to the District Court in Madras within whose jurisdiction the property against which the enforcement of the order was sought was situated though the order under section 186 of the Indian Companies Act had been passed by the Bombay High Court. All that was decided was that the proper procedure under section 199 and 200 of the Companies Act was that the order should be filed in the High Court

(1) (1927) A.I.R., Madras, 271.

(2) (1918) 47 I.C., 997.

and the High Court should treat it in the same manner as a decree passed by itself and transfer it for execution to the District Court. In the latter case the question was whether the assignee of an order under section 186 of the Companies Act can enforce the order in his favour without complying with the requirements of Order XXI, rule 16, C. P. C. and it was held that sections 199 and 200 of the Companies Act do not override the provisions of the Code of Civil Procedure. No question under section 73, C. P. C. arose in either of these cases and they are therefore no authority for the proposition that a person holding an order under section 186 of the Companies Act can be given rateable distribution under section 73 of the Code. On the other hand Courts in India have taken the view that an order under the Companies Act is not a decree as defined in the Code of Civil Procedure. In *Modern Chemical Works, Limited v. Manmohan Nath Dar* (1), it was clearly laid down that an order made by a liquidation court is not a decree though it is enforceable in the same manner as if it were a decree. In *A Reference Under Section 28 of Act No. VII of 1870* (2) also it was held that an order under section 214 of the Indian Companies Act of 1882 is not a decree or an order having the force of a decree. The case of *Mohan Lal Lal Chand v. Bhivraj Devichand* (3) is still stronger and was a case under section 73, C. P. C. It was held in that case that section 73 only permits application for rateable distribution by persons who have made application to the Court for the execution of decrees for the payment of money and not by persons who have obtained orders for payment of money which are capable of being executed, and that persons in whose favour orders for payment of money are passed, do not stand on the same footing as persons who have obtained "decrees" for the payment of money so as to entitle them to the benefit of section 73, C. P. C.

(1) (1935) A.I.R., Lahore, 975. (2) (1895) I.L.R., 17 All., 238.

(3) (1934) A.I.R., Nagpur, 243.

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We are therefore of opinion that the learned District Judge was right in holding that the Lyallpur Bank is not entitled to rateable distribution in the present case. The application of the Lyallpur Bank therefore fails and is dismissed with costs.

We now take up the application of the representatives-in-interest of Ramji Das, applicant deceased.

Ramji Das obtained a decree for Rs.35,400 and costs from the Court of the Subordinate Judge, of Lahore against Jairam Das on the 2nd February, 1928. On the 25th November, 1935, he applied for issue of a precept to the Subordinate Judge of Unao for attachment of the decree standing in favour of Jairam Das on the basis of the award, dated the 4th December, 1935, referred to above. On the 15th January, 1936, application was made by Ramji Das to the Subordinate Judge of Unao for execution. The learned Subordinate Judge on return from leave on the 17th January, 1936, made an order of attachment of the money deposited in the District Judge's Court. On the 3rd February, 1936, the Subordinate Judge passed an order that the money attached be sent for from the court of the District Judge but as in the meantime various decree-holders had applied to the District Judge for execution of their decrees against Jairam Das, the learned District Judge refused to send the money to the Subordinate Judge's court on that ground. It appears from the report put up by the office of the District Judge on 4th February, 1936, that the money in his court had already been attached in another case of the Subordinate Judge's court and in two cases of the District Judge's own court.

The learned counsel for the applicants in application no. 191 has challenged the learned District Judge's order on the ground that he had no jurisdiction to make an order of rateable distribution under section 73,

C.P.C., and the cases of *Kamini Kumar Chowdhury v. Sasanka Sekhar Chowdhury* (1) and *E. M. Visvanadhan Chetty v. Arunachelam Chetti* (2) have been relied on in support of this contention. No doubt these cases hold that the custody court which holds money under Order XXI, rule 52, C.P.C., cannot proceed under section 73 of the Code, but long before the date on which the present order was passed by the learned District Judge, viz. 6th August, 1936, his court had ceased to be a custody court under rule 52 and had become an execution court by reason of various applications for execution being filed in it. He was, therefore, perfectly competent to award rateable distribution.

The learned counsel argues that as Ramji Das was the first to apply for execution of his decree, he was entitled to full satisfaction of his decree and that the balance, if any, should have been distributed to the other decree-holders. We see no force in this argument. The court of the District Judge became vested with powers under section 73 as soon as it became an execution court by an application for execution being presented to it. Ramji Das's application was transferred by the Subordinate Judge to the District Judge for execution on 20th March, 1936, but we have seen that applications for execution were presented to the District Judge before the 5th of February, 1936. In fact, in view of this fact we doubt if Ramji Das was entitled at all to a share in the assets held by the District Judge; but as none of the parties has contested the learned District Judge's order awarding a rateable share to Ramji Das we are not called upon to interfere with the order passed in his favour. What is perfectly certain is that Ramji Das was not entitled to get his decree fully satisfied out of the assets. His application also therefore fails and is dismissed with costs.

*Application dismissed.*

(1) (1933) 37 C.W.N., 820.

(2) (1920) I.L.R., 44 Mad., 100.

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