REVISIONAL CIVIL.

1933.

Mar. 22, 23, 24.

Before James and Agarwala, JJ.

BHATOO SINGH

v.

RAJA RAGHUNANDAN PRASAD SINGH.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 73 *and Order XXI, rule* 89—*money deposited under rule* 89 *of Order XXI, whether becomes assets in the hands of the court within the meaning of section* 73.

Money paid into court for the benefit of a particular decree-holder under Order XXI, rule 89, Code of Civil Procedure, 1908, becomes assets in the hands of the court within the meaning of section 73 of the Code and is available for rateable distribution in the same way as any other money paid in for his benefit, whether realised by sale or paid in to avoid attachment.

Noor Mahomed Dawood v. *Bilasiram Thakursidass*(1) and *Sidh Nath Tewari* v. *Tegh Bahadur Singh*(2), followed.

Harai Saha v. *Fazlur Rahman*(3), *Thiraviyam Pillai* v. *Lakshmana Pillai*(4) and *Murugappa Chettiar* v. *Palaniyappa Chetty*(5), dissented from.

Narayan v. *Amgauda*(6), distinguished.

Application in revision by one of the decree-holders.

The facts of the case material to this report are stated in the judgment of the court.

G. P. Singh, for the petitioner.

S. N. Banerji, for the opposite party.

JAMES AND AGARWALA, JJ.—In this case two sets of decree-holders instituted proceedings in execution of decrees against one Tek Narain Singh, and an

* Civil Revision no. 94 of 1932, from the orders of Babu Tek Nath Jha, Munsif of Bihar, dated the 25th of January, 1932, and the 29th of January, 1932.

(1) (1919) I. L. R. 47 Cal. 515.
(2) (1932) I. L. R. 54 All. 516.
(3) (1913) I. L. R. 40 Cal. 619.
(4) (1917) I. L. R. 41 Mad. 616.
(5) (1917) 42 Ind. Cas. 507.
(6) (1920) I. L. R. 45 Bom. 1094.

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order was made for rateable distribution of the assets which should be realized. One of the decree-holders named Bhatoo Singh brought certain property to sale in execution of his decree with the result that the property was knocked down for Rs. 920, which would in the ordinary course have been available for rateable distribution among the creditors after deduction of the costs of execution; but within the statutory period the judgment-debtor paid his dues under Order XXI, rule 89, and secured a release of the property which had been sold. The amount deposited for the benefit of the decree-holder was Rs. 814. The other decree-holders, who had already obtained an order for rateable distribution, applied for rateable distribution of this amount; and their prayer was allowed by the Munsif.

We are asked to revise the order of the Munsif on the ground that he had no jurisdiction to make rateable distribution of money deposited under Order XXI, rule 89. The learned Advocate for the petitioner relies in the main upon the decision in *Harai Saha* v. *Fazlur Rahman*(1), wherein it was held that although money paid into Court under Order XXI, rule 89, might be regarded as assets held by a Court within the meaning of section 73 of the Code of Civil Procedure, it was not available for rateable distribution because it was specially paid for the benefit of a particular decree-holder, and the Court had no jurisdiction to utilize the money for any other purpose. Mr. Justice Phillips of the Madras High Court took a similar view in *Murugappa Chettiar* v. *Palaniyappa Chetty*(2), basing his decision on the ground that if the sum paid for the benefit of the decree-holder under Order XXI, rule 89, could be deemed to be held by a Court, the sum paid as a percentage of the purchase money for the benefit of the auction-purchaser would equally be assets liable to rateable distribution. The learned Advocate

(1) (1913) I. L. R. 40 Cal. 619.
(2) (1917) 42 Ind. Cas. 507.

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points out that the view that a payment under Order XXI, rule 89, must be regarded as definitely ear-marked for the specific creditor who is conducting the execution case finds support also from observations made in other cases. Thus in *Narayan* v. *Amgauda*(1) Sir Norman Macleod, discussing the opinion of the most eminent of commentators on the law of Civil Procedure, who considered that money paid into Court under rule 89 should be liable to rateable distribution, remarked that it appeared to him that when it was expressly provided that the money should be paid in for a particular purpose such money could not be treated as assets held by a Court. The question of whether money paid under Order XXI, rule 89, should be treated as available for rateable distribution did not actually arise in that case; and it may be remarked that the Calcutta High Court regarded the money as assets held by the Court, but specially ear-marked for the creditor who controlled the proceedings in execution in which it was realized. In *Thiraviyam Pillai* v. *Lakshmana Pillai*(2) Seshagiri Ayyar, J., holding that money realized under Order XXI, rule 83, was liable to rateable distribution, remarked that Order XXI, rule 89, distinctly provided for payment to the decree-holder and the purchaser, and that consequently the payment must be taken to have been ear-marked for those particular purposes. No decision of this Court, directly to the point, has been brought to our notice; but the learned Advocate for the opposite party argues that no logical distinction can be drawn between money paid into Court for the benefit of the decree-holder under rule 89 and money paid into Court for his benefit under any other rule. He adopts the words of Sir George Rankin in *Noor Mahomed Dawood* v. *Bilasiram Thakursidass*(3) wherein, dealing with section 73 of the Code of Civil Procedure, the learned Judge

(1) (1920) I. L. R. 45 Bom. 1094.

(2) (1917) I. L. R. 41 Mad. 616.

(3) (1919) I. L. R. 47 Cal. 515.

remarks that there is no support for theories grounded upon the voluntariness of any payment into Court under stress of execution. As Sir George Rankin says " 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 learned Advocate for the respondent-opposite party suggests that the Calcutta High Court might now be prepared to consider whether the provisions of section 73 of the Civil Procedure Code should not be applied to money paid under Order XXI, rule 89, even though that rule may direct that certain sums be paid for the benefit of the specific decree-holder. The learned Advocate also draws our attention to the judgment of Sir Grimwood Mears in *Sidh Nath Tewari* v. *Tegh Bahadur Singh*(1) wherein the remarks of Sir George Rankin are quoted with approval in discussing the question of whether part-payment made by a judgment-debtor in order to obtain a postponement of sale should be treated as assets liable to rateable distribution. It was then held that part-payment must be so treated.

It appears to be clear that all money paid by a judgment-debtor into Court under stress of execution before sale, whether to avoid attachment or whether made at an earlier or later stage, should be treated as assets held by the Court liable to rateable distribution under section 73 of the Civil Procedure Code; but there is some ground for doubt as to whether money paid into Court under Order XXI, rule 89,

(1) (1932) I. L. R. 54 All. 516.

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ought not to be exempted from this category. The ground of distinction given by Phillips, J., of the Madras High Court is that in addition to the money paid in satisfaction of the decree under execution the judgment-debtor is required to pay five per cent. of the purchase money as compensation to the auction-purchaser, which cannot be regarded as assets liable to rateable distribution. But on the view that money paid into Court for the benefit of the decree-holder cannot be regarded as assets liable to rateable distribution because by the provisions of Order XXI, rule 89, it must be paid in for the benefit of the decree-holder and so must be treated as ear-marked for his decree, the learned Advocate for the respondents points out that no assets will ordinarily be held by a Court which are not ear-marked for some specific purpose and no civil deposits are ordinarily accepted unless they are made for the benefit of some decree-holder or in the names of some specific persons. There appears to be considerable force in this argument. It may be true that under the provisions of Order XXI, rule 89, the Court would ordinarily have no discretion to dispose of the money deposited otherwise than by making it over to the individual decree-holder in whose name the particular execution may be proceeding; but this does not necessarily mean that if other decree-holders have already established their claims to rateable distribution, they shall not be entitled to share in the amount thus realized. There appears to be no logical ground for excluding from liability to rateable distribution any payment made into Court under stress of execution for the benefit of any of the decree-holders entitled to rateable distribution. In our judgment, the position is not affected by the fact that the sum of five per cent. which is deposited for payment to the auction-purchaser is not liable to rateable distribution; the auction-purchaser is not in any way concerned with the order under section 73. It is reasonable to hold, in the words of Sir George Rankin, that any payments made into Court under stress of execution cannot without anomaly be treated

otherwise than the results of execution would be treated; the debtor may be 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 a 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. We have not before us the exact figures representing the claims of the decree-holders in the present case; but it would appear that whereas on the sale originally made the petitioner would have been entitled to about Rs. 690 and the other creditors to Rs. 230, by the result of cancelling the sale under Order XXI, rule 89, the petitioner receives Rs. 605 and the other creditors Rs. 209. If the petitioner's claim had been allowed, he would have received Rs. 814 and the other creditors nothing. We cannot believe that when the rules under the first schedule of the Civil Procedure Code were framed, this result was intended; and we ought not to allow it unless the terms of the rules make it perfectly clear that these anomalies and undesirable consequences must necessarily follow from their application. As I have said, money paid into Court for the benefit of the decree-holder under Order XXI, rule 89, becomes assets in the hands of a Court in the same way as any other money paid in for his benefit, whether realized by the sale or paid in to avoid attachment; and the fact that under Order XXI, rule 89, this money is described as being paid for payment to the decree-holder does not make it ear-marked for his exclusive benefit any more than any other money realized under stress of execution towards satisfaction of his decree is to be regarded as specially ear-marked so as to remove it from the operation of section 73 of the Civil Procedure Code.

The application must be dismissed with costs: hearing fee one gold mohur. The learned Advocate for the petitioner draws our attention to the fact

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that his execution case should not have been dismissed with a note of full satisfaction; but this is a matter which can very easily be rectified.

Rule discharged.

APPELLATE CIVIL.

Before Wort and Khaja Mohamed Noor, JJ.

JAINARAYAN OJHA

v.

HIRA OJHA.*

JAMES AND AGARWALA, JJ.
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April, 22, 24.

Abatement—Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXII, rules* 2 *and* 4—*Hindu co-widows impleaded as defendants as representing the estate of their deceased husband—death of one—right to sue, whether survives against the other alone—substitution, whether necessary—rule* 2, *applicability of.*

Where in a suit the defendants were the two widows of a Hindu as representing the estate of their deceased husband and during the pendency of the appeal, in which the widows were the respondents, one of them died and no step was taken to bring on the record her legal representative.

Held, (*i*) that on the death of one of the widows the right to sue survived against the other alone and that, therefore, the case was governed by Order XXII, rule 2, Code of Civil Procedure, 1908.

(*ii*) that no substitution being necessary in the circumstances, there could not be an abatement of the appeal. *Lilo Sonar* v. *Jagru Sahu*(1), *Daroga Singh* v. *Raghunandan Singh*(2), *Basist Narain Singh* v. *Modnath Das*(3), and *Musammat Waleyatunnissa Begam* v. *Musammat Chalakhi* (4), distinguished.

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* Appeal from Original Order no. 216 of 1931 with Civil Revision no. 583 of 1931, from the orders of S. K. Das, Esq., I.C.S., District Judge of Shahabad, dated the 22nd July, 1931 and 16th May, 1931.

(1) (1924) I. L. R. 3 Pat. 853.
(2) (1925) 6 Pat. L. T. 451.
(3) (1927) I. L. R. 7 Pat. 285.
(4) (1930) I. L. R. 10 Pat. 341.