

costodian of Tha Htu and his estate, will be entitled to inherit to the exclusion of everyone else.

We are not called upon to decide between the claims of the defendants, and we express no opinion as to whether it is the natural heir or the custodian who is entitled to inherit.

One fact which is quite sufficient for the determination of this suit clearly emerges, and that is that the plaintiff-appellant, Maung Pan Gyaw, is not entitled to any share in the estate, and, therefore, has no status to bring this suit.

The appeal is, therefore, dismissed. There will be no order as to costs, the hearing having been *ex parte*.

1927  
 MAUNG PAN  
 GYAW  
 v.  
 MA BEIN  
 AND  
 OTHERS.  
 CARR AND  
 CUNLIFFE,  
 JJ

## APPELLATE CIVIL.

*Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.*

KWAI TONG KEE

v.

LIM CHAUNG GHEE.\*

1928  
 Jan. 3.

*Civil Procedure Code (Act V of 1908), ss. 63 and 73—Rateable distribution—Moneys attached by High Court and Small Cause Court creditors—Moneys paid into High Court—Whether all creditors to share rateably without Small Cause Court creditors applying to High Court prior to the receipt of the money—High Court to determine all claims.*

Creditors of a judgment-debtor in the Small Cause Court of Rangoon attached a sum of money deposited by the judgment-debtor with a Club. A High Court creditor of the judgment-debtor also attached the same sum. The money was paid into the High Court.

*Held*, that under the provisions of s. 63 of the Civil Procedure Code the High Court alone could determine all claims to the money. S. 73 must be read in conjunction with s. 63 of the Code, and under the circumstances of the case the High Court must be deemed to hold the assets on account of the Small Cause Court also; and therefore all the creditors were entitled to a rateable distribution. The decree-holders in the Small Cause Court need not in such a case make an application to the High Court for execution before the receipt of the assets.

\* Civil Miscellaneous Appeal No. 75 of 1927 from the order of the Original Side in Civil Miscellaneous No. 212 of 1926.

1928

KWAI TONG  
KEE  
v.  
LIM CHAUNG  
GHEE.

*Clerk v. Alexander*, 21 Cal. 200—referred to ; *Krishnashankar v. Chandra Shankar*, 5 Bom. 198—distinguished.

*Kyaw Din* for the appellant.

*Ray* for the respondent.

RUTLEDGE, C.J., and BROWN, J.—A certain sum of money deposited by one I. Raj with the Rangoon Turf Club was attached in execution of two decrees in the Small Cause Court of Rangoon. It was subsequently again attached in execution of a decree of this Court on the Original Side in favour of the appellant, Kwai Tong Kee, and the money has been paid into this Court. The question for decision is whether in the circumstances, in view of the provisions of section 73 of the Code of Civil Procedure, the appellant is entitled to draw out the whole of the amount deposited or whether he is bound to share it rateably with the other two decree-holders. The trial Court decided in favour of rateable distribution and Kwai Tong Kee has appealed against this decision.

Under the provisions of section 73, "where assets are held by a Court and more persons than one have before the receipt of such assets made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor . . . the assets . . . shall be rateably distributed among all such persons." It is contended on behalf of the appellant that it is only persons, who have made application to the Court before the receipt of the assets, who are entitled to rateable distribution and that as the assets are held by this Court and the other decree-holders made no application to this Court before the receipt of the assets they are debarred from participating in the assets.

It was held by the trial Judge that section 73 must be read together with section 63 and that if

these two sections be read together, it is clear that all the attaching creditors have a claim. That was the view taken by the High Court of Calcutta in the case of *Clark v. Alexander* (1). On the other hand, in the case of *Krishnashankar v. Chandra Shankar* (2), it was held that only those decree-holders share in the rateable distribution, who have actually applied for execution of their decree to the Court holding the assets. The circumstances of that case were not however similar to those of the present case and at that time section 295 of the Code, which corresponds with the present section 73, contained the words "have prior to the realisation applied to the Court by which such assets are held." The words "by which such assets are held" do not occur in section 73.

We agree with the construction placed on section 73 by the learned trial Judge. Under section 63, in a case such as the present, the Court that has to receive and realise the property attached and to determine all claims thereto, is the Court of highest grade. It is clear that the decree-holders in the Small Cause Court by attaching the properties in this case established a claim thereto and under section 63 that claim has to be determined by this Court as the Court of highest grade. If section 73 be read as meaning that, unless application was made to this Court for execution, the attaching creditor has no claim to rateable distribution, the provisions of section 63 would be rendered to a large extent nugatory. Under section 63, the assets are held by this Court but they are held by it not only on its own behalf but also on behalf of the other attaching Courts. In fact so far as attachment and realisation of this property is concerned, this Court exercises both its own jurisdiction

1928

KWAI TONG  
KEE

v.

LIM CHAUNG  
GHEE.RUTLEDGE,  
C.J. AND  
BROWN, J.

(1) (1893) 21 Cal. 200.

(2) (1880) 5 Bom. 198.

1928

KWAI TONG  
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GHEE.

RUTLEDGE,  
C.J., AND  
BROWN, J.

and that of the Small Cause Court. In this view of the matter, it does not seem to us to be an undue stretching of the meaning of the words "made application to the Court" in section 73 to hold that the Court in such a case includes not only the Court which actually holds the assets, but also any other Court by which attachment has been made and on account of which the assets are therefore in part held under section 63 by the Court which holds the assets.

We are therefore of opinion that it was not necessary for the decree-holders in the Small Cause Court to make application for execution in this Court before the receipt of such assets in order to entitle them to rateable distribution. They sufficiently complied with the requirements of the section by applying to the Court in which they obtained their decrees and by obtaining attachments therein. We are therefore of opinion that the case has been rightly decided and we dismiss this appeal with costs, advocate's fee five gold mohurs.

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## ORIGINAL CIVIL.

*Before Mr. Justice Chari.*

MATAPRASAD UPADHYA

v.

KUNNON DEVI AND ANOTHER.\*

1928

Jan. 20.

*Power of sale by mortgagee—Power to be conferred in express terms—What is not sufficient conveyance—Transfer of Property Act (IV of 1882), s. 69.*

*Held*, that section 69 of the Transfer of Property Act does not purport to confer any powers on mortgagees but it is intended, when a power is expressly conferred by the mortgage deed, to prescribe the procedure, to curtail the unfettered exercise of the power and to determine the rights of the purchaser at such a sale.

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\* Civil Regular No. 597 of 1927.