1938

Jan. 14.

CIVIL REVISION.

Before Mr. Justice Sharpe.

R. N. PANDAY
v.
MOHAMED KASSIM KHAN.*

Attachment before judgment—Application for execution after decree essential—No step by decree-holder after attachment before judgment—Subsequent decree-holder's action in getting attached money paid into Court—Claim by prior decree-holder for rateable distribution—Civil Procedure Code, s. 73, O. 38, r. 11.

O. 38, r. 11 of the Civil Procedure Code does not excuse an application for execution in any circumstances whatever ; it only says that, upon an application for execution, reattachment of the property need not be applied for if the property has already been attached under that order.

A decree-holder who has obtained an order for attachment before judgment of money belonging to the judgment-debtor in the hands of a third party cannot claim rateable distribution if he has taken no steps to realize his decree prior to the receipt of the money by the Court. In such a case a subsequent decree-holder who has also attached before judgment the same money gains priority over him if, after obtaining his decree, he applied to the Court for an order on the garnishee to pay the money into Court, and the garnishee has complied with the order.

M. Ahmed for the applicant.

No appearance for the respondent.

SHARPE, J.—On the 17th February last the present applicant for revision presented a plaint in the Court of Small Causes of Rangoon against one B. V. Rathnam

* Civil Revision No. 271 of 1937 from the order of the Small Cause Court of Rangoon in Civil Regular Suit No. 2739 of 1937.

1938

PANDAY v. KHAN.

SHARPE, J.

claiming 230 rupees said to be due on a promissory note. Later that same day he applied for the issue of a prohibitory order before judgment; the application was granted and on the 6th April the attachment before judgment was confirmed. The attachment was one covering the money then lying to Rathnam's credit in the books of the Burma Oil Subsidiary Provident Fund Trust (India) Ltd., to which Company I will hereafter refer as "the Company."

On the 7th April the present respondent presented a plaint in the same Court against the same Rathnam claiming 300 rupees said to be due on another promissory note. He, too, applied, immediately after presenting his plaint, for a prohibitory order covering the same money held by the Company. This second suit against Rathnam was uncontested and on the 4th May the respondent obtained a decree for the amount claimed, with costs, the second attachment being confirmed on the same day. The respondent took no further step to realize his decree until the application of the 27th July with which I will deal in a moment.

The present applicant's suit, unlike the respondent's, was contested by Rathnam, and it was not until the 18th May that a decree was passed in favour of the present applicant, who, on the 17th June, applied for an order directing the Company to pay into Court the money covered by the prohibitory order of the 6th April. Notice was issued to the Company who thereupon paid the money into Court; the amount so paid into Court was Rs. 290-4-0.

On the 27th July the respondent applied under section 73 of the Code of Civil Procedure for a rateable distribution of the Rs. 290-4-0 between himself and the present applicant.

The learned Judge of the Small Cause Court held that the respondent need not apply for execution after

obtaining his decree, and he directed the money to be rateably distributed between the two decree-holders. It is in respect of that decision that the present application for revision is made.

The point for decision is: Was it necessary for the respondent, in order to obtain a rateable distribution, to apply for execution after obtaining his decree? If so, was the decision of the Lower Court otherwise than "according to law" so as to call for revision under section 25 of the Rangoon Small Cause Courts Act?

Mr Ahmed, for the applicant, contends that the words of section 73 are clear and that, unless the respondent applied to the Court for the execution of his money decree before the money was paid into Court, he could not obtain an order for the money to be distributed rateably. Mr. Ahmed relies upon *Mistry* v. *Jordan* (1), and *A.L.A.R. Arunachellam Chettiar* v. *Rowthar* (2).

It is unfortunate that there has been no appearance by or on behalf of the respondent, and I have not therefore had the assistance of any contrary argument. I apprehend, however, that the case for the respondent would have been that, having regard to the terms of Order XXXVIII, rule 11, of the Code of Civil Procedure, it was unnecessary for him to apply for execution, as he had already attached the property before judgment. I do not think that that would have been a sound argument. Order XXXVIII, rule 11, does not excuse an application for execution in any circumstances whatever; it only says that, upon an application for execution, re-attachment of the property need not be applied for if the property has already been attached under that Order. As a matter of fact the words of the old section 490, [under which *Mistry* v. *Jordan* (1) was decided], were

(1) (1888) I.L.R. 12 Bom. 400. (2) (1910) I.L.R. 34 Mad. 25.

1938

PANDAY v. KHAN.

SHARPE, J.

"to re-attach property in execution of such decree" where now stand the words "upon an application for the execution of such decree to apply for a re-attachment of the property." The new words "upon an application" make it clear that after decree the decree-holder must apply in the usual way.

A.L.A.R. Arunachellam Chettiar v. *Rowthar* (1) was also decided under the old wording, and my attention has not been drawn to any reported decision since the coming into force of the Code of Civil Procedure of 1908. Any ambiguity or doubt which may previously have existed has been removed by the wording of the present rule 11 of Order XXXVIII. In my judgment, therefore, it was necessary for the respondent to apply for execution of his money decree before the Company paid the money into Court; he did not do so; and accordingly he was not entitled to an order for a rateable distribution of the money in Court.

From that it follows that the decision of the Lower Court was not "according to law", but that does not of itself entitle the applicant to an order in revision. The word in section 25 of the Rangoon Small Cause Courts Act, 1920, is "may", and not "shall"; this Court has a discretion as to what, if any, order it will pass when satisfied that a decree or order made by the Court of Small Causes is not "according to law." I have considered the matter as carefully as I can, without, as I have already said, the benefit of having any argument addressed to me on behalf of the respondent. On the whole I think that this is a case in which I may properly interfere in revision. This application is granted, and the order of the Court of Small Causes dated the 31st August 1937 ordering a rateable distribution of the money in Court must be set aside with costs.

(1) (1910) I.L.R. 34 Mad. 25.