

SPECIAL BENCH.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice,
Mr. Justice Mya Bu, and Mr. Justice Dunkley.

SOLOMON NAHOME v. A. E. McCANN.*

1939

Dec. 21.

Rateable distribution—Attachment of moiety of salary—Payments into Court by garnishee—Appropriation of amounts by attaching creditor—Application by judgment-debtor for cancellation of prohibitory order—Payment into Court by judgment-debtor of a monthly sum for rateable distribution among all creditors—No application by creditors—Court's jurisdiction to pass such order—Inherent powers—Civil Procedure Code, s. 73, O. 21, r. 48.

Where a Court has issued a prohibitory order under O. 21 rule 48 of the Civil Procedure Code attaching a moiety of the salary of the judgment-debtor (a railway servant) at the instance of his decree-holder and no other decree-holder has applied for rateable distribution, the attaching creditor is entitled to the whole of the amounts paid into Court towards the satisfaction of his decree. The Court has no jurisdiction, on the application of the judgment-debtor, to cancel the prohibitory order and to allow him to pay into Court a monthly sum for rateable distribution among all his creditors when no other creditor has made any such application to the Court. The inherent powers of the Court cannot be used for the purpose of overriding the rights of one party for the benefit of another.

Lochan Singh v. Maung Ba Hline, Civ. Rev. No. 321 of 1938, H. C. Ran., overruled.

C. K. Ray for the applicant. There is no provision either in the Civil Procedure Code or in the Rangoon Small Cause Court Act which enables the Court to allow a judgment-debtor to pay a fixed sum periodically towards different decrees passed against him for rateable distribution among his decree-holders, and to stay execution of the decrees. The case does not fall within s. 73 of the Civil Procedure Code, and what the Small Cause Court has done in effect is to exercise insolvency jurisdiction. (See s. 60 of the Rangoon Insolvency Act.)

A decree-holder has a statutory right to have his decree executed, and the Court has no power to refuse

* Civil Revision No. 149 of 1939 from the order of the Court of Small Causes, Rangoon, in Civil Reg. Suit No. 8026 of 1937.

1939
SOLOMON
v.
McCANN.

to execute the decree or to stay execution. No principles of equity can be applied in order to grant relief to one at the expense of others. S. 151 of the Code cannot be invoked for the purpose.

Except in cases under O. 21, r. 22 or 37, where notice has been issued to the judgment-debtor he has no right to come to Court and show cause against an application for execution after it has been granted. Where a decree is sought to be executed by attachment of the judgment-debtor's property the Court is bound to grant the attachment. It has no power to grant payment by instalments or refuse execution. O. 21, r. 17 (4) of the Code is mandatory.

The result of an order of the nature in question would be that many decree-holders would receive only a few rupees a month, and many of the decrees would not be paid in full even after 12 years, after which period the decrees will become unexecutable. Further the application for instalment in the present case, even if it is considered as a separate application is barred by limitation by reason of art. 175 of the Limitation Act.

The judgment of this Court in Civil Revision No. 321 of 1938 requires reconsideration ; it did not take into consideration the effect of O. 21, r. 17 (4) read with s. 58 of the Small Cause Court Manual.

Lynsdale for the respondent.

ROBERTS, C.J.—This is an application in revision against the order of the learned Chief Judge of the Rangoon Small Cause Court, dated the 6th March, 1939, cancelling certain attachment orders which had been issued against the salary of the respondent under the provisions of Rule 48 of Order 21 of the Civil Procedure Code, and allowing the respondent to pay into Court a sum of Rs. 70 per mensem, which sum

was to be distributed rateably "by way of instalments" to the credit of eighteen decrees which had been obtained by different persons against the respondent.

The applicant is the holder of a decree against the respondent, and his learned counsel has informed us of the whole history of the applicant's attempts to execute this decree, but for the purpose of the present application it is necessary to refer only to recent events. On the 5th January, 1939, the applicant applied to execute his decree by the issue of a prohibitory order, under Rule 48 of Order 21, attaching a moiety of the salary of the respondent, who is a servant of the Burma Railways. The learned Chief Judge ordered a prohibitory order as prayed for to issue, as he was bound to do by sub-rule (4) of Rule 17 of Order 21, seeing that the application complied with the provisions of sub-rule (2) of Rule 11 of that Order. The prohibitory order was duly served on the 11th January, 1939.

Now the applicant was legally entitled to the fruits of his diligence in being the first judgment-creditor to attach the respondent's salary, unless the respondent could show that for some reason, such as satisfaction, the decree was unexecutable, or unless other judgment-creditors applied in accordance with the provisions of section 73 of the Code for rateable distribution. It is not suggested that the applicant's decree was incapable of execution, nor is it suggested that any other judgment-creditor has made an application for rateable distribution. Consequently the applicant was entitled to receive the whole of the amounts deducted from the respondent's salary under the prohibitory order issued at his instance.

Nevertheless, on the 16th January the respondent petitioned for the withdrawal of this prohibitory order.

1939

SOLOMON

v.

MCCANN.

ROBERTS,

C.J.

1939
 SOLOMON
 v
 MCCANN.
 ROBERTS,
 C.J.

This application was naturally opposed by the present applicant and was withdrawn. Then on the 6th February, 1939, the respondent made an application which was entirely untenable in law. The application set out that there were eighteen decrees existing against him (the respondent), and asked that all the decrees should be taken together and considered *en bloc*, that the respondent should be permitted to deposit a sum of Rs. 70 per mensem into Court and that the Court should distribute this amount *pro rata* amongst all the eighteen decree-holders, and that all attachment orders issued against the respondent's salary should be withdrawn and cancelled. The learned Chief Judge granted this application by his order of the 6th March, and cancelled the prohibitory order issued at the instance of the present applicant. He plainly had no jurisdiction to do so. The present applicant was lawfully entitled to receive the whole amount deducted from the respondent's salary under the prohibitory order issued at his instance, save and in so far as a proper order for rateable distribution had been made under section 73 on the application of other decree-holders, and no such order has been made in this case ; and the learned Chief Judge had no jurisdiction to recall the prohibitory order. The inherent powers of the Court cannot be used for the purpose of overriding the rights of one party for the benefit of another. The respondent's application of the 6th February was, in substance, an application that the Small Cause Court should exercise the powers of an Insolvency Court, and the Small Cause Court has no insolvency jurisdiction. The order of the learned Chief Judge of the 6th March, 1939, was an order which he had no jurisdiction to make, and must therefore be set aside.

This application in revision is allowed with costs, advocate's fee ten gold mohurs, the order of the Small

Cause Court of Rangoon, dated the 6th March, 1939, is set aside, and the prohibitory order issued at the instance of the applicant on 4th January, 1939, is directed to be reissued forthwith. The decision of this Court in Civil Revision No. 321 of 1938, to the extent to which it conflicts with this judgment, must be considered to be overruled.

MYA BU and DUNKLEY, JJ., concurred.

1939
SOLOMON
v.
McCANN.
ROBERTS,
C.J.