

REVISIONAL CIVIL.

Before Tek Chand J.

MUNI LAL (DECREE-HOLDER) Petitioner,

versus

DIWAN CHAND (JUDGMENT-
DEBTOR)

THE PROVINCIAL GOVERN-
MENT, PUNJAB, THROUGH
THE COLLECTOR, AMBALA,

} Respondents.

Civil Revision No. 764 of 1938.

Civil Procedure Code (Act V of 1908), S. 73, O. XXI, r. 11, O. XXVII, r. 2, O. XXXIII, rr. 11 and 14 — Decree — Execution — application by private decree-holder — Sale of house of judgment-debtor — Application by District Nazir on behalf of Crown — for realisation of Government claim regarding amount of Court-fee payable by judgment-debtor for his appeal in forma pauperis — District Nazir — Whether competent to apply on behalf of Crown — Crown — whether has priority over private decree-holder.

M. obtained a money-decree against D. On his application for execution of the decree a house belonging to D. was attached and sold. In the meantime D. appealed in *forma pauperis* against the decree, but the appeal was dismissed by the District Judge in October, 1936, who ordered, under o. XXXIII, r. 11, that D. should pay to Government the amount of Court-fee payable on the memorandum of appeal. After dismissal of the appeal, the house was re-sold and the auction-purchaser deposited the purchase price in Court. During the pendency of execution proceedings, an application on behalf of the Crown was made by the District Nazir for execution of the decree for the amount of Court-fee payable on the memorandum of appeal. This application was dismissed on 2nd April, 1938, on the basis of a statement made by him that he did not wish to proceed further with it.

In the meantime, M. had applied to the execution Court that the purchase money realised by the sale of the house be paid to him after deducting the auction expenses. When this application came up for hearing, the District Nazir presented an application stating that the Crown was entitled to recover

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the amount of Court-fee out of the sum realised by the sale of the house in priority to M. Subsequently, the District Nazir made a formal application under o. XXI, r. 11, on behalf of the Crown for execution of the decree for Court-fee by attachment of the sale-price realised. The Court made no order on this application, but it passed an order at a later date on the application of M. (then pending) that the Crown had a prior right for satisfaction of the amount due to it on account of Court-fee and directed the payment of the sale price to the District Nazir.

In a revision petition to the High Court, M. contended (i) that the District Nazir had no authority to make an application on behalf of the Crown and the order, therefore, was illegal (ii) that the only application made by the District Nazir before the receipt in Court of the sale proceeds of the house having been withdrawn, and, the second application not having been made till long after the receipt of the sale proceeds in Court it was ineffectual and the order passed thereon was illegal.

Held (repelling both the contentions), (i) that by the Punjab Government (Home) Notification No.1940-J-37/18103, dated the 27th April, 1937, all District Nazirs were appointed *ex-officio* Government Pleaders for the purpose of filing execution applications in the Civil Courts of the District to which they were attached. Under that Notification, read with o. XXVII, r. 2 of the Civil Procedure Code, the District Nazir, was a "recognised agent" of the Crown and had authority to make the application in question; (ii) that under the terms of the decree of the District Judge, the Crown was a decree-holder for the amount of the Court-fee payable on the judgment-debtor's appeal. An application on behalf of the Crown had, in fact, been made for execution of the decree before the house was sold and was pending when the sale proceeds were actually received in Court. The Court had also before it the second application for execution by the District Nazir when the order of payment to the Crown was passed and therefore on all crucial dates the Crown was before the Court as an executing decree-holder.

Held also, that after the enactment of s. 73 of the Civil Procedure Code, it is beyond dispute that when the Crown and

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a private individual both execute their decrees against the same judgment-debtor and seek to be satisfied out of the same fund, the rules as to rateable distribution laid down in s. 73 (1) do not apply and the decree in favour of the Crown has priority.

Gayanoda Bala Dasseo v. Butto Kristo Bairagee (1) and *Varadachari v. Secretary of State for India* (2), referred to.

Other case-law discussed.

Revision from the order of Chaudhri Fazal Ilahi, Subordinate Judge, 1st Class, Ambala, dated 11th June, 1938, accepting the Crown's application and ordering that the balance of sale price be paid to the Crown towards the amount of Court-fee due from the judgment-debtor.

ASA RAM AGGARWAL, for Petitioner.

SHABIR AHMAD, for Advocate-General, for (Crown) Respondent.

DIWAN CHAND in person.

TEK CHAND J. TEK CHAND J.—On the 23rd of April, 1935, the petitioner, Muni Lal, obtained a decree against Diwan Chand for Rs.4,720 and costs. Two days later, on the 25th of April, 1935, he applied for execution of the decree by attachment and sale of a house belonging to Diwan Chand. The house was duly attached and ordered to be sold. In the meantime, the judgment-debtor, Diwan Chand had appealed in *forma pauperis* against the decree. The District Judge dismissed this appeal with costs on the 20th of October, 1936, and also ordered, under Order 33, rule 11, that Diwan Chand shall pay to Government Rs.397-8-0 the amount of Court fee on the memorandum of appeal. He also directed that, as laid down in Order 33, rule 14, a copy of the decree be forwarded to the Collector.

(1) I. L. R. (1906) 33 Cal. 1040.

(2) I. L. R. (1933) 59 M. L. J. 312.

After the dismissal of the judgment-debtor's appeal, proceedings for the sale of the house were continued and the house was sold, but there was some irregularity in publishing and conducting the sale, and the sale was set aside. On the 14th of January, 1937, the decree-holder Muni Lal applied for resale of the house and, after lengthy proceedings, the house was sold on the 18th of February, 1938, to one Sohan Lal for Rs.325. The auction-purchaser deposited one-fourth of the purchase price forthwith, and he paid the remaining three fourths on the 4th of March, 1938. The judgment-debtor, Diwan Chand, raised no objection to the sale which was confirmed by the executing Court on the 26th of March, 1938. On the confirmation of the sale, the Court ordered that the execution proceedings be dismissed in part satisfaction.

While these execution proceedings were going on, on the 14th July, 1937, an application on behalf of the Crown was presented by the District Nazir for execution of the decree for Rs.397-8-0 (the amount of the Court-fee payable on the pauper appeal presented by the judgment-debtor to the District Judge and dismissed by the latter) by attachment and sale of the moveable and immoveable property of the judgment-debtor. No details of the property sought to be attached were, however, given, nor was the necessary process fee paid. No attachment of any property of the judgment-debtor was, therefore, effected in proceedings on this application till the 2nd of April, 1938, when it was dismissed on a statement made by the District Nazir, that he did not wish to proceed further with it.

In the meantime, on the 29th of March, 1938, the decree-holder had applied to the executing Court

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that the purchase price realised by the sale of the house be paid to him after deducting the auction expenses. When this application came up for hearing on the 30th of March, 1938, the District Nazir appeared and presented an application stating that the Crown was entitled to recover Rs.397-8-0 on account of Court-fee out of the amount realised by the sale of the house, in priority to Muni Lal. Proceedings on these applications continued till the 12th of May, 1938, when the District Nazir, on behalf of the Crown, made a formal application under Order 21, rule 11, for execution of the decree for Rs.397-8-0 by attachment of Rs.325 which had been realized by sale of the judgment-debtor's house in execution of Muni Lal's decree, and for the balance by attachment and sale of some other property of the judgment-debtor. The executing Court passed no orders on this last application. But in the execution proceedings, which had been going on, on the application of Muni Lal for execution of his decree, it passed an order on the 11th of June, that the Crown had a prior right for satisfaction of the amount due to it on account of Court-fee, and directed payment of the amount realized by sale of the house to the District Nazir.

The decree-holder has come in revision, and the first contention raised on his behalf is that the District Nazir had no authority to make applications on behalf of the Crown and that for this reason the order is illegal. This contention is without any force. By Punjab Government (Home) Notification No. 1940-J-37/18103, dated the 27th April, 1937, all District Nazirs were appointed *ex officio* Government pleaders for the purpose of filing execution petitions in the

civil Courts of the Districts to which they are attached. Under this notification, read with Order XXVII, Rule 2 of the Civil Procedure Code, the District Nazir was a "recognized agent" of the Crown and had authority to make the applications in question.

The second contention is that the only application for execution made by the District Nazir before the receipt in Court of the sale proceeds of the house was that of the 14th July, 1937, but that application had been withdrawn on the 2nd of April, 1938, and the order for payment to the Crown passed by the lower Court on the 11th of June is illegal. It was contended that the second application for execution made on the 12th of May, 1938, is ineffectual as it was made long after the receipt of the sale proceeds in the Court and, further, because no proceedings were taken on this application. With regard to the application made by the District Nazir on the 30th of March, it was pointed out that this did not purport to be, nor was it in effect, an application for execution, but had been made merely to resist the decree-holder's prayer for payment of the sale proceeds to the petitioner and no order for payment could have been made on it. In support of this last contention, reliance is placed on *Panalal Jagannath v. Collector of Mandalay* (1). In that case some persons had obtained a money decree against a number of defendants. From this decree, some of the defendants had appealed in *forma pauperis*, but the appeal had been dismissed and a decree drawn up, containing a clause that the appellants were to pay to Government the amount of Court-fee which they would have had to pay if they had not been permitted to appeal as paupers. On receipt of a copy of

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(1) I. L. R. (1930) 8 Rang. 234.

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the decree the Collector instead of applying for execution of the decree, merely sent a letter to the executing Court, asking it to set aside the amount payable to Government under the decree out of the sale proceeds of the property which the decree-holders had got attached and sold in execution. On receipt of this letter, the executing Court deducted this amount from the sale proceeds and ordered it to be paid to the Collector. On appeal the High Court set aside the order, holding that Government was in the position of a decree-holder for the amount of the Court-fee, which could be recovered by applying for execution, but that the Collector's letter to the executing Court could not be regarded as an application for execution and the order of the executing Court making the payment to the Collector was illegal. The learned Judges observed :—

“ Had there been an application for execution made in the ordinary way by the Collector, it is possible that that Crown debts might be entitled to priority, but here there was only one decree being executed under which property had been attached, and without another application for execution on behalf of some other decree-holder being made, it was the duty of the executing Court to proceed with the sale of the attached property and apply the sale proceeds in satisfaction of the decree that was being executed.”

The present case, however, is distinguishable. Here the representative of the Crown had made a formal application for execution of the decree for recovery of the amount of the Court-fee before the house was

actually sold. No doubt this application was withdrawn later, but another application had been made subsequently, and this was pending before the executing Court on the date when the order of payment was made. It is true that the house or the sale proceeds had not been formally attached at the instance of the Crown. But this appears to be immaterial. It is expressly laid down in sub-section (3) of section 73, Civil Procedure Code, that nothing contained in that section affects any right of the Government. This sub-section gives statutory recognition to the maxim *quando jus domini regis et subditi concurrent, jus regis praeferri debet* (when the right of a king and that of the subject concur, the King's right shall be preferred). This principle had long been given effect to in England, where it had been held that when the right of the Crown and the right of the subject, in respect of payment of a debt of equal degree compete, the Crown's right prevails: *Rex v. Wells* (1); *Quicks case* (2); *In Re. Henlay and Co.* (3) and *New South Wales Taxation Commissioners v. Palmer* (4). That the Crown has the prerogative of precedence in respect of decree-debts was ruled by the Courts in this country, even before the enactment of any provision corresponding to section 73 (3) of the present Civil Procedure Code. (See *Secretary of State for India v. Bombay Landing & Shipping Co.* (5), *Ganpat Putaya v. The Collector of Kanara* (6) and *Gulzari Lal v. The Collector of Bareilly* (7)). After the enactment of this provision, it is beyond doubt that when the Crown and a private individual both execute their decrees against the same judgment-debtor and seek to

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(1) (1810) 16 East. 278.

(4) (1907) L. R. A. C. 179.

(2) (1810) 16 East. 282.

(5) (1868) 5 Bom. H. C. R. 23.

(3) (1878) L. R. 9 Ch. D. 469 (481).

(6) I. L. R. (1876) 1 Bom. 7.

(7) I. L. R. (1878) 1. All. 596.

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be satisfied out of the same fund, the rules as to rateable distribution laid down in section 73 (1) do not apply and the decree in favour of the Crown has priority. For decisions after the enactment of this provision, reference may be made to *Gayanoda Bala Dasse v. Butto Kristo Bairagee* (1) and *Varadachari v. Secretary of State for India* (2). In the Calcutta case cited above, it was further held that in such cases it was not necessary for the Crown or its representative to attach the fund before claiming payment.

Later decisions have gone much further and have ruled that the prerogative of priority may be invoked by the Crown not only when it has obtained a decree from a Court against the judgment-debtor, but also where it has the right to recover arrears of taxes payable by him under a statute. Thus in *Deputy Commissioner of Police v. Vendantam* (3), on an application by the Deputy Commissioner of Police payment was made to him by the executing Court out of the amount realized by sale of the judgment-debtor's property in preference to a private judgment creditor in execution of whose decree the property had been sold. More recently, a Full Bench of the same Court in *Manikkam Chettiar v. The Income-tax Officer Madura South* (4) passed similar orders on an application, made to the executing Court by the Income-tax Officer, under section 151, Civil Procedure Code in respect of the arrears of income-tax payable by the judgment-debtor. Similarly, the Burma High Court in *Soniram Rameshur v. Mary Pinto* (5), has held that where there are funds in Court belonging to the debtor, the Court can order payment of a Crown debt due by the

(1) I. L. R. (1906) 33 Cal. 1040.

(3) I. L. R. (1936) 59 Mad. 428.

(2) I. L. R. (1936) 59 Mad. 872.

(4) I. L. R. [1938] Mad. 744 (F. B.)

(5) I. L. R. (1933) 11 Rang. 467.

debtor, *e.g.*, income-tax arrears, on the application of the Crown without a formal attachment being issued.

As against these authorities, the petitioner's counsel has referred me to certain observations in a Division Bench decision of this Court in *Oudh Commercial Bank, Ltd. v. Secretary of State* (1). In that case it was held that section 73 (3) Civil Procedure Code does not confer any jurisdiction on the executing Court to entertain a claim on behalf of the Government in the absence of any decree in support of it. The sub-section only saves the rights of the Government, independent of the section, such as they might be and merely has reference to the right of priority which can ordinarily be claimed in respect of debts due to the Crown. Consequently, it was held that where the Government has not obtained any decree for the premium and arrears of rent for the land belonging to it, which had been leased to the judgment-debtor and on which he had constructed buildings and which buildings had been sold in execution of the decree of a private decree-holder, the executing Court had no jurisdiction to go into the merits of the claim and direct payment to Government of the rent out of the sale proceeds of the buildings realized in execution of the decree. It was further held that after the sale, the proceeds did not belong to the judgment-debtor but were held by the Court in trust for the benefit of the creditor executing the decree and such other creditors as had applied for rateable distribution under section 73, Civil Procedure Code.

It is not necessary for the purposes of this case to decide which of these rival views is correct, for in the case before us, under the terms of the decree of

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the District Judge, the Crown was a decree-holder for the amount of the Court-fee payable on the judgment-debtor's appeal. An application on behalf of the Crown had in fact been made for execution of the decree before the house was sold and it was pending when the sale proceeds were actually received in Court. The Court had also before it the second application for execution by the Nazir when the order of payment to the Crown was passed. On all crucial dates, therefore, the Crown was before the Court as an executing decree-holder. The fact that the first application had been withdrawn on the 2nd April and the second application was not made till the 12th of May is wholly immaterial, for no order was passed by the Court in the interval. It is equally immaterial that the order of payment to the Crown was written by the learned Judge on the record of the execution proceedings started by the petitioner and not on the application filed by the Nazir. Both proceedings were before the Court at the same time, and the order was passed after hearing the two rival decree-holders. I can, therefore, find no illegality or material irregularity in the order of the Court below.

The petition for revision fails and is dismissed, but in the circumstances the parties are left to bear their own costs throughout.

A. K. C.

Petition rejected.