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High Court that the affixing of a mark, as in this case, was a sufficient compliance with the Act, and it would appear that this view was shared by other learned Judges of that Court: *Sesha* v. *Seshaya*[1] and *Ellappa Nayak* v. *Annamalai*[2]. The reported cases disclose no subsequent dissent from these decisions, though they have been distinguished on more than one occasion. Were the matter *res integra* we might have felt difficulty in arriving at the same conclusion, but it is of paramount importance that in those matters, which enter into the daily life of the people, a long settled rule of law should not lightly be disturbed, merely because it may not fit in with the individual opinion of a Judge or Bench before whom it may come for consideration. It is true that according to prevailing notions, the Courts of one Presidency do not regard themselves as bound by decisions of another even on question of universal application —a matter on which perhaps some day a more satisfactory understanding may prevail—still we think we ought, under the circumstances, to be guided by the Madras decisions which completely cover the point before us.

On this ground therefore we hold the suit is not barred.

Order accordingly.

(1) (1883) 7 Mad. 55. (2) (1883) 7 Mad. 76.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1903. *December* 9.

MANILAL UMEDRAM AND OTHERS (ORIGINAL JUDGMENT-CREDITORS), APPLICANTS, *v.* NANABHAI MANEKLAL AND OTHERS (ORIGINAL OPPOSING DECREE-HOLDERS), OPPONENTS.*

Civil Procedure Code (*Act XIV of* 1882), *section* 295—*Rateable distribution—Realization of assets—Interpretation.*

A certain sum of money, which was deposited in a Bank in the joint names of the Collector and a judgment-debtor, and which belonged to the judgment-debtor, was sent by the Collector in the form of a cheque to the Court at the request of the Court to which the judgment-creditor had applied for the payment of his decretal amount out of the said money. After the cheque was

* Application No. 96 of 1903 under the extraordinary jurisdiction.

received by the Court and converted into cash, the judgment-creditor contended that the money was not liable to rateable distribution under section 295 of the Civil Procedure Code (Act XIV of 1882), between certain other judgment-creditors of the judgment-debtor, because the money did not fall within the description of assets dealt with in that section, that is, it could not be said that those assets had been realized, and if they had been realized, they had not been realized in execution of a decree inasmuch as the money had not been attached in the Bank.

Held, that section 295 of the Civil Procedure Code (Act XIV of 1882) applied and that the money was liable to rateable distribution between the several judgment-creditors. Section 295 provides that whenever assets are realized by sale or otherwise in execution of a decree, the consequences prescribed in the section shall follow.

Primâ facie the word "realized" means "converted into cash or into a form whereby it becomes available for immediate distribution" and there is nothing in the word itself which requires that that process should take place as the result of any ulterior proceeding in the course of execution.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of L. P. Parekh, First Class Subordinate Judge of Surat, in an execution proceeding.

Point as to the rateable distribution of assets realized under section 295 of the Civil Procedure Code (Act XIV of 1882).

On the 23rd January, 1903, the plaintiffs Manilal Umedram and his two brothers obtained a decree (No. 201 of 1902) against their debtor Zulfikaralli in the Court of the First Class Subordinate Judge of Surat for Rs. 14,372-8-9. On the 3rd February following, the plaintiffs applied, under darkhast No. 28 of 1903, for the execution of the said decree, praying among other things for an order under section 272 of the Civil Procedure Code (Act XIV of 1882) directing the payment of the decretal amount to them out of the sum of Rs. 23,000 which, they were informed, was deposited by the defendant with the Collector of Surat, and on the same date the Court sent to the Collector a prohibitory order accompanied with a letter. The Collector on the 6th February, 1903, returned the prohibitory order with a letter stating that the judgment-debtor's estate was not in his control. Thereupon, on the 7th February the plaintiffs presented an application to the Court and prayed for an order directing the Collector to pay the attached amount to them under section 277

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of the Code. But the Court declined to pass such an order at that stage and addressed a further letter to the Collector, who, by his reply dated the 11th February, 1903, accepted finally the prohibitory order, and the Court on the 14th February directed that a notice be issued to the judgment-debtor requiring him to pay the decretal amount within a fortnight, and that, on his default, the Collector would be asked to pay the amount. On the 2nd March, 1903, the judgment-debtor applied for stay of execution for a month and a half on the ground that he was unable to make the payment, his property being then not in his control. The Collector also supported the judgment-debtor's application, but the Court rejected the application and on the 3rd March wrote a letter to the Collector asking him to send the decretal amount. On the 5th March the plaintiff again applied to the Court for an order on the Collector for the payment of the amount to them, but the Court declined to make the order on the ground that the rights of other decree-holders, who had in the meanwhile applied for execution of their decrees, had to be considered. On the 6th March the Collector wrote a letter to the Court inquiring whether execution was levied by attaching the judgment-debtor's money which was lying in the Bank of Bombay in the joint names of the Collector and the judgment-debtor and expressing his willingness to sign the order for the withdrawal of the said money if the judgment-debtor permitted him to do so. But before the said letter was received by the Court, the plaintiffs on the 6th March, 1903, made an oral application to the Court for the payment of the money jointly to all decree-holders who had up to that date presented applications for the execution of their decrees. The Court declined to do anything in the matter till a reply from the Collector was received. On the 9th March the plaintiffs applied reiterating their prayer for an order on the Collector for the payment of the decretal amount to them and undertook to give security for the claims of the other decree-holders who had applied for execution. The Court made no order on the said application, but made an order on the original application for execution dated the 3rd February, 1903, to the effect that a letter be written to the Collector requesting him to send a cheque for the decretal amount payable to the Nazir of the Court, and a letter to the said effect was sent to the Collector on the 10th March follow-

ing. The Collector on the 18th March sent a cheque for Rs. 15,623-11-3, that being the amount payable under the decree to the Nazir. The cheque was received by the Court on the 20th and it was cashed on the 23rd March. On the 24th March, 1903, the plaintiffs applied for subpœnas to the Collector and the Manager of the Bombay Bank for their examination to show that the payment made by the Collector was a voluntary payment by the judgment-debtor and, therefore, it would not fall under section 295 of the Civil Procedure Code. The Court merely recorded this application. On the 4th April, 1903, the day to which the hearing was postponed, the plaintiffs presented a further application submitting that the Collector had sent the amount as the agent, and with the sanction, of the judgment-debtor out of the funds lying in the Bank of Bombay in the joint names of the Collector and the judgment-debtor and not out of the monies in the hands of the Collector that were attached and that, therefore, section 295 of the Civil Procedure Code was not applicable and the other decree-holders were not entitled to rateable distribution of the said amount. But the Court overruled the plaintiffs' contention and ordered rateable distribution of the amount between decree-holders who had presented their darkhasts before the 20th March, 1903. The Court made a remark that it was not necessary to examine the Collector.

The plaintiffs applied under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) urging *inter alia* that the Court acted without jurisdiction, illegally and with material irregularity ; that the Court wrongly declined jurisdiction in refusing to pass an order under section 277 of the Civil Procedure Code, which was repeatedly asked for; that the Court had no jurisdiction under the circumstances of the case to apply section 295 of the Code; that the Court erred in holding that the monies sent by the Collector were realized in execution of the decree so as to fall under section 295 : that the Court should have held that the Collector made the payment on behalf of the judgment-debtor in satisfaction of the decree ; that the Court acted illegally and with material irregularity in refusing an opportunity to the applicants (plaintiffs) to adduce evidence in support of their contention that section 295 was not applicable

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to the circumstances of the case; and that in any event the Court erred in ordering rateable distribution to all decree-holders who had applied for execution before the 20th March 1903. A *rule nisi* was issued calling on the opposing decree-holders to show cause why the order of the Court should not be set aside.

Setalvad (with *K. M. Jhaveri*) appeared for the applicants (plaintiffs) in support of the rule:—Our first contention is that section 295 of the Civil Procedure Code is not applicable and that the Court had no jurisdiction to pass the order for rateable distribution. Our next contention is that the Court ought to have given us an opportunity to prove that the payment was a voluntary payment made by the judgment-debtor. Rateable distribution can be allowed only when the amount was realized by the Court under some process in execution and not otherwise. In the present case the money that came into Court was not attached. The money which was in the hands of the Collector was attached and not that which was deposited in the Bombay Bank. The money was not realized by sale or other process in execution proceedings. Further mere attachment would not make the money available for payment under section 295 of the Civil Procedure Code. There must be a further step, namely, realization in execution. The money being already in the hands of the Collector or in the Bank, it did not go to him in execution of the decree. Under the prohibitory order the Collector merely retained the money which was already in his hands.

[JENKINS, C. J.—Take the case of a judgment-debtor depositing money in Court.]

We submit that if he deposits the money in Court under the order of the Court, then it would be a deposit in execution proceedings. But in the present case the money had not come to the Court in that manner. The Bombay Bank was the debtor of the judgment-debtor and if the money had been attached while it was in the Bank, then section 295 would have applied. The Collector was not the judgment-debtor, therefore, the payment by the Collector was a voluntary payment: *Purshotamdass Tribhovandass* v. *Mahánant Surajbharthi*[1].

(1) (1882) 6 Bom. 588.

[JENKINS, C. J.—Would not section 295 of the Code be applicable to a payment made into Court by a receiver?]

We submit that the appointment of a receiver is a process in execution. The money must be realized in execution under the provisions of the Code and not otherwise: *Fink* v. *Maharaj Bahadoor Sing*(1). The word "otherwise" in section 295 means some process recognized by the Civil Procedure Code. *Ganga Din* v. *Khushali*,(2) shows that though the property of the judgment-debtor was attached still he made a voluntary payment. See also *Gopal Dai* v. *Chunni Lal*(3), *Sew Bux Bogla* v. *Shib Chunder Sen*(4), *Prosonno Moyi Dassi* v. *Sreenauth Roy*(5). The letters written by the Court to the Collector cannot be considered to be in the nature of any process known to the Civil Procedure Code. The Collector and the Manager of the Bank being not examined we are in the dark with respect to the circumstances under which the payment was made.

Supposing that section 295 is applicable, then the realization must be taken to have been effected on the date of the attachment. The money in the hands of the Collector was money in the hands of the judgment-debtor. Though the money was originally in the Bank when the order for attachment was made, still it was not in the Bank when it was actually attached. Therefore it could not be attached in the hands of the Collector by virtue of any legal process under the Code.

[JENKINS, C. J.—Has the cheque been cashed?]

It has been cashed and the money stands to the credit of the Court, but the money has not come to Court under any process known to the Code.

Further the persons entitled to come in for rateable distribution are decree-holders Nos. 78 and 84 only. Decree-holders Nos. 68, 69, 70 and 75 are not entitled to come in because at their instance no process had been issued under section 248 of the Civil Procedure Code, their decrees being more than one year old. The procedure under section 248 is not merely a matter of form. It is a procedure which must be gone through.

(1) (1899) 26 Cal. 772.
(2) (1885) 7 All. 702.
(3) (1885) 8 All. 67.
(4) (1886) 13 Cal. 225.
(5) (1894) 21 Cal. 809, 817.

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[JENKINS. C. J.—The Privy Council have held that so far as strangers are concerned the procedure under section 248 is not compulsory.]

Some of the applicants (decree-holders) for rateable distribution have merely put in applications under section 248, but have taken no further steps, such as payment of process fee, issue of notices, etc. Such applicants cannot take the benefit of section 295. These remarks apply to decree-holder No. 73. The application under section 248 must be such an application as is subsisting.

Goculdas K. Parekh for the opponent 9 (decree-holder No. 73).—Under the penultimate clause of section 295 of the Civil Procedure Code, the applicants can have their remedy by a separate suit.

So far as the question of evidence is concerned it has taken a new turn here. In the Lower Court it was stated that the applicant wanted to examine the Collector and the Manager of the Bank for the purpose of ascertaining the terms under which the money was deposited and to produce certain correspondence. No question was distinctly raised in the Lower Court as to whether the payment was voluntary.

As no process was issued against the Bank it was urged that the procedure adopted was rregular. But the applicants themselves brought about the irregularity, if any, and they cannot now turn round and say that they are entitled to the benefit of that irregularity. If the procedure was, according to their contention, irregular, they must take the consequences. The irregularity, however, would not absolve the money from its liability to rateable distribution. The Collector was asked by the Court to send in the money and he did so. Therefore the money came to the Court in execution process and consequently it was liable to rateable distribution under section 295 of the Code. A mere prohibitory order is not a final order under section 272. That section requires something more to be done and the money was brought into Court under the provisions of that section.

It was further contended that the money was not realized in a manner which would make section 295 applicable and certain

decisions were relied on. But those decisions are distinguishable. The payments therein referred to were not made under any process aimed at the money. In *Purshotamdass* v. *Mahânant Swajbharthi*[1] the money was paid under arrest. In *Fink* v. *Maharaj Bahadoor Sing*[2] rents were realized by a receiver and in *Prosonno Moyi Dassi* v. *Sreenauth Roy*[3] there was a sale by private agreement. We rely on *Sorabji E. Warden* v. *Govind Ramji*[4], *Srinivasa Ayyangar* v. *Seetharamayyar*,[5] and *Vishvanath Maheshvar* v. *Virchand Panachand*[6]. The last ruling is on all fours with this case. The prohibitory order is always subject to another order by the Court. What is to be taken into consideration is the stage at which the money goes into Court: *Bidhoo Beebee* v. *Keshub Chunder*[7], *Fink* v. *Maharaj Bahadoor Sing*[2]. Long before the money came into Court, applications for the attachment of the money were pending in the Court.

As to the objection under section 248 of the Civil Procedure Code:—Our application for attachment was made on the 16th March and the cheque was cashed on the 23rd March, 1903. The application was for the attachment of the money lying in the Bombay Bank in the names of the judgment-debtor and the Collector. The Court passed the order for attachment, but before the process fee was paid in, the money came into Court. It was, therefore, not necessary for us to take any further steps. Our application was therefore a good application. We made a second application with reference to the balance that was left in the Bank.

Manmukhram K. Mehta for opponents 1, 3, 4 and 5 (decree-holders Nos. 248, 68 and 69):—We adopt the argument advanced on behalf of opponent 9 in connection with section 295 of the Civil Procedure Code.

On the 6th March, 1903, the applicants (plaintiffs) made an application to the Court below that they were willing to take the money on behalf of all the decree-holders who had appeared. It was only on the 28th March that they changed their mind and

(1) (1882) 6 Bom. 588.
(2) (1899) 26 Cal. 772.
(3) (1894) 21 Cal. 809.
(4) (1891) 16 Bom. 91.
(5) (1895) 19 Mad. 72.
(6) (1881) 6 Bom. 16.
(7) (1868) 9 W. R. 462.

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applied to the Court for subpœnas to the Collector and the Manager of the Bank. It was in the discretion of the Court to grant or refuse such an application.

Under section 248 notices were issued to the judgment-debtor, but he did not appear and the Court ordered rateable distribution.

Setalvad in reply.—What was paid into Court was money not attached. Therefore the payment was a voluntary payment to which section 295 would not apply. What was attached was money standing in the names of the Collector and the judgment-debtor. It did not come into Court by way of realization under the decree.

The payment must be taken to have been made on the day the Court received the cheque, that is, on the 20th March: *Bhagvandas Kishordas* v. *Abdul Husein Mahomed Ali*[1].

There may be a remedy by suit, but that is no reason why we should not come up under the extraordinary jurisdiction if the Court below has failed to exercise its jurisdiction and has acted with material irregularity in shutting out our evidence: *Tiruchittambala Chetti* v. *Seshayyangar*[2].

JENKINS, C. J.—The only question we have to decide in this case is, whether on the facts disclosed we should be justified in setting aside, under section 622 of the Civil Procedure Code, the order of the Subordinate Judge, who has directed a distribution, under section 295 of the Civil Procedure Code, of assets held by it.

The petitioners have obtained a decree against Mr. Zulfikarally and they contend that a sum of money, which has been paid into Court, ought not to have been distributed under section 295, but should have been paid to them exclusively. They maintain that the sum of money which is in Court does not fall within the description of assets dealt with in section 295, because, in the first place (they argue), it cannot be said that those assets have been realized, and, in the next place, even if they have been realized, they have not been realized in execution of a decree

(1) (1878) 3 Bom. 49. (2) (1881) 4 Mad. 383.

The circumstances under which the assets in dispute came into Court are briefly these. The present petitioners, believing that the Collector had in his hands money belonging to the judgment-debtor, applied for an attachment of that money by proceedings under section 272, Civil Procedure Code, and they further asked for a direction for payment to them of their decretal amount out of the sum of money which, (as they alleged) they were informed and believed, was deposited with the Collector by the judgment-debtor. An order was passed on that occasion, but it did not bear any immediate fruit. Subsequently the Collector wrote to the Judge asking whether the attachment was levied against certain moneys that were deposited in the Bank of Bombay. The Collector intimated not only that the moneys were deposited in the Bank of Bombay in the joint names of the Collector and the judgment-debtor, but also that he was willing to sign the order for the withdrawal of the money if the judgment-debtor permitted him to do so.

The petitioners then applied for an order on the Collector to pay them the decretal amount and the Court directed that a letter be written to the Collector requesting him to send the cheque for the decretal amount to the Court payable to the Nazir of the Court. On the 10th of March a letter in those terms was sent to the Collector.

On the 18th March the Collector sent a cheque for Rs. 15,623-11-0, payable to the Nazir of the Court, that being the amount of the petitioners' decree, and it is that sum with which we are now concerned.

We have passed over some intermediate stages of the proceedings which led up to the payment of that sum; but we have stated enough to indicate the circumstances under which it was paid, and we have now to determine whether the Judge in directing a distribution under section 295 has fallen into an error that would justify us in exercising our revisional jurisdiction.

First then can it be said that there has been no realization?

What the section provides is that whenever assets are realized by sale or otherwise in execution of a decree, the consequences prescribed in the section shall follow.

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Prima facie the word "realized" implies that property has been converted into or obtained in cash or some other form available for immediate distribution, and there is nothing in the word itself which requires that that process should take place as the result of any ulterior proceeding in the course of execution. So that, if we take the word "realized" alone, it is insufficient to bear the burden that the petitioners would place on it. But then it is said it has not been realized in execution, because the cash came into Court as a result of orders which were not properly made having regard to the circumstances which have since been disclosed.

The line of argument is briefly this: inasmuch as the money was not in the hands of the Collector but was standing to the credit of the Collector and the judgment-debtor in the Bank of Bombay, any order under section 272 should have been directed not against the Collector but against the Bank. But it is quite clear that an order under section 272 is an order in execution, and section 272 contemplates that the Court should not only direct notice to issue, but should pass further orders in the matter.

The Subordinate Judge acting (as he appears to us to have acted) under section 272, whether rightly or wrongly, ordered the letter to be written to the Collector which resulted in the payment into Court of this sum of Rs. 15,623-11-0. How can it with fairness be said by the present petitioners that that money was not brought in in execution?

There is a general principle that a litigant must act throughout consistently with the position he has taken up in the litigation in which he is engaged.

Here these petitioners have been enabled by an order of the Court, purporting to have been passed in execution at their own instance, to obtain payment into Court of a sum of money, and now they come and ask us to say that it was not paid in execution.

We do not think that we ought under section 622 to listen for a moment to such a suggestion. We think that if there has been any irregularity (we are not at present deciding that there was) it was an irregularity occasioned by the petitioners themselves, and an irregularity out of which they have gained most

substantial advantage, so that we should be putting section 622 to a purpose for which it is never intended, if we gave effect to the contention they have urged before us.

We are not fo getful of the case of *Purshotamdass Tribhovandass* v. *Mahánant Surajbharthi Haribharthi*,(1) and the many other cases that have been brought to our notice; but it is enough for us to say that they appear to us to be absolutely foreign to the present case. By way of example we may take the case of *Purshotamdass* v. *Mahánant Surajbharthi*,(1) where a judgment-debtor paid off an execution against his person and in return secured his release. The decree-holder was master of the position and the only reasonable interpretation, we think, to be put on that case was that the decree-holder accepted that sum of money as the only term on which he would be a party to the release of the judgment-debtor.

We may remark in passing in reference to that case that so far as the record discloses it does not appear that it came in strictness within section 295 at all, because from the reference as cited in the report it does not seem that the assets were held by the Court. But be that as it may, the circumstances to which we have alluded show there is a broad and fundamental distinction between that case and the present.

It is made a matter of grievance by the petitioners that they were not allowed to call the Bank Manager and the Collector, but we think the Judge exercised a wise discretion in the matter.

So much for the general questions; it only now remains to notice very shortly the particular objections urged against the participation in this distribution of individual creditors. First it is said that the decree-holder No. 73, who is the ninth respondent, is not entitled to share, because there was no effective application for execution made by him at the time when the realization took place. But we think that the answer to that is to be found in the application of the 16th March, 1903, which was a clear application for execution of the decree though *bhatta* was not paid.

The objection urged against the other decree-holders, who have been distinguished before us by Nos. 68, 69, 70 and 78, is

(1) (1882) 6 Bom. 588.

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that the provisions of section 248, Civil Procedure Code, have not been complied with, but it is clearly shown that in the case of Nos. 68 and 69 there is no ground for this suggestion and we cannot on the record before us find anything which entitles us to say that the Judge has committed any error with regard to Nos. 70 and 75.

The result is that the rule must be discharged with costs.

Rule discharged.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1903. *December* 15.

THE SECRETARY OF STATE FOR INDIA (ORIGINAL DEFENDANT) APPELLANT, *v.* HARBATRAO HARI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Inámdár—Dasname Sanyasi and Gosavi Zundivale—Kadim (ancient) haks—Escheat—Corporate body—Fluctuating communities—Duty of the Court, if possible, to find legal origin of existing facts.

The plaintiffs, whose title as Inámdárs of a village dated back to 1762, sued on the strength of their title as Inámdárs to recover, on account of certain haks, a sum of money which they alleged was due to them and was wrongly taken by the defendant. The defendant alleged that the haks were *Kadim* (ancient, *i. e.*, which came into existence prior to the Inám grant of the village to the plaintiffs' ancestors) and had escheated to Government. The Court below allowed the claim.

On appeal by the defendant,

Held, confirming the decree, that in order to make out that the Government had become entitled to the haks (Dasname Sanyasi and Gosavi Zundivale) by virtue of an escheat three things must be established, namely, that (1) there was a heritable grant to individuals, (2) that the heirs of those individuals have failed, and (3) that on the happening of these two conditions the haks would escheat to Government.

The burden of establishing a title by escheat lies on those who assert it.

The expressions Dasname Sanyasi and Gosavi Zundivale do not indicate individuals. They indicate a group or community of Sanyasis or Gosavis.

The law of the country recognizes fluctuating communities as legal *persons* capable of owning property, as, for instance, the caste and the village, and the hakdars in the present case were communities composed of the religious elements their names indicate.

* Appeal No. 93 of 1901.