

## APPELLATE CIVIL.

*Before Sir John Beaumont, Chief Justice, and Mr. Justice Sen.*

DHIRENDRARAO KRISHNARAO GUNJIKAR (ORIGINAL APPLICANT),

APPLICANT v. VIRBHADRAPPA G. HOSMANI (ORIGINAL

OPONENT), OPPONENT.\*

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*Civil Procedure Code (Act V of 1908), sections 63, 73, Order XXI, rule 72—Rateable distribution—Proceedings in superior and inferior Courts in execution of their decrees—Assets realised by superior Court—Decree-holder in that Court allowed to set-off decretal amount against purchase-money—Rateable distribution not affected by set-off—Application for rateable distribution can be made to the Court passing the decree before the receipt of the assets.*

A decree was obtained by the applicant in the Court of the First Class Subordinate Judge at Dharwar. In execution of the decree the immoveable property of the judgment-debtor was ordered to be sold. The applicant got leave to purchase the property at the Court sale and to set-off the purchase-money against the decretal amount. At the date of the sale there were other decree-holders (opponents Nos. 2 to 6), who had obtained decrees against the same judgment-debtor in the Court of the Second Class Subordinate Judge at Dharwar. After the sale, opponents Nos. 2 to 6 applied to the First Class Subordinate Judge at Dharwar for the rateable distribution of the sale proceeds and that distribution was ordered. The applicant applied in revision against the order. It was contended on his behalf, firstly, that no rateable distribution could be ordered because the order allowing the applicant to set-off was a proceeding within section 63(2) of the Civil Procedure Code, which could not be invalidated under the section; and secondly, that under the terms of section 73 of the Civil Procedure Code, the First Class Subordinate Judge had no power to order rateable distribution because the applications were made to him after the receipt of the assets under the sale.

*Held*, that the order of set-off made under Order XXI, rule 72 (2) of the Code, was mere machinery which did not affect the rights of third parties and all that was meant by the order was, that the decree-holder could exercise his right by setting off the amount of his decree against that portion of the proceeds of sale to which he was entitled, but could not apply for a set-off against those portions of the proceeds of sale which belonged to other parties.

*Navaj v. Totaram*,<sup>(1)</sup> followed.

Section 63 of the Code of Civil Procedure does not determine the principle on which the Court is to act in determining claims of persons who have obtained attachments in execution of the decrees of inferior Courts to rateable distribution of the proceeds of sale. It only lays down which Court is to decide the question. In determining whether rateable distribution is to be allowed or not the Court has to look at section 73. In a case such as the present, sections 63 and 73 must be read

\* Civil Revision Application No. 116 of 1933.

<sup>(1)</sup> (1930) 33 Bom. L. R. 503.

together and when so read the true construction of section 73 is that an application need only have been made to the Court which granted the decree before the receipt of the assets and need not be made to the Court which holds such assets. In other words that the Court to which application for execution must be made means the appropriate Court and includes an inferior Court which granted a decree to be executed.

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*Girindra Nath Ray v. Kedarnath Bityanta*,<sup>(1)</sup> *Narasimha Chariar v. Krishnama Chariar*,<sup>(2)</sup> *Kwai Tong Kee v. Lim Cheung Ghee*<sup>(3)</sup> and *Shihappa Laxmanna v. Gurusangaya Akhandaya*,<sup>(4)</sup> followed.

CIVIL APPLICATION for setting aside the order passed by V. V. Phadke, First Class Subordinate Judge at Dharwar.

Application for rateable distribution.

The applicant obtained a decree on September 7, 1930, against opponent No. 1 and two others for Rs. 6,367-3-0 in a suit in the Court of the First Class Subordinate Judge at Dharwar. He filed a darkhast No. 181 of 1930 for the recovery of Rs. 7,738-2-2 asking for the sale of the immoveable property of the judgment-debtor and got leave to purchase the property at the Court sale and to set-off the purchase-money against the decretal amount. The sale was held on September 3, 1932, and the amount realised was Rs. 7,776. This amount was set off against the decretal amount.

The opponents Nos. 2 to 6 had obtained decrees against judgment-debtor in the Court of the Second Class Subordinate Judge, Dharwar, before the sale, and at the date of the sale, they had applied to that Court to execute their decrees. After the sale, on September 6, 1932, they applied to the First Class Subordinate Judge at Dharwar for rateable distribution of the sale proceeds. The Subordinate Judge made the order for rateable distribution on the following grounds :—

“ In all these darkhasts the judgment-debtor is the same. The decrees are all decrees for money and applications to execute the decrees have been made before the realisation of the assets. As laid down in 33 Bom. L. R. 503 assets could only be

<sup>(1)</sup> (1924) 29 Cal. W. N. 575.

<sup>(2)</sup> (1914) 26 Mad. L. J. 406.

<sup>(3)</sup> (1928) 6 Ran. 131.

<sup>(4)</sup> (1930) 55 Bom. 473.

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deemed to have been received when the sale actually took place . . . I think, therefore, that the amount for which the property was sold must be rateably distributed among all the decree-holders who have submitted applications for execution of their decrees before the date of sale."

The applicants applied to the High Court.

*R. A. Jahagirdar*, for the applicant.

*G. P. Murdeshwar* and *B. G. Murdeshwar*, for the opponents.

BEAUMONT C. J. This is a revision application, in which we are asked to review an order of the First Class Subordinate Judge of Dharwar, allowing rateable distribution of the proceeds of a sale in execution at the suit of the applicant, amongst the various opponents jointly with the applicant.

The material facts are that on September 7, 1930, the applicant obtained a decree for Rs. 6,000 odd in a suit in the Court of the First Class Subordinate Judge, Dharwar, against the defendant in the suit, and on November 20, 1931, filed a darkhast asking for the sale of immoveable property of the judgment-debtor, and the darkhast was sent to the Collector for execution. On July 21, 1932, the applicant got leave to purchase the property at the Court sale and to set-off the purchase money against the decretal amount. On September 3, 1932, the sale took place and realised substantially the exact amount due upon the applicant's decree. It appears that at the date of the sale there were darkhasts outstanding which had been filed in the Court of the Second Class Subordinate Judge of Dharwar in favour of various opponents, and opponents Nos. 2 to 6 applied, on September 6, 1932, to the First Class Subordinate Judge of Dharwar for rateable distribution of the sale proceeds, and that distribution was ordered. The applicant now applies in revision against the order. He says that in terms of section 73 of the Civil Procedure Code the Judge had no power to order rateable distribution because applications to him to enforce the decrees in the Second Class Subordinate Judge's Court

had not been made before the moneys were received, that is, before September 3, 1932.

A preliminary point was taken by the applicant that no rateable distribution could be ordered because of the direction that he be allowed to set-off the amount of his decree against the purchase money, such order being said to be "proceeding" within section 63 (2) of the Civil Procedure Code. That order was made under the power conferred by Order XXI, rule 72 (2), of the Code of Civil Procedure, and the order is, in my opinion, mere machinery, which does not affect the rights of third parties. Apart from the order allowing set-off, the decree-holder, who purchased, would have to bring the purchase money into Court and then he would be paid, as far as the moneys went, the amount due to him on his decree. To avoid this procedure the Court can allow set-off, but all that the order allowing such set-off means is that the decree-holder can exercise his right by setting off the amount of his decree against that portion of the proceeds of sale to which he is entitled. He cannot set-off against a portion of the proceeds of sale which belongs to other parties. That was the view of this Court in *Navaj v. Totaram*,<sup>(1)</sup> and it seems to me to be clearly the right view.

The substantial point which arises on this application is as to the construction of sections 63 and 73 of the Civil Procedure Code. Section 63 provides :—

"Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realise such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached."

The effect of that section in the present case is to impose upon the First Class Subordinate Judge at Dharwar the duty of realising the property, receiving the proceeds and determining the claims thereto; and amongst those claims to be determined are the claims of persons who have obtained attachments in execution of the decrees of inferior Court for

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<sup>(1)</sup> (1930) 33 Bom. L. R. 503.

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rateable distribution of the proceeds of the sale. But section 63 does not determine the principle on which the Court is to act in determining the claims; it only lays down which Court is to decide the question. In determining whether rateable distribution should be allowed or not the Court has to look at section 73, which provides :

“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 and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons.”

It is to be noticed that the wording of section 73 differs materially from the wording of section 295 of the former Code, which it replaced. That section dealt, not with the assets held by the Court, but with assets which had been realised by the Court, and instead of referring, as the present section does, to an application to the Court for the execution of a decree, it refers to an application to the Court which has realised the assets, so that, there could be no doubt that under the old section the Court to which an application had to be made was the Court which had realised the assets. It is not so clear in the present section that the Court to which the application has to be made must be the Court which holds the assets, and may not be the Court which granted the decree. But we are not concerned in this case with the construction of section 73 except in a case which is dealt with by the Court under section 63. In a case of that nature it seems to me to be clear that sections 63 and 73 must be read together. Section 63, on the facts of the present case, in substance prevents the holders of decrees of inferior Court from enforcing those decrees and imposes upon the superior Court, that is the Court of the First Class Subordinate Judge, the duty of distributing the assets, and thereby in effect, executing not only the decree of his own Court but the decrees of the inferior Court. In such a case it would certainly be a hardship on the holders of the decrees of the inferior Court if they could not claim any share

in the execution carried out by the superior Court, unless, before the moneys were received by the superior Court, they had got their decrees transferred to that Court. Such procedure would involve considerable expense and, moreover, the holders of decrees in the inferior Courts might not hear of the proceedings of the superior Court until after the receipt of the assets to be distributed, when it would be too late to share. So that considerations of equity and common-sense suggest that in a case in which the Court is determining under section 63 the right to rateable distribution, the true construction of section 73 is that an application need only have been made to the Court which granted the decree before the receipt of the assets and need not be made to the Court which holds such assets. In other words that the Court to which application for execution must be made means appropriate Court and includes an inferior Court which granted a decree to be executed. In my opinion, that is the right view and it is the view which has prevailed in various High Courts in India: See *Girindra Nath Ray v. Kedarnath Bidyanta*,<sup>(1)</sup> *Narsimha Charivar v. Krishnama Chairiar*,<sup>(2)</sup> *Kwai Tong Kee v. Lim Chaung Ghee*,<sup>(3)</sup> *Shiddappa Laxmanna v. Gurusangaya Akhandaya*.<sup>(4)</sup> In my opinion, therefore, the First Class Subordinate Judge was right in this case in allowing rateable distribution.

Mr. Jahagirdar for the applicant has relied on *Nimbaji Tulsiram v. Vadia Venkati*,<sup>(5)</sup> but that was a decision on the old section 295, and is, therefore, no authority on the construction of section 73 of the present Code. Moreover, that case followed *Muttalagiri v. Muttayyar*,<sup>(6)</sup> which has since been dissented from by the High Court of Madras.

The application is dismissed with costs.

SEN J. I agree.

*Application dismissed.*

J. G. R.

<sup>(1)</sup> (1925) 29 Cal. W.N. 575.

<sup>(2)</sup> (1914) 26 Mad. L. J. 406.

<sup>(3)</sup> (1928) 6 Ran. 131.

<sup>(4)</sup> (1930) 55 Bom. 473.

<sup>(5)</sup> (1892) 16 Bom. 683.

<sup>(6)</sup> (1883) 6 Mad. 357.

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