

proposed by my learned brother in his judgment, dated October 9, 1936, must be carried out, that is, the learned Subordinate Judge should ascertain the amount of the compensation that the plaintiffs are entitled to, on the basis of section 70 of the Indian Contract Act, in respect of the beef market and the slaughter-house put up by the plaintiffs on the municipal sites.

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Finding to be returned within two months.

Appeal allowed.

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APPELLATE CIVIL.

Before Mr. Justice Barlee and Mr. Justice Tyabji.

CHUNILAL RAICHAND, VAHIWATDAR OF BROACH PANJARAPOLE PROPERTIES (ORIGINAL DECREE-HOLDER), APPLICANT v. THE BROACH URBAN CO-OPERATIVE BANK LTD. AND ANOTHER (ORIGINAL OPPONENTS), OPPONENTS.*

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Civil Procedure Code (Act V of 1908), section 73—Rateable distribution—Interpretation of section 73.

Under section 73 of the Civil Procedure Code, 1908, rateable distribution can be allowed only where there are two or more decrees passed against the same judgment-debtor.

The petitioner Chunilal obtained a money decree against one Jorbhai and after his death opponent No. 4 obtained a decree against the widows of Jorbhai to recover money owed by Jorbhai. In execution of opponent No. 4's decree, Jorbhai's property was sold by the Court. Before the assets were realized, the petitioner applied to the Court for rateable distribution.

Held, that the petitioner could not be allowed rateable distribution under the provisions of section 73 of the Civil Procedure Code, 1908.

Govind Abaji Jalhadi v. Mohoniraj Vinayak Jalhadi,⁽¹⁾ followed.

Rama Krishnan Chettiar v. Viswanathan Chettiar,⁽²⁾ disapproved.

APPLICATION praying for setting aside the order passed by D. V. Yennemadi, District Judge at Broach, confirming the order passed by P. C. Diwanji, First Class Subordinate Judge at Broach.

Application for rateable distribution.

* Civil Revision Application No. 388 of 1936.

⁽¹⁾ (1901) 25 Bom. 494.

⁽²⁾ (1935) 59 Mad. 93, F. B.

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The petitioner, Chunilal Raichand, obtained a money decree in Suit No. 265 of 1928 against one Jorbhai Dadabhai. He filed Darkhast No. 358 of 1930 and in execution got Jorbhai's property attached. Pending execution Jorbhai died. His widows were brought on record and execution of the decree was proceeded with.

In 1934, opponent No. 4, The Broach Urban Co-operative Bank Ltd., obtained a decree against the widows of Jorbhai to recover money due to the Bank by Jorbhai. The Bank filed a Darkhast No. 514 of 1934 and got the same property which was attached under petitioner's Darkhast No. 358 of 1930, sold through Court.

Before the assets were realized by the Court, the petitioner applied to the Court for rateable distribution.

The First Class Subordinate Judge, Broach, held that he was bound by the ruling of the Bombay High Court reported in 25 Bom. 494 though that view was not accepted by the Full Bench of the Madras High Court in 59 Mad. 93. The application was, therefore, rejected.

The appeal preferred to the District Judge was dismissed under Order XLI, rule 11 of the Civil Procedure Code, 1908.

The petitioner applied to the High Court.

B. G. Thakore, for the applicant.

H. D. Thakor, for opponent No. 4.

BARLEE J. The question which we have to decide is whether we should refer this case to a full bench for reconsideration of the ruling of this Court in *Govind Abaji Jakhadi v. Mohoniraj Vinayak Jakhadi*,⁽¹⁾ in view of the subsequent decision of a full bench of the Madras High Court in *Rama Krishnan Chettiar v. Vishwanathan Chettiar*.⁽²⁾ The question concerns the interpretation of section 73 of the Civil Procedure Code which provides for rateable distribution amongst

⁽¹⁾ (1901) 25 Bom. 494.

⁽²⁾ (1935) 59 Mad. 93, F. F.

decree-holders of assets held by a Court. Such assets have to be rateably distributed amongst such persons as have applied to the Court for the execution of decrees passed against the *same* judgment-debtor. Now in *Govind Abaji Jakhadi v. Mohoniraj Vinayak Jakhadi*⁽¹⁾ a decree had been obtained by Mohoniraj against one Bhau Babaji; Bhau died shortly after and his son Kashinath was placed on the record as his legal representative; meantime Govind Abaji obtained a decree against Kashinath as the legal representative of the estate of his father Bhau and applied under section 295 (now section 73) to share rateably in the proceeds. The trial Court rejected the application and Govind Abaji later came before this Court in revision, when Sir Lawrence Jenkins C.J. and Chandavarkar J. decided that there was no case made out for a rateable distribution. The learned Chief Justice's judgment is very short. He says (p. 496) :—

"In my opinion no case is made for a rateable distribution under section 295 . . . It is useless to speculate as to any other test than that which the section itself provides, and that test is stated in the plainest terms. So far as the present case goes, it is enough to say that the money decrees must be against the *same* judgment-debtor. Here, however, one decree is against Bhau Babaji Jangam and the other is against his son Kashinath."

In the present case the petitioner obtained a decree against one Jorbhai and after his death defendant No. 4, the Broach Urban Co-operative Bank, obtained a decree against the widows of Jorbhai to recover money due to the bank by Jorbhai. Therefore the two decrees were not passed against the same judgment-debtor and the position is exactly the same as that in *Govind Abaji Jakhadi v. Mohoniraj Vinayak Jakhadi*.⁽¹⁾ The Judges who decided the Madras full bench case were of opinion that the view taken in our Court was too narrow. Mr. Justice Pandurang Row says (p. 97) :—

"In neither of these two cases [*Govind Abaji Jakhadi v. Mohoniraj Vinayak Jakhadi*⁽¹⁾ and *Srinivasa Aiyangar v. Kanthimathi Amma*⁽²⁾] was any reference made to the objects of section 73 of the Code of Civil Procedure."

⁽¹⁾ (1901) 25 Bom. 494.

⁽²⁾ (1910) 33 Mad. 465.

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Later on he says (p. 98) :—

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“ In *Nilmani v. Hirval*,⁽¹⁾ the fact that both the decrees were capable of execution against the same estate was held to be a sufficient reason for concluding that the decrees may without unduly straining the language of section 73 of the Code of Civil Procedure be regarded as passed against the same judgment-debtor. . . . ”

This view had been considered but discarded in our Court. Mr. Justice Cornish stated (p. 100) :—

“ The notion underlying these principles is that the legal representative takes the place of the deceased and is under the obligation which lay upon the deceased of paying lawful claims against the deceased out of the deceased's assets.”

This is no doubt correct, but hardly relevant. It explains why the legislature should have provided for a case of this sort. But the fact remains that section 295 of the Code of Civil Procedure did not provide for a case of this nature. It provided for one case only where there are two or more decrees passed against the same judgment debtor; and though after that decision, which was delivered in 1901, the Civil Procedure Code of 1882 was repealed and re-enacted and Sir Lawrence Jenkins himself was a member of the Special Committee on the Bill, the legislature neglected to take the opportunity of changing the words of the section. In my opinion the Madras interpretation is not justified by the words of the section, and since the legislature has not cared to amend it, we must accept it as it is unamended, and must follow the case of *Govind Abaji Jakhadi v. Mohoniraj Vinayak Jakhadi*.⁽²⁾

The rule is, therefore, discharged with costs.

TYABJI J. I agree. We are invited to refer the question to a full bench on the ground that the decision in *Govind Abaji Jakhadi v. Mohoniraj Vinayak Jakhadi*⁽²⁾ requires to be reconsidered, especially in view of the decision in *Rama Krishnan Chettiar v. Vishwanathan Chettiar*.⁽³⁾

In *Govind v. Mohoniraj*⁽²⁾ it was held that the rule laid down in section 295 of the Civil Procedure Code of 1882 (which corresponds to section 73 of the present Code) must be

⁽¹⁾ (1917) 27 Cal. L. J. 100.

⁽²⁾ (1901) 25 Bom. 494.

⁽³⁾ (1935) 59 Mad. 93, F. B.

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construed in accordance with the language of the legislature. Sir Lawrence Jenkins observes : " It is useless to speculate as to any other test than that which the section itself provides ; " and he goes on to say : " that test is stated in the plainest terms ". The test provided by the section is that the decrees in execution of which the assets may be rateably distributed, must be decrees against the same judgment-debtor. Sir Lawrence Jenkins shortly states that the judgment-debtor cannot be said to be the same when the earlier decree is against the deceased and the second decree is against the legal representative of the deceased,—notwithstanding that both decrees are ultimately founded on a liability resting upon the deceased. Chandavarkar J., who agreed with Sir Lawrence Jenkins, elaborates the reasoning. He refers in particular to the phraseology of the Code where the expression " Judgment-debtor " is defined ; and to section 234 corresponding to section 50 of the present Code. He comes in the result to the same conclusion as Sir Lawrence Jenkins, viz., that a decree obtained against A must be construed as a decree against a different judgment-debtor from a decree obtained against the legal representatives of A.

The petitioner before us relies mainly upon the reasoning of the full bench case decided by the Madras High Court to which I have already referred. Shortly stated the reasoning comes to this that though section 73 refers to " the same judgment-debtor ", yet the reason why the section is enacted and the object of the section apply not only to decrees against the same judgment-debtor, but to a wider class of decrees, viz., to all decrees capable of execution against the same estate ; and that on this ground although the wording of section 73 provides that the decrees must be against " the same judgment-debtor, " the section must be construed as if it provided that decrees capable of execution against the same estate must result in

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the assets being rateably distributed amongst all the decree-holders.

It seems to me that the Courts have no jurisdiction to expand in this manner a legislative provision such as section 73. The section primarily relates to procedure. It provides for one particular case. Another case (considered from what the Court conceives to be the object with which section 73 is enacted) may stand on the same footing. But this is no ground for assuming jurisdiction to decide the other case, for which no provision has been made by the legislature, as if it had been provided for by the Legislature. My learned brother has pointed out that one of the Judges taking part in the decision in *Govind Abaji Jakhadi v. Mohoniraj Vinayak Jakhadi*⁽¹⁾ was Sir Lawrence Jenkins and that after the decision he sat on the Special Committee for revising the Civil Procedure Code; and yet the Code was not altered so as to provide for such cases.

If once the Courts proceed on the basis that is suggested, we may be invited to proceed similarly on an infinite number of grounds. Every matter referred to in section 73 may then be liable to be substituted by other matters which the Court may consider to stand on a similar footing. Section 73 may thus be expanded infinitely in all directions, by a process of the permutation and combination of conditions, which it may be argued stand on principle on the same basis as the particular condition expressly referred to by the legislature. But that is a power that the Courts cannot assume to themselves,—for all the prayers and tears of the party who for the time being suffers from this limitation upon the functions and powers of the Court.

It seems to me, therefore, that taking the law as it is laid down in section 73,—and not the law as it might have been if the section had not restricted its terms in the manner in which they are restricted,—no other decision could have

⁽¹⁾ (1901) 25 Bom. 494.

been arrived at than that contained in *Govind Abaji Jakhadi v. Mohoniraj Vinayak Jakhadi*⁽¹⁾; and it is useless to speculate whether other circumstances are so similar to those mentioned in section 73 that the legislature ought to provide that a similar rule ought to govern the other circumstances.

I agree, therefore, that we ought to follow *Govind v. Mohoniraj* and that there is no reason why the case should be referred to a full bench.

Rule discharged.

J. G. R.

⁽¹⁾ (1901) 25 Bom. 494.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice N. J. Wadia.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT),
APPELLANT v. GANESH NARAYAN GADGIL (ORIGINAL PLAINTIFF), RESPONDENT.*

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*The Bombay Land Revenue Code (Bom. Act V of 1879), sections 65 and 66—
Occupant—Agricultural land—Trespasser using land for non-agricultural purpose—
Liability of occupant to pay fine.*

Under section 66 of the Bombay Land Revenue Code, 1879, an occupant of land assessed for agricultural purposes is liable to fine if there is any user of his land for purposes other than agriculture by a trespasser whether or not the occupant has consented to or has knowledge of such user.

SECOND APPEAL against the decision of S. M. Kaikini, District Judge, Thana, reversing the decree passed by R. G. Shirali, First Class Subordinate Judge at Thana.

Occupant's liability to pay fine.

The plaintiff was the occupant of Hissa No. 6 in Survey No. 260 of Murbad, assessed for agricultural purposes. In 1928, the Talati made a report that from a portion of this land stones were quarried. On this, the District Deputy