APPELLATE CIVIL.

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

LALCHAND RADHAKISAN AND OTHERS, OWNERS AND VAVIVATDARS OF THE SHOP STYLED "RADHAKISAN LALCHAND" (ORIGINAL PLAINTIFFS), APPELLANTS *v.* RAMDAYAL RAMNARAYAN AND OTHERS (NOS. 1 to 5 DEFENDANTS: NO. 6 SURETY, NOS. 7 AND 8 JUDGMENT-CREDITORS IN THE DARKHAST), RESPONDENTS.* 1938 August 18

Civil Procedure Code (Act V of 1908), s. 73—"Assets held by a Court"—Interpretation—Execution—Money paid by surety under surety bond—Bond executed to enable defendant to set aside ex parte *decree—Rival decree holders—Rateable distribution—Question affecting surety—Appeal—Revision.*

It is apparent from a consideration of the terms of s. 73, and its position in the Civil Procedure Code, 1908, that the words "assets held by a Court" mean assets received in execution. The section plainly does not apply to moneys paid into Court in a suit when no question of execution arises. The other limitation to be applied to the words is that when the assets have been paid in for a specific purpose, they cannot be applied generally in execution, so as to defeat the specific purpose.

Where money is paid into Court by a surety in execution proceedings taken out against him in consequence of his obligation under a surety bond executed by him in order to enable a defendant to have an *ex parte* decree set aside, the money thus paid by him is not subject to rateable distribution under s. 73 of the Civil Procedure Code, 1908.

Sorabji Coovarji v. Kala Raghunath,[1] referred to.

Held, overruling the preliminary objection, that an appeal lay under s. 47 read with s. 145 of the Civil Procedure Code, 1908, but even if an appeal did not lie, the Court could deal with the matter in revision under s. 115 of the Civil Procedure Code, 1908.

SECOND APPEAL from the decision of K. M. Kumthekar, District Judge, Ahmednagar, confirming an order made by T. N. Desai, First Class Subordinate Judge, Ahmednagar.

Rateable distribution.

In 1930, Lalchand Radhakisan and others (appellants) obtained against Ramdayal Ramnarayan and others (respondents Nos. 1 to 5) an *ex parte* decree in the Court of the First Class Subordinate Judge, Thana. The appellants then started execution proceedings in the Court of the First Class Subordinate Judge, Ahmednagar.

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The respondents Nos. 1 to 5 applied, however, to the First Class Subordinate Judge's Court, Thana, to have the suit restored to the file and the Court made an order, granting the application provided the respondents furnished in the First Class Subordinate Judge's Court, Ahmednagar, a fit and solvent surety for the decretal amount. Narayandas Tarachand (respondent No. 6) passed on November 25, 1930, a surety bond in the following terms :—

"Darkhast (application for execution) of the said number has been filed by the plaintiff in the First Class Sub-Judge's Court at Nagar in execution of the decree in suit No. 189/30 of the Thana Court. The said defendants have filed Mis. Application No. 70/30 in the First Class Sub-Judge's Court at Thana for restoring the said suit to the file. (sic.) And in the said proceedings the defendants have applied to the Thana Court for the stay of the execution proceedings pending in the First Class Sub-Judge's Court at Nagar. And on (their) application Me. F. C. Sub-Judge, Court Thana, has passed an order that if the defendants furnish a fit and solvent surety for the decretal amount in the First Class Court at Nagar, the execution proceedings should be stayed. A yadi (memo) Outward No. 355/14-10-30. to this effect has been received from Me. F. C. Sub-Judge Saheb, Thana. Accordingly the yadi (memo) has been placed at Ex. 6 in the record of D. No. 1063/30 of the Nagar First Class Court. In accordance with that I the surety—Narayandas Tarachand Marwadi, age 35 years, occupation trading, residence Nagar, do give in writing that I am ready and willing to offer myself as a surety for the defendants Ramdayal Ramnarayan Marwadi and others of Nagar, to the extent of Rs. 3,400 three thousand and four hundred. And I have become a surety for the said defendants to the extent of Rs. 3,400. And I do agree with the Court that the defendants will submit to and will discharge their liability on the decree or the order, which decree or order will be passed in suit No. 189/30 on account of Mis. Application No. 70/30 of the Thana Court. If the defendants fail to act accordingly, I the surety Narayandas Tarachand Marwadi of Nagar will myself pay into Court Rs. 3,400 three thousand and four hundred rupees, in accordance with the order of the Court. I will pay in and my heirs will pay in and executors of my will (and) assignees will pay into Court Rs. 3,400 in accordance with the orders of the Court. This surety bond has been passed in writing. Signed. Date 25th November 1930 A.D.

1 Sd. Narayandas Tarachand, in his own hand."

On October 26, 1932, the appellants obtained against respondents Nos. 1 to 5 a fresh decree the material terms of which were as follows :—

"The defendants do pay to plaintiffs Rs. 2,838 personally and from the property of the shop of Kanayalal Ramchandra & Co. of Ahmednagar. Likewise, they should pay half the costs of the suit and further interest on Rs. 2,438 at Rs. 6 per cent. per annum from the date of the suit."

On March 29, 1933, the appellants applied to execute their decree by *darkhast* No. 309 of 1933 against respondents Nos. 1 to 5 and the surety (respondent No. 6) to recover the decretal amount by attachment and sale of their moveable property.

On June 2, 1933, the surety paid through the judgment-debtors Rs. 700 and himself paid Rs. 2,700 on June 5, 1933, praying that the amount should be received and the surety bond cancelled. On the same day, Motilal Arjun and Shridhar Raghunath (respondents Nos. 7 and 8) applied to the Court, claiming rateable distribution in the moneys paid in *darkhast* No. 309 of 1933, they having previously applied to execute their decrees respectively by their *darkhasts* Nos. 1039 of 1932 and 454 of 1933.

The executing Court, while holding that Rs. 700 were not liable to rateable distribution, held that Rs. 2,700 were so liable and accordingly allowed rateable distribution to respondents Nos. 7 and 8.

On appeal, the District Judge held that no appeal lay against the order and on the merits he further held that the order of the Court below was correct. He gave his reasons as follows :—

"Against that order the present appellants have come to this Court in appeal. They allege that as it's the surety that had paid that amount in Court, that amount was not liable for rateable distribution. But a preliminary objection has been raised on the other side that the order of the lower Court of June 12, 1933, against which this appeal has been preferred, is not appealable at all under s. 73 of the Civil Procedure Code. The learned pleader for the appellants admits that, if it be held by the Court that the order falls under s. 73 of the Civil Procedure Code, then it is not appealable. He, however, contends that the order falls under s. 47 of the Civil Procedure Code, and that, therefore, it is appealable.

The other side does not accept that proposition. It alleges that the order falls under s. 73 of the Civil Procedure Code, and not under s. 47 of the Civil Procedure Code.

The question determined by the lower Court is really a question between the various decree-holders. The order, therefore, falls under s. 73 of the Civil Procedure Code and not under s. 47 of the Civil Procedure Code. I, therefore, find that it is not appealable.

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Assuming, however, that the order is appealable, still on the merits I do not find that the lower Court's order allowing rateable distribution in the amount of Rs. 2,700 between the appellants and the decree-holders of Darkhasts Nos. 1,039 of 1932 and 454 of 1933 is wrong. (*Vide* 26 Calcutta Weekly Notes, page 169; *vide* also Mulla's Civil Procedure Code, page 265 "I" 1934 Edition.)

The authorities cited on behalf of the appellants (51 Calcutta 761; 41 Madras, 327 and 51 Allahabad 346) do not apply here."

The plaintiffs appealed.

Y. V. Dixit, for the appellants.

V. R. Gadkari, for *Ramnath Shivlal*, for respondents Nos. 1 to 3.

P. V. Nijsure, for respondent No. 6.

J. G. Rele, for respondents Nos. 7 and 8.

BEAUMONT C. J. This is a second appeal from a judgment of the District Judge of Ahmednagar and it raises a question in execution. The facts are that in the year 1930 the present appellants obtained an *ex-parte* decree in the Thana Court, and they applied to execute that decree in the Court of Ahmednagar. The defendants asked for a stay of execution, and the Court granted a stay on terms that respondent No. 6 on this appeal became surety for the judgment-debtor. A surety bond was executed (exhibit 14), which stated that the defendants had applied for stay of execution in the Thana Court and that on that application the First Class Subordinate Judge of Thana passed an order that if the defendants furnished a fit and solvent surety for the decretal amount in the First Class Court at Ahmednagar the execution proceedings should be stayed. Accordingly, respondent No. 6 became surety for the defendants to the extent of Rs. 3,400 and he agreed with the Court that the defendants should submit to and discharge their liabilities on the decree or order, which decree or order would be passed in the suit in the Thana Court. It was also provided that if the defendants failed to act accordingly, the surety would himself pay into Court Rs. 3,400; so that the bond was taken by the Court of Ahmednagar to secure the plaintiffs against any

loss by reason of the execution of their decree being stayed. It seems to me that the plain intention of the bond was that if the plaintiffs ultimately became entitled to the amount of the decree, it could be satisfied out of the money in Court and the plaintiffs would, therefore, not lose on account of the execution being stayed.

It appears that subsequently the *ex-parte* decree was set aside in the Thana Court, but in 1932 the plaintiffs obtained a decree in the same suit *inter parties*, so that in effect no advantage was obtained by setting aside the *ex-parte* decree. In March, 1933, the plaintiffs applied in the Ahmednagar Court to execute their fresh decree, and notice of this was given to the surety. On June 2, 1933, the surety paid Rs. 700 into Court, and on June 5, he paid Rs. 2,700 into Court, thus making up the total of Rs. 3,400 which he had undertaken to pay. On the same day, i.e., June 5, 1933, respondents Nos. 7 and 8 who had obtained decrees against the same judgment-debtor in other suits, applied for rateable distribution. The decrees of respondents Nos. 7 and 8 were obtained long after the stay of execution granted to the judgment-debtor in 1930. The question which arises is whether the Rs. 3,400 paid into Court by the surety is subject to rateable distribution. The lower Courts have held that the sum of Rs. 700 which was paid into Court before the application for rateable distribution was not subject to rateable distribution, but that the Rs. 2,700 was so subject. The question is whether that view of the matter is right.

Section 73 of the Civil Procedure Code provides that where assets are held by a Court and more persons than one make application for execution of decrees, the assets are to be distributed rateably. The first question which arises is what is the exact meaning of the expression " assets held by a Court ". Under s. 295 of the old Code the expression was " when assets are realised by sale or otherwise in execution of a decree ". No doubt the expression in the present Code is wider, but it is plain that some limitation must be put

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Beaumont C. J.

upon the generality of the expression. It is, I think, apparent from a consideration of the terms of the section, and its position in the Code, that the words " assets held by a Court " must be assets received in execution. The section plainly does not apply to moneys paid into Court in a suit when no question of execution arises. I think that all the High Courts in India are in agreement that the expression " assets held by a Court " means assets received in execution, though there has been some difference of opinion as to the exact effect of these words. I think also that we must apply to the words one other limitation, and that is, that when the assets have been paid in for a specific purpose, they cannot be applied generally in execution, so as to defeat the specific purpose. It seems to me clear that if a Court receives money on terms that it is to be applied for payment of the debt of A, it cannot apply the money in payment of the debt of B. The Court cannot commit what would be in substance a breach of trust. The general principle above mentioned was laid down by a Division Bench of this Court in *Sorabji Coovarji* v. *Kala Raghunath*,[1] in which it was held that moneys paid into Court under O. XXI, r. 55, of the Civil Procedure Code, were moneys paid for a particular purpose and were not applicable in rateable distribution. The actual decision has been dissented from in some other High Courts, which considered that moneys paid under O. XXI, r. 55, being paid by the judgment-debtor, and paid in execution, were subject to rateable distribution, but the general principle has not, I think, been dissented from. In the present case the moneys were paid into Court for a particular purpose. The Court was being asked to stay execution of the plaintiffs' decree, which was being challenged, but which at the moment was executable. The Court granted a stay on terms which ensured that the plaintiffs' debt was secured. That is what it comes to. Having entered into an arrangement with the surety that he would pay the amount of the plaintiffs' debt, and having

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taken security from him, the Court stayed the execution of the plaintiffs' decree. It is obvious that if, when the plaintiffs ultimately come to execute their decree, the Court holds that creditors who have obtained their decrees long after the money was paid into Court by the surety are entitled to share in it, the Court is not carrying out the arrangement which was intended to secure the original decree-holders. The original decree-holders are being very seriously prejudiced by the stay of execution of their decree. If the execution had not been stayed, the decree could have been executed in 1930, and there would then have been no question of rateable distribution. I do not see how it can be suggested that the Court, having received these moneys on terms which seem to me to make it necessary for the Court to apply them in payment of the plaintiffs' debt, should now apply them in payment of somebody else's debt as well as the plaintiffs' debt. That disposes of the appeal on the merits.

Beaumont C. J.

I should have mentioned that preliminary objection was taken that an appeal did not lie, but in my opinion the question involved on this appeal affects not only the creditors *inter se* but it affects the surety to a considerable extent and the judgment-debtor to a lesser extent. I think, therefore, that an appeal does lie under s. 47 read with s. 145 of the Civil Procedure Code, but even if an appeal does not lie, we could deal with the matter in revision under s. 115 on the ground that the lower Courts have committed material irregularity in not carrying out the arrangement which was entered into. I think, therefore, that the appeal must be allowed and the Darkhast proceedings should go back to the executing Court for being disposed of according to law.

Costs in this Court and the lower appellate Court to be paid by respondents Nos. 6, 7 and 8. Money, if already paid to respondents Nos. 7 and 8, to be refunded to the plaintiffs.

Appeal allowed.

Y. V. D.