

greater space than he had occupied in the rented premises, then no doubt it might have been a different matter. It seems to us that to prevent the plaintiff from occupying a space in his own premises equal to the space previously rented by him on the ground stated by the learned Judge would be going entirely beyond the jurisdiction of the Court in cases falling under the Rent Act. We make the Rule absolute.

There will be a decree for possession within one month of the service of this order on the occupants of the shop with costs throughout.

Rule made absolute.

J. G. R.

APPELLATE CIVIL.

FULL BENCH.

*Before Sir Norman Macleod, Kt., Chief Justice, Mr. Justice Shah and
Mr. Justice Fawcett.*

DATTATRAYA GOVINDSETH LUBRI (ORIGINAL DECREE-HOLDER), APPLICANT v. PURSHOTTAM NARAYANSETH DALI (ORIGINAL RIVAL DECREE-HOLDER), OPPONENT².

1921.

October 21.

Civil Procedure Code (Act V of 1908), section 73—Decree—Execution—Rateable distribution—Decree claiming distribution challenged on the ground of fraud—Fraud cannot be gone into by executing Court—Practice and procedure.

The opponent obtained a decree in execution of which assets were realised and brought into Court. The applicant who also held a decree against the same judgment-debtor claimed rateable distribution. The opponent having pleaded that the applicant's decree was obtained by fraud, the executing

² Civil Extraordinary Application No. 111 of 1921.

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Court decided that it could go into the question of fraud in execution, proceedings. On the applicant's application :—

Held, that the executing Court had no power to deal with the question whether a decree on an application for rateable distribution had been obtained by fraud.

Chhaganlal v. Fazavali⁽¹⁾, overruled.

THIS was an application under the Extraordinary Jurisdiction of the High Court, from an order passed by R. K. Bal, First Class Subordinate Judge at Ratnagiri.

Execution proceedings.

The opponent obtained a decree against one Dharma, and in execution of it realised assets belonging to the judgment-debtor. The applicant who also held a decree against the same judgment-debtor applied for rateable distribution of the assets. It was pleaded by the opponent that the applicant's decree was obtained by fraud.

The executing Court decided to go into the question of fraud in the execution proceedings.

The applicant applied to the High Court.

K. N. Koyajee, for the applicant :—The lower Court has no jurisdiction to go into the question of fraud or *bona fides*. Section 73 of the Civil Procedure Code requires that where assets have been realised in execution of a decree, they shall be rateably distributed amongst all judgment-creditors who have already applied for execution. There are no words empowering the Court to make any investigation or inquiry into the question whether the decrees were properly obtained or not. Such power was given under section 272 of the Code of 1877. But that

(1) (1888) 13 Bom. 154.

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provision has been omitted from the subsequent Codes. Power is given to investigate claims under Rules 58 and 97 of Order XXI. But there is no similar power given under section 73. Clause (4) of the section expressly provides for the remedy by way of a suit, which is the only remedy for any wrong done in consequence of a payment under the section. I submit with great respect that the ruling in *Chhaganlal v. Fazarali*⁽¹⁾ is not correct. *Saravana Pillai v. Arunachalam Chettiar*⁽²⁾ to the contrary lays down the correct law. The Privy Council has laid down in *Shankar Sarup v. Mejo Mal*⁽³⁾ that distribution under section 73 is not a judicial but an administrative act, and it follows that in its administrative function the executing Court cannot go into judicial matters, such as fraud and *bona fides* and the validity of decrees.

P. B. Shingne (amicus curiae), for the opponent:— The lower Court has inherent power to inquire if the decree of the applicant was a real decree properly obtained without fraud or *mala fides*. The Calcutta High Court has for a number of years adhered to the practice of going into the validity of a decree when action is taken under section 73: *In re Sunder Dass*⁽⁴⁾; *Raghu Nath Gujrati v. Rai Chatraput Singh*⁽⁵⁾; *Puran Chand v. Surendra Narain*⁽⁶⁾ and *Peary Lal Das v. Peary Lal Dawn*⁽⁷⁾. The case of *Chhaganlal v. Fazarali*⁽¹⁾ approved of *In re Sunder Dass*⁽⁴⁾ and followed it. If such power was not exercised, fraudulent decree-holders colluding with the judgment-debtor might walk away with the money and subsequent recovery might often be impossible.

(1) (1888) 13 Bom. 154.

(4) (1884) 11 Cal. 42.

(2) (1916) 40 Mad. 841.

(5) (1897) 1 C. W. N. 633.

(3) (1901) 23 All. 313.

(6) (1912) 16 Cal. L. J. 582.

(7) (1913) 19 C. W. N. 903.

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Koyajee, in reply :—It would be always open to an aggrieved judgment-creditor to file a suit at once and obtain an immediate injunction on making out his case.

MACLEOD, C. J. :—This is an application to this Court under section 115 of the Code of Civil Procedure. The applicant obtained a decree against his debtor, presented a Darkhast for execution, and applied therein for rateable distribution of the proceeds of a sale in execution of another decree obtained by the opponent against the same judgment-debtor.

The opponent raised a plea that the applicant's decree had been obtained by fraud. The lower Court considered this question and being bound by the decision in *Chhaganlal v. Fazarali*⁽¹⁾ decided that the Court could decide the question of fraud in execution proceedings, where the rival decree-holder raised the point, notwithstanding that a concurrent remedy by a regular suit was left open to him. It is necessary therefore to consider the ruling in *Chhaganlal v. Fazarali*⁽¹⁾. Sir Charles Sargent C. J. said : "The question referred to us is not without difficulty, but we are disposed to adopt the ruling of the Calcutta High Court (*In re Sunder Dass*)⁽²⁾ that the Court distributing the proceeds of execution under section 295, Civil Procedure Code (Act XIV of 1882) should inquire into the *bona fides* of the decree-holders if called in question and decide it in the same manner as all the other questions that arise in execution." This question arose in *Saravana Pillai v. Arunachalam Chettiar*⁽³⁾. The learned Judges after considering the Calcutta case and also the decision of *Chhaganlal v. Fazarali*⁽¹⁾ came to the conclusion that it was not open to a Court exercising its duties under section 73 of the

⁽¹⁾ (1888) 13 Bom. 154.⁽²⁾ (1884) 11 Cal. 42.⁽³⁾ (1916) 40 Mad. 841.

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Code of 1908 to inquire into the legality or validity of a decree brought to its notice in distributing the assets.

Our attention has been drawn by Mr. Koyajee to section 272 in the Code of 1859 which says :—

“ If it shall appear to the Court, upon the application of a decree-holder, that any other decree under which property has been attached was obtained by fraud or other improper means, the Court may order that the applicant shall be satisfied out of the proceeds of the property attached, so far as the same may suffice for the purpose, if such other decree be a decree of that Court; or, if it be a decree of another Court, may stay the proceedings to enable the applicant to obtain a similar order from the Court by which the decree was made. ”

Therefore, under that Code the Court which was distributing the assets amongst the decree-holders had the power to deal with the question whether any of the decrees passed by itself had been obtained by fraud or other improper means. But this power was not given by section 295 of Act XIV of 1882 nor by section 73 of the present Code. Section 73 directs that the assets, after deducting the costs of realization, shall be rateably distributed among all such persons as shall have made applications to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor. On general principles, the Court, which would be merely a distributing agency, would not have any power to deal with the question whether any of the decrees had been obtained by fraud or other improper means just as in an ordinary case of execution the Court which executes the decree cannot go behind the decree. So it would appear that where the Court is only concerned with distributing assets under section 73, it cannot have any greater power to go behind the decrees which are presented by the various decree-holders asking for rateable distribution. Sub-section 2 of section 73 expressly provides

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that where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets on the ground that such share of the distribution was obtained by fraud or collusion. No doubt, any such suggestion is made to the distributing Court, the applicant making it would be given an opportunity of filing a regular suit to set aside the decree, which, he alleges, had been obtained improperly, and the distribution might be stayed till that suit was decided. But that would be a matter purely for the distributing Court to decide, because sub-section 2 implies that in spite of an objection the assets have been distributed, in which case the suit would be one for the refund of the amount distributed, on the ground that the person who obtained such amount had got a decree passed in his favour either by fraud or other improper means. I think therefore the decision in *Chhaganlal v. Fazarali*⁽¹⁾ must be overruled. The Rule must be made absolute and the distribution must proceed in the lower Court in the light of this judgment.

Costs to be costs in the execution in the lower Court.

SHAH, J. :—I agree.

FAWCETT, J. :—I agree.

Rule made absolute.

R. R.

⁽¹⁾ (1888) 13 Bom. 154.