to be taken as deciding anything as to the ultimate rights of the parties in the estate. These, if disputed, will probably have to be decided in a regular suit. Under these circumstances I do not think we ought to interfere. The appeals are dismissed. We make no order as to costs.

GEIDT, J. I concur.

Appeals dismissed.

30 C. 583 (=7 C. W. N. 414.)

[583] FULL BENCH.

GONESH DAS BAGRIA *v.* SHIVA LAKSHMAN BHAKAT.*

[13th February, 1903.]

Rateable distribution—Execution of decree—Civil Procedure Code (Act XIV of 1882) s. 295—Proportionate distribution of sale-proceeds—Decrees against the same judgment-debtor—Suit for refund of assets distributed.

B obtained a decree against three judgment-debtors—X, Y and Z. A obtained a decree against X and Y only :—

Held, that A is entitled under the provisions of s. 295 of the Code of Civil Procedure to a proportionate distribution of the assets realised by the sale of a property of X, Y and Z, so far as they represent the share of his own judgment-debtors X and Y in that property.

Debcki Nundun Sen v. *Hart* (1) overruled.

[Foll. 27 All. 158=1904 A. W. N. 200=1 A. L. J. 562 ; 29 Bom. 528=7 Bom. L. R. 567; Rel. on 10 O. C. 129; Ref 8 O. C. 86 ; 42 Cal. 1 ; 15 C. W. N. 872=14 C. L. J. 50 ;=10 I. C. 527. Not Appl. 36 Cal. 130]

REFERENCE to a Full Bench, in second appeal by the plaintiffs, Gonesh Das Bagria and another.

The defendant No. 1 had obtained a decree against the *pro forma* defendants Nos. 3 to 5, and in execution of it a certain sum of money was realised by the sale of immoveable properties belonging to them jointly. The defendant No. 2, in execution of a decree obtained by him against these three defendants, applied for a rateable division of the proceeds of the execution sale, under section 295 of the Code of Civil Procedure. The plaintiffs also, who had taken out execution of a decree obtained by them against the *pro forma* defendants Nos. 3 and 4 only, applied for a rateable division of the said proceeds under the same section of the Code. But the Court rejected their application, and directed the proceeds of the execution sale to be rateably divided amongst the defendants Nos. 1 and 2.

[584] Thereupon the present suit was instituted by the plaintiffs under the penultimate clause of section 295, to compel the defendants Nos. 1 and 2 to refund the assets that had been paid to them in excess of their own shares, and which, it was alleged, was due to the share of the plaintiffs. The Munsif decreed the suit; but on appeal by the defendant No. 1, the Subordinate Judge held that the plaintiffs were not entitled to claim a refund of the assets, and set aside the decree of the Munsif so far as the defendant No. 1 was concerned.

The appeal to the High Court originally came on for hearing before a Division Bench (MACLEAN, C. J. and BANERJEE, J.) ; and their Lordships, entertaining a view in conflict with that expressed in the case of

* Reference to Full Bench, in appeal from Appellate Decree No. 1295 of 1899.

Full Bench : Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Sale, Mr. Justice Stevens and Mr. Justice Geidt.

(1) (1885) I. L. R. 12 Cal. 294.

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FULL BENCH.

30 C. 583=7 C. W. N. 414.

Deboki Nundun Sen v. *Hart* (1), referred the case to a Full Bench, on the 5th August 1902, with the following opinions:—

MACLEAN, C. J. Two points are raised upon this appeal: the first is that the suit is not maintainable, and the second is that if the suit is maintainable, the plaintiff is not entitled to the relief which he seeks. In connection with the first point, there is a subsidiary point, namely, that the plaintiff, even if he is entitled to bring a suit, is premature in so doing.

The suit is one asking for a refund of certain moneys which have been paid under the provisions of section 295 of the Code to the principal defendant who appears before us to-day. The position is this. The principal defendant obtained judgment against three judgment-debtors, say X, Y and Z. The present plaintiff obtained a judgment against X and Y only, and he contends that under the provisions of section 295 of the Code he is entitled to a proportionate distribution of the moneys realized by the sale of the property of X, Y and Z, so far as those moneys represent the share of his own judgment-debtors X and Y in that property. The principal defendant replies that he is not so entitled, because he does not bring himself within the provisions of section 295, inasmuch as the decrees are not against the *same* judgment-debtor. The question we have to decide is whether the plaintiff is entitled as he claims.

Here I may conveniently refer to the subsidiary point, namely, that the suit is in any event premature. It is said that it has not been shown that the moneys ordered to be paid by the order of the 19th of September 1896 have been paid over to the principal defendant, and that, unless this has been done, the plaintiff cannot be entitled to bring a suit for a refund under section 295, and that the suit is premature and ought to be dismissed. This point has never been taken until the present moment. I am not saying that it cannot be taken so long as the suit is alive; but I think we ought not to accede to the contention because there is no evidence before us that the money has not been drawn out by the principal defendant. The Munsif says: "That point was not suggested in the petition of the [585] 8th September last. There is, besides, no evidence before me in support of that plea." No doubt, in subsequent observations, he suggests reasons for saying that the money has not been drawn out, but I think, we must take it, there is no finding by the Lower Appellate Court to support that plea. As regards the right to bring a suit, that has not been now disputed.

The only other point then is whether, having brought the suit, the plaintiff is entitled to the relief he seeks.

In the case of *Deboki Nundan Sen* v. *Hart* (1), it was distinctly held by a Division Bench of this Court that, inasmuch as the decree was not against the same judgment-debtor, the plaintiff, in a case such as is substantially the present, was not entitled to claim under section 295 to share rateably in the sale proceeds. Although the same point was not distinctly decided in the case of *Hury Doyal Guho* v. *Din Dayal Guho* (2) and in *Shumbhoo Nath Poddar* v *Luckynath Dey* (3), the principle of those decisions would seem to clash with the view taken in the case of *Deboki Nundun Sen* v. *Hart* (1). With every respect to the learned Judges who decided the latter case, I think the view taken by them placed too narrow a construction on the expression "the same judgment-debtor" in section 295. If the language of the section be absolutely clear, the circumstance that such a construction as was put upon it in that case may lead to injustice or to anomaly or to hardship, could not prevent us from putting such construction upon it. But looking at the whole of section 295, and especially to that portion of it which deals with the distribution of the assets, where it speaks of 'the judgment-debtor' not using the expression 'the same judgment-debtor,' and to the equitable distribution which is aimed at by the section, I am disposed to think that the construction put upon it by the case of *Deboki Nundun Sen* v. *Hart* (1) is too narrow. In one sense, if there is a decree against X, Y and Z and also a decree against X and Y, to some extent, at any rate, the judgment-debtors are the same.

Entertaining this view, which is in conflict with that expressed in the case (1) to which I have referred, we must, I think, refer the case to a Full Bench; and as the matter will come up again for further discussion, I have not gone so fully into the authorities as otherwise I probably should have done. In my view the plain-

(1) (1885) I. L. R. 12 Cal. 294.
(2) (1883) I. L. R. 9 Cal. 479.
(3) (1883) I. L. R. 9 Cal. 920.

tiff is entitled to a rateable share of so much of the sale proceeds as represents the share of his own judgment-debtors in the whole property sold.

BANERJEE, J. I concur with the learned Chief Justice in thinking that this case should be referred to a Full Bench. My reason for not agreeing with the view taken in the case of *Deboki Nundun Sen* v. *Hart* (1) may be shorly stated thus :— If A holds a decree against two persons X and Y, and B holds a decree against only one of them (X), in so far as the decrees are both decrees against X, they are decrees against the same judgment-debtor ; and if both A and B have applied for execution of their decrees and have not obtained satisfaction thereof, and assets are realized by the sale of any property, either of X alone or of X and Y, at the instance of the decree-holder B or of the decree-holder A, the other decree-holder may well say, so far as the assets are realized by the sale of the property of the judgment-debtor X, that he is entitled to rateable distribution. That it is [586] not necessary that the decrees should be against identically the same judgment-debtors is clear from the cases of *Shumbhoo Nath Poddar* v. *Luckynath Dey* (2) and of *Sarat Chandra Kundu* v. *Doyal Chand Seal* (3), and I do not think that the language of section 295 requires that the judgment-debtors in the two decrees should be identically the same. The case, in my opinion, comes sufficiently within the language of the section, if the judgment-debtors or some of them are the same in the two decrees, and if any property belonging to the common judgment-debtors under the two decrees has been sold. The language of section 295 is not against this view, nor is there anything in reason to clash with the same view. If property belonging to X be sold at the instance of the second decree-holder B in the hypothetical case I have stated above, and A, the holder of the decree against X and Y, can claim rateable distribution, there is no reason why when property belonging to X and Y jointly is sold at the instance of the decree-holder A, B should be held disentitled to claim a rateable share in the sale proceeds so far as they arise from the sale of the property belonging to X. I may add that the decision of the Privy Council in the case of *Shankar Sarup* v. *Mejo Mal* (4), though not overruling the decision in *Deboki Nundun Sen* v. *Hart* (1), goes to show that some of the reasons for the decision in the last mentioned case can no longer be accepted as valid.

Babu *Prasanna Chandra Roy* for the appellant. The decision depends upon the wording of s. 295. The word *same* occurs in the *first* paragraph, but is omitted from the 4th clause of proviso (*c*). The view set out in the order of reference is consonant with justice, and serious consequences would result from the contrary view. Assuming for the sake of argument that the executing Court cannot go into the question of shares of different judgment-debtors, that difficulty does not arise when a regular suit is brought, as in the present case. The following cases were referred to :—*Shumboo Nath Poddar* v. *Luckynath Dey* (2), *Hart* v. *Tara Prasanna Mukherji* (5), *Gogaram* v. *Kartick Chunder Singh* (6), *Wooma Moyee Burmonya* v. *Ram Buksh Chetlangee* (7). *Gowri Prosad Kundu* v. *Ram Ratan Sircar* (8), *Deboki Nundun Sen* v. *Hart* (1), *Delhi and London Bank* v. *Uncovenanted Service Bank, Barielly* (9), *Nimbaji Tulsiram* v. *Vadia Venkati* (10), *Sarat Chandra Kundu* v. *Doyal Chand Seal* (11), and *Shankar Sarup* v. *Majo Mal* (4).

[587] Babu *Lal Mohan Das*, for the respondent, referred to the Indian Contract Act, s. 262, and *Nimbaji Tulsiram* v. *Vadia Venkati* (10).

MACLEAN, C. J. The only point we have to deal with on the present reference is that which has been referred and no other. The question arises in this way :—" The principal defendant obtained judgment against the judgment-debtors, say X, Y and Z. The present plaintiff obtained a judgment against X and Y only, and he contends that, under the provisions of section 295 of the Civil Procedure Code, he is entitled

(1) (1885) I. L. R. 12 Cal. 294.
(2) (1883) I. L. R. 9 Cal. 920.
(3) (1899) 3 C. W. N. 368.
(4) (1901) I. L. R. 23 All. 313 ; L. R. 28 I. A. 203.
(5) (1885) I. L. R. 11 Cal. 718.
(6) (1868) 9 W. R. 514.
(7) (1871) 16 W. R. 41.
(8) (1886) I. L. R. 13 Cal. 159.
(9) (1887) I. L. R. 10 All. 35.
(10) (1892) I. L. R. 16 Bom. 683.
(11) (1899) 3 C. W. N. 368.

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to a proportionate distribution of the moneys realized by the sale of the property of X, Y and Z, so far as those moneys represent the share of his own judgment-debtors X and Y in that property. The principal defendant replies that he is not so entitled, because he does not bring himself within the provisions of section 295, inasmuch as the decrees are not against the *same* judgment-debtor. The question we have to decide is whether the plaintiff is entitled as he claims." The whole question turns upon whether, under such circumstances, the case falls within section 295 of the Code. I was a member of the Court which referred the case, and for the reasons which I gave in my judgment, which it is unnecessary to repeat, and also for those which are very clearly stated by my colleague, Mr. Justice Banerjee, I consider that the question ought to be answered, as we then answered it, in the affirmative.

PRINSEP, J. I am also of opinion that this is a case which may properly come under section 295 of the Code of Civil Procedure, in which the claims of two rival judgment-creditors may be adjusted and satisfied.

SALE, J. I also agree in thinking that the case falls under section 295 of the Code of Civil Procedure, and may be dealt with under that section.

STEVENS, J. I am also of the same opinion.

GEIDT, J. I am also of the same opinion.

[588] MACLEAN, C. J. The result is that the decree of the lower Court is set aside and this appeal allowed with costs in all Courts, including the costs of this reference.

Appeal allowed.

30 C. 588 (=7 C. W. N. 547).

CIVIL RULE.

HALADHAR MAITI *v.* CHOYTONNA MAITI.* [13th April, 1903.]

Jurisdiction—High Court, power of, to review orders passed without jurisdiction in the Presidency Small Cause Court—Bench consisting of the Chief Justice and another Judge—Charter Act (24 & 25 Vict. C. 104) ss. 14, 15—Registrar, Presidency Small Cause Court, jurisdiction of—Ex-parte decree for default—Civil Procedure Code (Act XIV of 1882) s. 622—Rules 63, 70, 92, 94 (framed by the High Court) under s. 9 of the Presidency Small Cause Courts Act (I of 1895).

By virtue of the power conferred under s. 14 of the Charter Act (24 and 25 Vict., c. 104), the Chief Justice by constituting a Division Court consisting of himself and any other Judge of the High Court, can deal with applications against an order made by the Presidency Small Cause Court.

Shamsher Mundul v. *Ganendra Narain Mitter* (1) explained.

The Registrar of the Presidency Small Cause Court has no jurisdiction to entertain an application for new trial to set aside an *ex-parte* decree made by him for default.

[Ref. 37 C. 714 ; 39 M. 527 ; Foll. 1914 M. W. N. 368=26 M. L. J. 467=23 I. C. 572 ; 18 M. L. T. 254=1915 M. W. N. 907=30 I. C. 488 ; 18 M. L. T. 164=29 M. L. J. 353=1915 M. W. N. 728=30 I. C. 353.]

RULE granted to the defendants, Choytonna Maiti and another, under s. 622 of the Code of Civil Procedure, and s. 15 of the Letters Patent.

* Civil Rule No. 914 of 1903, against the order of F. K. Dobbin, Registrar, Presidency Small Cause Court, Calcutta, dated March 24, 1903.

(1) (1902) I. L. R. 29 Cal. 498.