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be realized, is, however, a question which we are not called upon to discuss in the present case.

The appeal will accordingly be decreed. The applicant will be granted probate of the will of Dhan Krishna Sircar, and we think the proper way to give effect to this order will be to substitute the applicant's name for the name of Jagobundhu, deceased, in the probate already granted to him and Doorgamoni jointly, and which we observe was filed in the Court of the District Judge with the application in this case.

We make no order as to costs.

Appeal allowed.

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

CLARK v. ALEXANDER.*

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 Sept. 8.

Sale in execution of decree—Rateable distribution—Attachment of salary—Civil Procedure Code, 1882, ss. 285, 295—Attachment by Small Cause Court—Transfer of decrees to superior Court.

Practice of the Calcutta High Court in favour of the principle of rateable distribution amongst all the attaching creditors, without any such condition as the transfer of the execution proceedings to the superior Court, adopted and held supported by the cases of *Gopee Nath Acharje v. Achcha Bibee* (1), *Bykant Nath Shaha v. Rajendro Narain Rai* (2), and *Bhugwan Dass Bogla v. Bunko Behary Bajpie* (3).

Muttalagiri Nayak v. Muttayyur (4) and *Nimbaji Tulsiram v. Padia Venkati* (5) not followed.

ON the 13th February 1893 the plaintiff obtained in the High Court a decree against the defendant for Rs. 9,970-4.

In execution of this decree, under an order of the 11th April 1893, the plaintiff attached a moiety of the salary of the defendant, who was a member of the Bengal Pilot Service, and in accordance with an order obtained by the plaintiff on the 22nd May 1893, the Accountant-General on the 4th July paid into Court

* Original Civil suit No. 30 of 1893.

(1) I. L. R., 7 Calc., 553. (3) Suit No. 130 of 1884, unreported.

(2) I. L. R., 12 Calc., 333. (4) I. L. R., 6 Mad., 357.

(5) I. L. R., 16 Bom., 633.

to the credit of the suit a sum of Rs. 975-14-4, representing two monthly moieties of the defendant's salary which had come to the hand of the Accountant-General.

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The plaintiff, having obtained the usual certificates from the Sheriff of Calcutta and from the Registrar of the High Court that no other attachments had been issued or applications in execution made against the defendant in the High Court, applied to Mr. Justice Sale, in Chambers, to withdraw the sum of Rs. 975-13-7, standing to the credit of the suit.

It, however, appeared that prior to the order of the 22nd May, but subsequent to the plaintiff's attachment, several other attachments were in existence on the moiety of the defendant's salary, issuing from the Calcutta Court of Small Causes, two of the said attachments having been obtained in execution of decrees transferred from the Court of the 1st Munsif of the 24-Parganas to the Calcutta Court of Small Causes for execution, and the others in execution of decrees of the Calcutta Small Cause Court itself. These attaching creditors had not, however, transferred their decrees for execution to the High Court; on this application coming on in Chambers, Mr. Justice Sale directed that it should stand over and be renewed upon notice to all outside creditors. After service of summons on these creditors the application was renewed.

Mr. *Acowth* for the applicant:—My client is entitled to the whole fund; the money has been realized under section 295 of the Code, and no other creditors have applied for execution. I rely on *Muttalagiri Nayak v. Muttayyar* (1), *Nimbaji Tulsiram v. Vadia Venkati* (2), and on *Krishnashankar v. Chandrashankar* (3), and refer to *Gopee Nath Acharje v. Achcha Bibee* (4).

Mr. *O'Kinealy* for the Small Cause Court creditors:—Section 295 has no application, but the section applicable is 285; the rights of all the creditors should be determined, and the fund rateably divided amongst them.

SALE, J.—This was an application by the plaintiff for an order that a sum of Rs. 975-13-7, now in Court standing to the credit of this suit, be paid to him in part satisfaction of the decree obtained

(1) I. L. R., 6 Mad., 357.

(3) I. L. R., 5 Bom., 198.

(2) I. L. R., 16 Bom., 683.

(4) I. L. R., 7 Calc., 553.

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by him in this suit. The money represents salary which was attached in the hands of the Accountant-General of Bengal. There were, it appears, five attachments made by the Calcutta Court of Small Causes, under s. 285 of the Code, in execution of three of its own decrees and two decrees of a mofussil Court sent to it for execution.

Under these attachments a moiety of the salary of the defendant, who is in the Pilot Service, was from time to time realized by the Small Cause Court in part satisfaction. Before full satisfaction could be obtained, an attachment was made by this Court in execution of the decree in this suit, which was followed by an order for payment of the money so attached into this Court to the credit of this suit. That order was made without notice to the outside decree-holders, although there was a certificate of the Accountant-General of Bengal showing that the money was subject to existing attachments on the part of these outside creditors. I therefore thought it right that notice of this application should be given to all these creditors, some of whom have now appeared and claim to participate with the petitioner in the fund which he seeks to have paid out to him. The only other material fact is that the petitioner is the only judgment-creditor who has applied for execution to this Court.

Upon these facts it was contended, on the part of the petitioner, that the money had been realized under s. 295 of the Code, and that, as the petitioner was the only creditor who had applied for execution to this Court, he alone was entitled to the whole fund to the exclusion of the outside attaching creditors, who in fact were excluded by the terms of the section.

On the other hand, it was said that the section applicable to the facts of this case was s. 285 and not s. 295, and that the realization in this case should be treated as having been made under the former section, which requires the Court to consider and determine the rights of all creditors who have attached the property realized under that section, and that the fund ought to be distributed rateably amongst all of them.

In support of the contention on the part of the plaintiff, two cases were cited: the case of *Muttalagiri Nayak v. Muttayyar* (1)

(1) I. L. R., 6 Mad., 357.

and the case of *Nimbaji Tulsiram v. Vadia Venkati* (1), which followed the former case.

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After careful consideration of these cases I have come to the conclusion that the contention made on behalf of the outside creditors is the correct one. To give s. 295 the signification contended for by the plaintiff would, in my opinion, have the effect of altogether nullifying s. 285. The duty of the superior Court under s. 285 is to consider and determine the rights of the attaching creditors in all the cases to which that section applies, whether they have applied to the superior Court or not. There is nothing in that section which requires that before an attaching creditor can have his claim determined he must obtain a transfer of his decree to the superior Court and apply to that Court for execution. If that were required, it would operate with great hardship in the case of creditors for small amounts who had attached through the Small Cause Court, especially where the attached property was of small value. The extra expense that would be incurred by reason of the transfer to the superior Court and the re-attachment through that Court, would in some cases deprive the Small Cause Court creditors of all benefit arising under their attachments, and the result in those cases would be, at the least, the practical postponement of the rights of such creditors to those of creditors for larger amounts who had attached through the superior Court. It certainly would be a remarkable result if, where property is attached under s. 285, the superior Court, while required by that section to consider the rights of all attaching creditors, irrespective of the Courts by which the attachments were made, should at the same time be restricted so as to have no alternative but to apply the rule of exclusion contained in s. 295 to all creditors except those who have applied to the superior Court prior to realization, and so come strictly within the terms of that section. Such a result cannot have been intended, and may be avoided if ss. 285 and 295 be read together and due effect given to each. The specific point, whether realization should be treated as having been made under s. 285 alone, or under that section and s. 295, was not, so far as appears, raised in the cases cited on behalf of the plaintiff, or considered by the Courts. In each of those cases it would seem to have been

(1) I. L. R., 16 Bom., 683.

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assumed that the realization was under s. 295. On the other hand, there are decisions of this Court in which this point has been considered. The case of *Gopecnath Acharje v. Acheha Bibee* (1) was a decision under ss. 272 and 295. In that case this was said by the Court—"It may be proper to observe" (p. 555 of the report) "that s. 295 of the Code of Civil Procedure has no application to a case of this kind. That section applies only where the decree-holders have all applied to the same Court for execution of their decrees. Now, in this case the plaintiff did not apply to the Small Cause Court Judge for execution of her decree, seeing that that decree was a decree of the Munsif and had never been transferred into the Small Cause Court for execution. Then, with reference to s. 272, we think that the Subordinate Judge has taken a proper view of the proviso, which is merely intended to mean that any question of title or priority is to be determined by the Court in which, or in the custody of which, the property is, and not by the Court which made the order of attachment." The contention was between two attaching creditors, one of whom had attached through the Court holding the assets, the other was an outside creditor; and inasmuch as they had not applied to the same Court for attachment, the learned Judges seem to have held that s. 295 did not apply, that is, did not apply so as to exclude the rights of creditors under the earlier ss. 272 and 285.

The case is referred to in the Madras case *Muttalagiri Nayak v. Muttayyar* (2) as an authority for the proposition that before an attaching creditor has a right to rateable distribution under s. 295, he is bound to transfer his execution to the Court holding the assets. I cannot agree that it supports that proposition.

In another case, *Bykant Nath Shaha v. Rajendra Narain Roy* (3), where property had been attached both by an inferior Court and by a superior Court in the same district, and was sold first by the inferior Court and then by the superior Court, it was under all the circumstances held that the first sale by the inferior Court should not be set aside, and that the superior Court should have accepted the sale and required the purchase money to be brought

(1) I. L. R., 7 Calc., 553.

(2) I. L. R., 6 Mad., 357.

(3) I. L. R., 12 Calc., 333.

in and placed under its control, "so that (as observed by the Court) it might be rateably distributed amongst all the decree-holders." In that case it was assumed that a rateable distribution was capable of being made without transfer of the execution to the Court holding the assets. And, after the best enquiry I have been able to make as to the practice of this Court, it seems to be in favour of the principle of rateable distribution amongst all the attaching creditors without any such condition as the transfer of the execution proceedings to the superior Court. In illustration of this I will refer to two unreported cases.

In a case where money was attached in the hands of a mercantile firm, first by this Court and then by the Calcutta Small Cause Court by direct attachment, and was paid into this Court, the attaching creditors made a joint application to the Court that their rights as to participation might be determined under ss. 285 and 295. It was referred to the Registrar to enquire who under these sections were entitled to the money, and that distribution be made according to the Registrar's report, after confirmation by effluxion of time or otherwise. The Registrar reported in favour of a *pro rata* distribution. That report was confirmed and carried out—*Bhugwan Dass Bogla v. Bunko Behary Bajpie* (1). It is to be observed that the reference in that case was an open one, though made on a joint application of the attaching creditors.

There was another case in which property in Calcutta, attached in execution of a decree of this Court, was taken up for public purposes. The compensation money awarded was in the hands of the Collector of the 24-Pergunnahs, who, at the request of this Court, sent the money to this Court, with the request that it should be received "for credit" of the suits in this Court, a suit of the Calcutta Small Cause Court and an execution suit in the Alipore Court. That money was attached in the hands of the Collector by a creditor who had obtained a decree in the Alipore Court. It was held by Wilson, J., that the money having been attached within the jurisdiction of the Alipore Court in execution of a decree of that Court, had been irregularly brought into this Court, yet that, having been brought into this Court, it must be deemed

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(1) Suit 130 of 1884, unreported.

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to have been realized in all the suits, and the principle of rateable distribution between all the creditors should be applied.

For these reasons I prefer to adopt the practice of this Court, supported as it seems to me to be by the authority of the cases decided in this Court which I have cited. I therefore hold that the money realized in this case should be rateably distributed between all the attaching creditors, and that their costs of appearing before me should be added to their claims respectively.

Attorney for applicant : Mr. *E. J. Fink*.

Attorneys for the Small Cause Court creditors : Messrs. *Dignam, Robinson and Sparkes*.

T. A. P.

Before Mr. Justice Sale.

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Sept. 11.

IN THE MATTER OF SRISH CHUNDER SINGH & OTHERS.*

Guardian—Appointment of Guardian—Infant residing out of the jurisdiction of the Court—Letters Patent, High Court, clause 17—Guardian and Wards Act (VIII of 1890), ss. 4, 7, 9—Testamentary guardians—Jurisdiction of High Court.

Case in which the Court refused, on a summary proceeding under clause 17 of the Charter, to appoint a guardian of the person and property of an infant who was not a European British subject, and who was living outside the limits of the ordinary Original Civil Jurisdiction of the Court, there being testamentary guardians in existence, and no application or suit filed to remove them.

On these two last grounds the Court also refused to appoint a guardian of the infant's property under Act VIII of 1890.

THIS was an application made under clause 17 of the Charter of the High Court, and section 17 of the Guardian and Wards Act (VIII of 1890), by one Dabendrobala Dabee for her appointment as guardian of the person and property of her adoptive son Srish Chunder Singh, then an infant of 12 years of age.

It appeared that in October 1887 one Grish Chunder Singh died, leaving a widow, Dabendrobala Dabee, and three brothers, Poorno Chunder Singh, Kanti Chunder Singh, and Sarut Chunder Singh, and also a son of his father's brother, Indra Chunder

* Original Civil Suit.