1888
JAN. 21.

ORIGINAL CIVIL.

12 B. 400.

12 B. 400.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

PALLONJI SHAPURJI MISTRY (*Plaintiff*) *v.* EDWARD VAUGHAN JORDAN (*Defendant*).* [21st January, 1888.]

Civil Procedure Code (Act XIV of 1882), ss. 235, 295, 490—*Application for execution, necessity of, in order to share in distribution under* s. 295—*Attachment before judgment, effect of—Decree—Execution—Decree-holder with an attachment before judgment must after decree apply for execution under* s. 235 *in order to share in distribution.*

A decree-holder who has attached before judgment is not entitled to rank under s. 295 of the Civil Procedure Code (Act XIV of 1882) as an applicant in execution and as such to obtain, in execution, a rateable share of the property which he has attached, unless, subsequently to his decree, he has applied for execution under s. 235 *et seq.* of the Civil Procedure Code.

Under s. 230 of the Civil Procedure Code all decree-holders if desirous of enforcing their decrees are required to apply for execution. There is no exception of cases arising under s. 490.

[401] Section 490 of the Civil Procedure Code (Act XIV of 1882) does not *by implication* confer upon a decree-holder who has attached before judgment the right to come in under s. 295 and share in the distribution of the property which he has attached. The effect of that section is merely to take away the necessity for a re-attachment of the property. The attachment before judgment enures and becomes an attachment in execution.

[F., 34 M. 25=7 Ind. Cas. 856=8 M.L.T. 226 ; R., 33 C. 639=10 C.W.N. 634 (637) ; 38 C. 448=15 C.W.N. 795=10 Ind. Cas. 305 ; 19 M. 72 (74) ; 16 C.L.J. 86=16 C.W.N. 1097=14 Ind. Cas. 345.]

APPLICATION in chambers. This was an application by the plaintiffs in suit No. 464 of 1887, under s. 295 of the Civil Procedure Code (Act XIV of 1882), to be allowed to share rateably in certain moneys realised in execution of a decree obtained against the defendant in suit No. 358 of 1887. The other parties entitled were the plaintiffs in suit No. 358 of 1887, suit No. 501 of 1887, and suit No. 509 of 1887, respectively. The money in question had been realised (paid into Court) on the 23rd December, 1887. The plaintiffs in the three last mentioned suits had applied for a rateable distribution under s. 295, and, in accordance with the practice of the Court, had obtained from the Prothonotary certificates stating the names of such persons as within a year prior to the realisation had applied under s. 235 of the Civil Procedure Code for execution of their decrees. The names of the present applicants were not included in those certificates, and they now applied to the Judge in chambers to have their names inserted, and to be allowed to share rateably in the property realised, on the ground that, although they had not applied for execution under s. 235, they had attached the property in question before judgment.

The defendant was an officer in the service of the G. I. P. Railway Company, and there was a sum of Rs. 10,462-6-0 in the hands of the Company belonging to him. On the 4th October, 1887, a decree was obtained against him by the plaintiffs in suit No. 358 of 1887 for Rs. 5,000. They subsequently applied for execution under s. 235 of the Civil Procedure Code (Act XIV of 1882), and on the 24th October attached the above sum in the hands of the Company.

*Suit No. 464 of 1887.

1888
JAN. 21.

ORIGINAL CIVIL

12 B. 400.

On the 21st November, 1887, the present applicants filed their suit (No. 464 of 1887), and on the next day (22nd November, 1887), they obtained an attachment before judgment. They obtained a decree for Rs. 5,000 on the 16th December, 1887, but made no [402] application for execution under s. 235 subsequently to the date of their decree.

On the 17th December, 1887, the plaintiffs in suit No. 358 of 1887 took out a summons calling upon the G. I. P. Railway Company to show cause why, out of the defendant's money in their hands, which had been attached by them as above stated on the 24th October, 1887, a sufficient sum to satisfy their decree should not be paid into Court. The plaintiffs in suit No. 464 of 1887 who, as above stated, had attached this money before judgment having become aware of the granting of this summons, appeared at the hearing before the Judge in chambers on the 22nd December, 1887, and consented to the following order. It was entitled in both suits :—

"Upon reading the Judge's summons in suit No. 358 of 1887, dated 17th instant, and on hearing Messrs. Nanu and Hormasji, (attorneys for plaintiffs in that suit), in support of the said summons; and Mr. Little on behalf of the G. I. P. Railway Company, who explains that there are other suits and claims against the defendant; and Mr. Bomanji and Hormasji, (attorneys for plaintiffs in suit No. 464 of 1887), on behalf of the plaintiffs in suit No. 464 of 1887, who consent to this order,—I do order that the proper officer of the G. I. P. Railway Company do further pay to the Prothonotary the sum of Rs. 10,462-6 standing to the defendant's credit, &c., &c."

This order was signed by the attorneys for plaintiffs in suit No. 358 of 1887 and suit No. 464 of 1887, respectively.

On the 23rd December the plaintiffs in suits Nos. 501 of 1887 and 509 of 1887 respectively obtained decrees against the defendant, the former for Rs. 6,250 and the latter for Rs. 5,100, and in the afternoon of that day they applied for execution under s. 235 of the Civil Procedure Code.

On the same day, *viz.*, the 23rd December, the G. I. P. Railway Company paid the said sum of Rs. 10,462-6 into Court.

Early in January, 1888, the plaintiffs in suit No. 501 of 1887 applied for a rateable distribution of the Rs. 10,462-6 which had been paid into Court. Before doing so they obtained a certificate [403] from the Prothonotary setting forth the names of the persons who had applied for execution of their decrees within a year prior to the realisation of this money, *viz.*, the 23rd December, 1887. As above stated, the present applicants (plaintiffs in suit No. 464 of 1887) were not included in the certificate, inasmuch as they, relying on their attachment before judgment, had not subsequently to their decree made an application for execution under s. 235. They now applied to be allowed to share rateably, contending that by reason of having already attached the property (*i.e.*, before judgment) they were exempt from the necessity of making a fresh application for execution under s. 235 after obtaining their decree.

Latham, (Advocate General), for the applicants.—We contend that as at the date of our decree the property was under attachment by virtue of an order for attachment before judgment and is still under that attachment, it was not necessary for us, after we had obtained our decree, to make a fresh application for execution under

1888
JAN. 21.
ORIGINAL CIVIL.
12 B. 400.

s. 235—*Gamble* v. *Bholagir* (1). The procedure for attaching property before judgment, as laid down in s. 483 *et seq.* of the Code, is similar to that for attaching property after decree: see s. 230 *et seq.* In *Sri Rammanik* v. *Tincowri Rai* (2) it was held that a new attachment was necessary. But subsequently to that decision the Code of Civil Procedure (Act XIV of 1882) was passed; and the new s. 490 was inserted. Our case comes under that section. That section converts an attachment before judgment into an attachment after judgment. An application for execution under s. 235 is not an attachment. It is only a step taken towards obtaining an attachment: see cl. (*j*) of s. 235. To hold that we must be ousted from a share would be to add an exception to s. 490, to the effect that, unless a party who has attached before judgment shall take some steps after decree to re-attach the property, he shall take nothing under s. 295. When s. 490 says "it shall not be necessary to re-attach," it must mean it shall not be necessary to take any step towards re-attachment, *e.g.*, by applying for attachment under [404] s.235; otherwise the provision is absurd. The application under the section must be refused if made. Then what is the use of making it? Section 490 must be read with s. 295. We contend that an attachment before judgment is more than an equivalent to a mere application for execution under s. 235, *e.g.*, by attachment: see cl. (*j*).

Next, we say that if an application is necessary, what we have done is equivalent to an application, and should be regarded as one. We are parties to the order made on the 22nd December, 1887, under which the property in question was realised (see above)—*Lakshmi* v. *Kuttunni* (3); *Viraragava* v. *Varada* (4); *Ganga Din* v. *Khushali* (5). In this last case the Court draws a distinction between an attachment and an application under s. 295. It holds that such an application is not equivalent to attachment so as to prevent alienation of the property. From that it follows that there can be an attachment without a previous application for execution under s. 235. The above cases show that in such a case as this any application is sufficient to entitle a claimant to share, and the application need not satisfy the requirements of s. 235.

Inverarity, for the decree-holder in suit No. 501 of 1887 *contra*.—In order to enable creditors to share under s. 295, they must, previously to realization, have applied for execution under s. 235. That application must formally set forth the particulars indicated by the section. The applicants contend that what they have done should be regarded as equivalent to an application under the section. But they have not given to the Court any of the important information required by the sub-clauses of s. 235. An application under s. 235 is not necessarily an application for attachment: see cl. (*j*). Section 490 has no reference to rateable distribution under s. 295. It was passed to protect the creditor against the Official Assignee. The attachment of the applicants is good for that purpose, but worthless under s. 295. It is clearly necessary that a formal application under s. 235 shall be made and recorded under [405] s. 245. How, otherwise, is the Court to know who are entitled to share? Further, unless such application appears on the register kept under s. 245, the Court cannot receive any other evidence that such application has been made: Evidence Act (I of 1872), s. 91.

(1) 2 B.H.C.R. 146. (2) 4 B.L.R. 63 F.B. Rul. (3) 10 M. 57 (60, 61).
(4). 5 M. 123. (5) 7 A. 702.

1888
JAN. 21.

ORIGINAL CIVIL.

12 B. 400.

The applicants made no application. Their consent to the application made by the plaintiffs in suit No. 358 of 1887 is not equivalent to an application.

Farran, on the same side, for the decree-holders in suit No. 509 of 1887.—We also oppose this application. Section 295 is not an insolvency section. It does not provide for distribution among all creditors, but only those of a certain class. That class is comprised of those only who have obtained decrees and have applied for execution. All others are excluded. The application for execution must be under s. 235. Where is the applicant's application giving the Court the prescribed information? Their application (cl. *j*) should state the nature of the assistance they require. Under s. 245 the Court might reject their application, but as they have never made an application there has been no possibility of rejecting it. How can they be said to have done something equivalent to an application?

The consent by the applicants to the order of the 22nd December is not an application. The application must be in writing.

JUDGMENT.

SCOTT, J.—Does s. 490 enable the holder of an attachment before judgment to rank under s. 295 as an applicant in execution against the property attached after a decree is given in his favour, or is he still obliged to apply for execution under s. 230 and the sections which follow the chapter of the Code upon execution of decrees?

Section 490 does not, in express terms, confer the right, but the Advocate-General maintained that it is given by implication. The words of the section are "it shall not be necessary to re-attach the property in execution of such decree." No application for attachment, therefore, is necessary. The attachment before judgment enures, and becomes an attachment in execution. That is the effect of the section.

[406] Can a person holding such an attachment in execution proceed to a sale in execution of his decree; or are there other conditions to fulfil? Chapter XIX deals with execution generally, and I turn to it for the answer to this question. Section 223 says: "A decree may be executed under the provisions hereinafter contained," *i.e.*, contained in chap. XIX. Section 230 next says: "When the holder of a decree desires to enforce it, he *shall* apply to the Court which passed the decree or to the officer, if any, appointed in this behalf." This section does not reserve or except a case arising under s. 490. It applies to all holders of decrees. Section 235 says that the application shall be in writing, and shall contain certain particulars—ten in number—among which ranks "the mode in which the assistance of the Court is required, whether by delivery of the property, or by arrest and imprisonment, or by attachment of property."

Now, s. 490 already has given such attachment to the decree-holder. So that in a case under s. 235, when attachment of property is the mode of assistance required, the application for execution at first sight would seem unnecessary. But other particulars are also required by the section, such as, for instance, whether an appeal has been filed—whether there has been any adjustment since decree, and whether there has been any previous application for execution. These requirements are evidently treated as essential; for s. 245, in substance, says that if the requirements of s. 235 (amongst others) are not complied with, the Court may reject the application; and s. 245 goes on to say that the Court will only order execution of the decree after the application has been

1888
JAN. 21.
ORIGINAL CIVIL.
12 B. 400.

admitted. Then, lastly, s. 295, which deals with the rateable distribution of assets, says they shall be divided rateably among all persons who have, prior to the realization, *applied to the Court for execution.* Reading these sections together, their meaning is quite clear on the point in question; and the construction suggested by the learned Advocate-General would, in my opinion, be a departure from that meaning. I am, therefore, forced, somewhat reluctantly, to the conclusion that an application for execution is necessary before s. 295 can include the case, under s. 490, of the [407] holder of an attachment before judgment; until he has made his application he only holds a security, which may be destroyed by the interposition, after decree has been given, of a *jus tertii.* It seems hard that a person who holds an attachment in execution should not rank *pari passu* with other judgment-creditors. But the law lays down a certain procedure as a condition precedent to the right of any decree-holder to rateable distribution, which the others have followed, and he has not.

I must, therefore, reject this application. I may add, that this decision is supported by the practice of the Court for the last eleven years. There have been no decisions which directly settle the question; none, that is to say, with reference to s. 490, as bearing upon s. 295. But there are decisions which show that the observance of the rules of procedure laid down in the chapter on Execution in the Code is essential to a claim for rateable distribution—*Tiruchittambala Chetti* v. *Sheshayyangar* (1); *Vishvanath Maheshvar* v. *Virchand Panachand* (2).

I cannot hold that there was anything done by the applicants which could be regarded as an application for execution. The summons on the 17th December was taken out by the plaintiffs in suit No. 358 of 1887, and the applicants only consented to the order made in that summons. That order for payment into Court was, no doubt, made in both suits, but that circumstance does not make their consent amount to an application for execution.

Application rejected.

Attorneys for the applicants:—Messrs. *Bomanji and Hormasji.*
Attorneys for the other parties:—Messrs. *Little, Smith, Frere, and Nicholson,* and Messrs. *Nanu and Hormasji.*

---

12 B. 408.

[408] ORIGINAL CIVIL.

Before Mr. Justice Bayley and Mr. Justice Scott.

In re JAIKISSONDAS PURSHOTAMDAS, (*Petitioner*).*
[24th February, 1888.]

Practice—Presidency Small Cause Courts Act XV of 1882, *ss* 38 *and* 71—*Re-hearing, application for—Compliance with requirements of Act subsequently to application for rehearing—Rule of Court No.* 208.

An application to the High Court for a re-hearing unders. 38 of the Presidency Small Cause Courts Act XV of 1882 must be in writing.

---

* Small Cause Court Suit, No. 245/25983 of 1887.

(1) 4 M. 383. (2) 6 B. 16.