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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.*

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[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.

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

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

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A decree was passed against the petitioner by the Court of Small Causes on the 9th December, 1887. On the 16th December counsel on his behalf was instructed to apply to the High Court, under s. 38 of Act XV of 1882, for a re-hearing of the suit. The Court was then engaged in hearing appeals; but, in order to prevent the petitioner's application from being barred by limitation under the provisions of the section which requires the application to be made within eight days, their Lordships before rising allowed the application to be then formally made, but adjourned the hearing to a subsequent day. When the case came on, it appeared (1) that the petition had not been signed and declared until the 17th December, 1887, (*i.e.*, the day after the application had been made in Court); (2) that the affidavit in support of the application as required by s. 38 had not been filed until two days after the application in Court; and (3) that the Court fees which by s. 71 of Act XV of 1882 should be paid prior to the application had not been paid until the 20th December, 1887, *i.e.*, four days after the application.

Held, that the application for a re-hearing must be rejected. The application, although nominally made on the 16th December, was only provisionally received, and every objection to its reception which could have been taken on that day could be taken at the hearing. The subsequent compliance by the petitioner with the requirements of the Act could not place him in a better position than he occupied when the application was made.

THE petitioner was the defendant in this suit brought against him in the Bombay Court of Small Causes, and a decree was passed against him by that Court on the 9th December, 1887.

Counsel was instructed on his behalf, on the afternoon of the 16th December, to apply to the High Court, under s. 38 of the Presidency Small Cause Courts Act (XV of 1882), for a re-hearing of the suit. The Court was then engaged in hearing appeals; but, in order to prevent the petitioner's application from being barred by limitation under the provisions of the section which requires the application to be made within eight days, **[409]** their Lordships (BAYLEY and SCOTT, JJ.) before rising allowed the application to be then formally made, but adjourned the hearing to a subsequent day. The matter now came on for disposal.

On the case being called on, the Registrar informed the Court, first, that the petition for a re-hearing, which was requisite under Rule No. 208 of the High Court Rules (1), had not been signed and declared until the 17th December, 1887, *i.e.*, the day after the application had been made in Court; secondly, that the affidavit in support of the application, as required by s. 38, had not been filed until two days after the application in Court; thirdly, that the Court fees, which by s. 71 of Act XV of 1882 should be paid prior to the application, had not been paid until the 20th December, 1887, *i.e.*, four days after the application.

Jardine, for the petitioner.—The application has been made by us and received by the Court within the eight days required by s. 38, and should now be heard upon its merits. The Court should not refuse to hear the application, because of the informalities which admittedly have occurred in making it. With regard to the first objection, *viz.*, that the petition was not declared until the 17th December, that is of no importance. The application was made on the 16th December orally to the Court. Section 38 does not forbid an oral application. An application under s. 37 is always oral. The words used in these two sections are similar, and should receive a

(1) Rule 208.—Applications under the Presidency Small Cause Courts Act, XV of 1882, s. 38, shall be made by petition, which must be filed in the Prothonotary's office within eight days from the date of the judgment complained of, accompanied by a precipe to set down the matter before the Division Court hearing appeals from the decrees and orders of the Judges of the High Court exercising Original Civil Jurisdiction on the first day it shall sit.

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similar construction. No doubt the rule of this Court, No. 208, prescribes that the application under s. 38 shall be by petition. That rule is *ultra vires* if it is held to limit the right given by the section to apply either orally or in writing. There is nothing in the Act to show that the application should be signed or verified. As to the second objection, *viz.*, that the affidavit was not filed at the time the application was made, the section does not require that to be done. The affidavit has since been filed. It [410] was actually handed in on the day the application was made, and my client is not responsible for the filing of it in the office. As to the third objection with respect to the fees, it is true the fees had not been paid when the application was made. But that was merely an oversight. The petitioner and those who advised him were unaware that the Act required that the fees should be paid prior to the application. They were paid shortly afterwards, and if the objection had been taken by the officer of the Court, they would have been paid then and there. So the question is, whether under these circumstances the application having been actually received, this Court will now hold that the non-payment of fees prior to the application nullifies the application. Although the strict requirements of the Act have not been complied with, the Court can hear the application—*Park Gate Iron Company* v. *Coates* (1); *Waterton* v. *Baker* (2). If the Court rules against us on these points, I apply under s. 5 of the Limitation Act XV of 1877.

JUDGMENT.

BAYLEY, J.—I think we must reject this application. No doubt s. 38 of the Act does not say, in express words, that an application for re-hearing under that section must be in writing, but reading that section with s. 71, I think we must hold that the intention was that such an application should be in writing. If, however, there was any doubt about the matter, I think the doubt has been cleared up by the rule (No. 208) framed by the Judges of this Court, which provides that the application shall be by petition. We are now asked to say that this rule is *ultra vires*. We are not prepared to come to that conclusion.

Then, what are the circumstances under which this application is made? We find that although the application was nominally made on the 16th December, the petition was not signed or declared until the 17th December; that the affidavit in support of it was not filed until two or three days subsequently; and that the fees were not paid until the 20th December. Even assuming that s. 5 of the Limitation Act (XV of 1877) applies to such a case as this, I do not think that any facts are shown to [411] justify us in exercising the discretion given to us by that section in favour of the applicant. I think the application must be rejected.

SCOTT, J.— I concur. I am also of opinion that if s. 5 of the Limitation Act applies, there are no circumstances here which should induce us to extend the time prescribed by s. 38 for making such an application as the present.

I think, also, that it should be clearly understood that, although this application was nominally made on the 16th December, it was only provisionally received; and that every objection to its reception which could have been taken on that day can be taken now. The subsequent compliance by the petitioner with the requirements of the Act cannot place

(1) L.R. 5 C.P. 634. (2) L.R. 3 Q.B. 173.

him in a better position than he occupied when the application was made. There is no doubt that if these objections had been then taken, the application must have been rejected, and, consequently, I think we must reject the application now.

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Application rejected.

Attorneys for the petitioner :—Messrs. *Payne, Gilbert, and Sayani.*

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12 B. 411.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

VENKAPA NAIK (*Original Decree-holder*), *Appellant v.* BASLINGAPA BIN KOTRABASAPA (*Original Surety*), *Respondent.** [18th July, 1887.]

Surety—Stay of execution of decree appealed against on giving security—Surety for fulfilment of appellate decree—His liability—Mode of enforcing it—Civil Procedure Code (Act XIV of 1882), ss. 253 and 583—Execution proceedings—Separate suit—Words "in an original suit" in s. 253 of Act XIV of 1882 superfluous.

Under Act VIII of 1859 and the supplemental Act XXIII of 1861 the ordinary mode of enforcing payment by a surety was by summary process in execution, not by means of a separate suit. This was so, equally whether the security had been taken in the course of the original suit or of the appeal. The present Code of Civil Procedure (Act XIV of 1882) makes no alteration in the law on this subject.

[412] Reading s. 253 with s. 583 of Act XIV of 1882, it is clear that the Court has the power to proceed against a person who has become a surety under s. 546, for the fulfilment of the decree in appeal, in the same way as against a surety who has become liable under s. 253 to satisfy a decree of a Court of first instance.

The words "in an original suit" in s. 253 may be treated as a superfluous expression.

[**Diss.**, 23 C. 212 (216) ; **F.**, 23 B. 473 (483) ; 25 B. 409 (411) ; 4 L.B.R. 197 (198) = 14 Bur. L. R. 170 ; 103 P.R. 1906 = 1 P.L.R. 1907 ; **Appr.**, 17 A. 99 (102) ; 13 M. 1 (5) ; **R.**, 19 B. 578 (580) ; 22 B. 42 (45) ; 31 B. 128 (135) = 8 Bom. L.R. 932 ; 36 B. 42 = 13 Bom. L.R. 909 = 12 Ind. Cas. 549 ; 2 Bom. L.R. 203 (205) ; 13 C.P.L R. 104 (106) ; 7 O.C. 210 (211) ; **Expl.**, 30 B. 506 (507) = 8 Bom. L.R. 367.]

APPEAL from the decision of Rav Bahadur G. V. Bhanap, First Class Subordinate Judge of Dharwar, in *darkhast* No. 188 of 1886.

The appellant Vankapa Naik obtained a decree against Shankarbharathi Swami in original suit No. 326 of 1881 in the Court of the First Class Subordinate Judge of Dharwar. Against this decree an appeal was preferred to the High Court. Pending the appeal the execution of the decree was stayed on the judgment-debtor's furnishing security for the satisfaction of the decree of the appellate Court. One Baslingapa became his surety. The High Court confirmed the decree of the Court of first instance. Thereupon the decree-holder sought, in execution, to enforce the decree both against the judgment-debtor and the surety.

The surety objected to the execution of the decree against him, on the ground that he, having become a surety after, and not before, the passing

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* Appeal, No. 87 of 1886.