

## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.*

1901.

June 24.

GOVIND ABAJI JAKHADI, APPLICANT, v. MOHONIRAJ  
VINAYAK JAKHADI, OPPONENT.\*

*Civil Procedure Code (XIV of 1882), section 295—Rateable distribution under several decrees—Decrees must be against same judgment-debtor—Decree against judgment-debtor—Subsequent decree against his legal representative and his estate.*

Mohoniraj obtained a money decree against one Bhau Babaji, who died shortly afterwards. His son Kashinath, as his legal representative, was then placed on the record and the property of the deceased judgment-debtor Bhau Babaji was then attached and sold in execution. Meantime the applicant, Govind Abaji, had obtained a decree against "Bhau Babaji, deceased, by his son Kashinath and against the estate of Bhau Babaji, deceased"; and he applied under section 295 of the Civil Procedure Code (XIV of 1882) to share rateably in the proceeds of the sale held in execution of the other decree.

*Held*, that the application should be refused. Under section 295 the money decrees in respect of which rateable distribution is given must be against the same judgment-debtor. In this case one decree was against Bhau Babaji and the other against his son Kashinath. The fact that the latter decree was expressed to be made against "Bhau Babaji, deceased, by his son Kashinath," made no difference. One decree was against Bhau Babaji himself; the other was against his legal representative.

The fact that the second decree was also "against the deceased's estate" did not make Bhau Babaji a judgment-debtor under that decree in a suit commenced after his death.

The practice hitherto prevailing in the mofussil of making a dead man "by his heir" a party to a suit is erroneous and should be discontinued.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of Ráo Sáheb G. L. Chandorkar, Subordinate Judge of Sinnar, in the Násik District, in darkhást No. 1368 of 1900, in execution of a money decree in suit No. 878 of 1899.

On the 20th January, 1899, one Mohoniraj Vinayak Jakhadi obtained a money decree against Bhau Babaji Jangam in the Court of the Second Class Subordinate Judge of Sinnar. Bhau Babaji Jangam died shortly after the decree and the name of his son and legal representative, Kashinath, was brought on the record,

\* Application No. 52 of 1901 under Extraordinary Jurisdiction.

and Mohoniraj then applied for execution of his decree, and the deceased judgment-debtor's property was accordingly attached and sold in execution.

In the meantime, *viz.* on the 18th June, 1900, the applicant, Govind Abaji Jakhadi, obtained a money decree in the same Court against "Bhau Babaji, deceased, by his son and heir Kashinath, a minor, by his guardian the Nazir" and against the deceased's estate, and he then applied under section 295 of the Civil Procedure Code (XIV of 1882) for a rateable distribution of the proceeds realised by the sale of the property in execution of Mohoniraj's decree.

The Judge rejected the application on the ground that the applicant's decree was not against the same judgment-debtor as the decree obtained by Mohoniraj.

The applicant then applied to the High Court under its extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882,) and obtained a rule *nisi* requiring Mohoniraj Vinayak Jakhadi to show cause why the order of the Judge should not be set aside.

*Mahadeo B. Chaubal* for the applicant in support of the rule :—  
The Court below was wrong in holding that the decrees are against different defendants. They were both passed against Bhau Babaji Jangam. In our suit it is true he is represented by his son and heir Kashinath, but it is Bhau Babaji who was sued, and it is against him and his property the decree was made and is now to be executed. We can apply independently for execution against Bhau Babaji's property. If so, we can surely claim rateable distribution. The rulings in *Deboki Nundun v. Hart*<sup>(1)</sup> and *Chattrapat Singh v. Judukul Prosad*,<sup>(2)</sup> show that regard should be had to the property sought to be sold. *Hart v. Tara Prasanna*<sup>(3)</sup> is, we submit, in our favour. The decision in *Nimbaji Tulsiram v. Vadia Venkati*<sup>(4)</sup> shows that the fact that one of the decrees is against two defendants is immaterial.

There was no appearance for the opponent.

(1) (1885) 12 Cal. 294.

(2) (1892) 20 Cal. 673.

(3) (1885) 11 Cal. 718 at p. 723.

(4) (1892) 16 Bom. 683.

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JENKINS, C.J.:—In my opinion no case is made for a rateable distribution under section 295 of the Civil Procedure Code. It is useless to speculate as to any other test than that which the section itself provides, and that test is stated in the plainest terms. So far as the present case goes, it is enough to say that the money decrees must be against the *same* judgment-debtor. Here, however, one decree is against Bhau Babaji Jangam and the other is against his son Kashinath.

It is true that the second decree is expressed to be against "Bhau Babaji Jangam, deceased, by his son Kashinath": but this incorrect mode of expression can make no difference. It is due to the erroneous practice which prevails in the mofussil Courts of this Presidency, according to which a dead man is expressed to be a party to a suit by his heir. A circular has recently been sent to the several Courts drawing attention to this matter, and requesting amendment, so that I hope the practice has now become a thing of the past. It is so obvious that one hesitates to make the remark, but it is the fact that a dead man cannot be a party to a suit. It cannot too, in this case, make any difference that the decree is expressed further to be "against the deceased's estate": that does not make Bhau a judgment-debtor in respect of a decree in a suit commenced after his death. The interpretation of "judgment-debtor" in section 2 and the phraseology of section 234 of the Civil Procedure Code leave no doubt on the point. The rule must therefore be discharged.

CHANDAVARKAR, J.:—I am also of opinion that section 295 of the Code of Civil Procedure has no application to the facts of the present case.

Those facts are:—In suit No. 1195 of 1899 one Mohoniraj Vinayak Jakhadi obtained a money decree against Bhau Babaji Jangam in the Subordinate Judge's Court at Sinnar. The judgment-debtor, Bhau Babaji Jangam, having died after the decree, the decree-holder Mohoniraj presented a *darakhást* for execution after bringing on the record Bhau's son and heir Kashinath as his legal representative. The deceased judgment-debtor's property was then attached.

The present applicant thereupon applied to the Court for rateable distribution under section 295, as he held a decree

obtained against Bhau Babaji Jangam, deceased, by his son Kashinath and against the deceased's estate.

Section 295 requires that the decrees in respect of which rateable distribution has to be made must be decrees against the same judgment-debtor. "Judgment-debtor," as defined in the Civil Procedure Code, means "any person against whom a decree or order has been made." The decree obtained by the present applicant is against Bhau Babaji Jangam, deceased, by his son and heir Kashinath. Can it be said to be a decree against Bhau Babaji? It is a decree passed against Bhau's legal representative, whereas the decree obtained by the opponent Mohoniraj was against Bhau himself. It cannot be said, therefore, looking to the names of the parties, that the two decrees are against the same judgment-debtor. It is true that the estate that is liable in the case of both the decrees is the estate of the deceased Bhau, but section 295 does not make the nature of the liability under the decrees contemplated by it one of the essential conditions for the application of the section.

If, again, we consider the question by the light of other sections in the Code, which relate to a legal representative, we arrive at the same result as that indicated by the definition of the term "judgment-debtor," showing that a decree obtained against A while he is alive and a decree against B after A's death, as A's legal representative, are not against one and the same judgment-debtor. Section 234 provides for the execution of a decree where that execution is sought after the judgment-debtor's death. It is the deceased in that case who is, according to the terms of that section, the "judgment-debtor." Where, on the other hand, a person is sued from the beginning as the legal representative of a deceased person, the person so sued is the defendant, and, according to section 50 of the Code, the plaintiff must show that he is interested in the subject-matter of the claim and that he is liable to be called upon to answer the plaintiff's demand as the legal representative of the deceased. In such a case, if the person sued is the legal representative as alleged, a decree must be passed against him as such representative where the liability of the deceased is proved, whether he (the representative) has assets or not belonging to the deceased the

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question of his liability to the extent of the assets that have or could have come into his hands being left to be determined in execution—*Girdharlal v. Bai Shiv.*<sup>(1)</sup> In other words, the decree is passed against him, and he is therefore the “judgment-debtor.”

The result is the same where the legal representative of a defendant is brought on the record in the event of the defendant dying in a pending suit. In that case section 368 provides that “the case shall thereupon proceed in the same manner as if such representative had originally been made a defendant and had been a party to the former proceedings in the suit.” Where, however, a defendant dies after a decree has been made against him, his legal representative “may”—not “must” as in the other case—be brought on the record, and he can in that event be brought on the record under a different section, *i.e.* section 234 of the Code, which does not say that after he has been brought on the record he shall be proceeded against as if he had been originally a defendant. He is, according to the section, simply the legal representative of the deceased, but it is the deceased who is the “judgment-debtor.” It is true that he becomes a “judgment-debtor” within the definition of that term when an order is passed against him in execution proceedings, but that does not entitle his judgment-creditor to claim rateable distribution under section 295, for the terms of that section require that “the decrees”—not “orders”—should be against the same “judgment-debtor.”

Applying these considerations to this case before us, it is obvious that the decree obtained by the present applicant was against Bhau's son and heir, Kashinath, who must be regarded as his “judgment-debtor,” whereas the decree obtained by the opponent was against Bhau as his judgment-debtor. The opponent by bringing Kashinath as the legal representative of Bhau on the record in his execution proceedings and obtaining an *order* for execution as against Kashinath as such representative, has no doubt made him his “judgment-debtor,” according to the definition of that term in the Code. But though that order obtained by the opponent and the decree obtained by the present applicant are against the same “judgment-debtor” (*i.e.* Kashinath), yet the decree of the former is against Bhau, whereas

(1) (1884) 8 Bom. 309.

the decree of the latter is against Kashinath, and it is the decrees and not the orders passed in execution which form the test for a rateable distribution under section 295 of the Code. The present application must therefore fail. I agree, for these reasons, in holding that the rule must be discharged.

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*Rule discharged.*

## ORIGINAL CIVIL.

*Before Mr. Justice Russell.*

MOWJI SHAMJI AND OTHERS (PLAINTIFFS), v. NATIONAL  
BANK OF INDIA, DEFENDANTS.\*

1900.

October 4.

*Bank — Banker and customer — Pass-book — Cheque lodged by customer for collection — Effect of entry in customer's pass-book of such cheque as if collected — Estoppel.*

Early in March, 1900, the Hope Mills Company purchased 600 bales of cotton from the plaintiff at Rs. 278 per *candy*, but, being unable to accept and pay for them, it was arranged between the Company and the plaintiffs that one Shridhan should take them over from the plaintiffs at Rs. 243-8-0 per *candy* (the price having fallen in the meantime) and that the Company should pay the plaintiffs the difference of price. In fulfilment of this agreement the Company sent to the plaintiffs a cheque for Rs. 9,500 drawn by them on the Commercial Bank, being approximately the amount of the difference. This cheque was given to the plaintiffs on the 23rd March, 1900, but was post-dated the 3rd April. It was sent by the plaintiffs for collection to the defendant Bank (with which the plaintiffs had an account) on the next day (the 4th) at about 12 o'clock together with the plaintiffs' pass-book. The pass-book was asked for by the plaintiffs and was returned to them at about 4-30 o'clock on the same day with the Rs. 9,500 duly credited therein and initialled by one of the Bank's officers. On that same afternoon the plaintiffs delivered 100 of the bales to Shridhan. On the next day (the 5th April) another 100 bales were delivered by the plaintiffs to Shridhan, and after the delivery had proceeded thus far the plaintiffs at about 1-30 o'clock on the 5th April received notice from the defendant Bank that the Company's cheque for Rs. 9,500 had been dishonoured. Subsequently to the receipt of this notice the plaintiffs delivered the remaining 400 bales to Shridhan. The plaintiffs now sued the defendant Bank to recover the sum of Rs. 9,500, alleging that it was impossible to recover the amount from the drawers of the cheque (the Company), and contending that the defendant Bank

\* Suit No. 434 of 1900.