with which we are not concerned. We can only draw the attention of the Government to the hardship that is likely to be caused to those who have been deprived of their property. The result, therefore, is that in our opinion the order made by the Collector of Nasik under s. 5 (*1*) was an administrative order and, therefore, no writ of *certiorari* can lie to correct that order.

The result is the petition fails and must be dismissed with costs.

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ALARAKHIA SOMJEE BHIVANDIWALA *v.* COLLECTOR OF NASIK

Chagla C. J.

Petition dismissed.

J. G. R.

APPELLATE CIVIL

Before Mr. Justice Rajadhyaksha and Mr. Justice Dixit.

NARAYAN GANESH VARDE (ORIGINAL APPLICANT—DECREE-HOLDER), APPLICANT *v.* FATMA W/o DAUD TARAPORWALA AND OTHERS (ORIGINAL JUDGMENT-DEBTOR'S HEIRS AND APPLICANT IN DARKHAST NO. 22 OF 1948), OPPONENTS.*

1951 Feb. 20

Civil Procedure Code (V of 1908), s. 73—Rateable distribution, right to —Property sold pending suit and proceeds deposited in Court to the credit of the suit—Subsequent decree-holder's right to rateable distribution—Executing Court and Custody Court same—Assets held by a Court, meaning of—When assets are said to be received.

In order to entitle a person to claim rateable distribution the assets must be assets held by a Court and secondly, the person claiming rateable distribution must have made an application for execution of his decree before the receipt of such assets. When the executing Court and the Custody Court are the same the amount realised by the sale of the judgment-debtor's property and kept to the credit of the particular suit becomes "assets held in Court" within the meaning of s. 73, Civil Procedure Code, 1908, only when the Court passes an order for payment to the decree-holder in that particular suit. If a subsequent decree-holder makes an application for rateable distribution before that order is passed he is entitled to succeed.

Nachiappa Chettiar v. *Subbier*[1]; *Imperial Bank of India* v. *Balasubramania Pandia*[2]; *Visvanadhan Chetty* v. *Arunachalam Chetty*[3]; and *Bithal Das* v. *Nand Kishore*,[4] relied upon.

* Civil Revision Application No. 258 of 1948.

(1) (1923) 46 Mad. 506.
(2) [1945] A. I. R. Mad. 412.
(3) (1920) 44 Mad. 100.
(4) (1900) 23 All. 106.

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NARAYAN GANESH VARDE v. FATMA DAUD TARAPORWALA AND OTHERS

Civil Revision Application from the decision of R. N. Kulkarni, Esquire, Civil Judge (Junior Division), Dahanu.

Rateable distribution.

Narayan Ganesh Varde (Applicant) obtained a decree for Rs. 2,386-9-0 against opponent No. 1 in civil suit No. 196 of 1947 on February 7, 1948. Opponent No. 2 had obtained a decree against opponent No. 1 in civil suit No. 191 of 1947 for Rs. 1,285-6-0 on January 23, 1948. The applicant applied for attachment before judgment upon the moveable property of opponent No. 1 which was granted. Opponent No. 2 also applied for attachment before judgment upon the same moveable property and got the order. Both attachments were made absolute under the respective decrees. The moveable property which was attached, being of perishable nature, was sold and Rs. 1,412 were realised on December 8, 1947. This amount was kept in Court to the credit of suit No. 191 of 1947. On January 27, 1948, opponent No. 2 filed Darkhast No. 22 of 1948 and prayed that he should be given Rs. 1,412 which were lying to the credit of his suit. On January 30, 1948 notice was issued to the present applicant (Plaintiff in suit No. 196 of 1947) returnable on February 10, 1948. On February 19, 1948 the present applicant filed darkhast No. 31 of 1948 for execution of his own decree and prayed that he should be given rateable distribution with the decree-holder in darkhast No. 22 of 1948 (i.e. present opponent No. 2). On March 20, 1948, the learned Judge passed an order directing that the decree-holder of darkhast No. 22 of 1948 (i.e. present opponent No. 2) was entitled to get his decree satisfied out of the whole amount lying in Court.

The applicant applied in Revision to the High Court.

M. M. Virkar, for the applicant.

M. H. Shah, for opponent No. 2.

DIXIT J. This revisional application raises a question of rateable distribution under s. 73 of the Code of Civil Procedure and the facts necessary to understand the question are these.

The applicant obtained against opponent No. 1 a decree for a sum of Rs. 2,386-9-0 in civil suit No. 196 of 1947 on February 7, 1948. Opponent No. 2 to the application obtained a money decree for a sum of Rs. 1,285-6-0 against the same defendant in civil suit No. 191 of 1947 on January 23, 1948. The petitioner

had applied for attachment before judgment upon the moveable property of the defendant. The attachment was granted and the same was made absolute under the decree. Opponent No. 2 also had applied for attachment before judgment upon the defendant's moveable property and that attachment too was made absolute under the decree.

The moveable property in respect of which attachment was sought and levied happened to be property of a perishable nature and it appears that the property was sold, pending the opponent's suit and a sum of Rs. 1,412 was realised as a result of the sale. This sum of Rs. 1,412 was placed to the credit of suit No. 191 of 1947, that is to say, in the suit of opponent No. 2.

On January 27, 1948, that is to say, about four days after obtaining his decree, opponent No. 2 filed darkhast No. 22 of 1948, and in the prayer clause of the darkhast he stated that he should be given the sum of Rs. 1,412 which lay to the credit of his suit and which amount was recovered as a result of a sale of the moveable property of the defendant. Upon this application for execution the executing Court made an order on January 30, 1948, directing notice to the plaintiff in civil suit No. 204 of 1947 and civil suit No. 196 of 1947 to issue. It appears that this notice was made returnable on February 10, 1948, and the matter stood adjourned to February 19, 1948. Upon the latter date, viz. February 19, 1948, the petitioner applied for execution of his own decree by Darkhast No. 31 of 1948. In the application for execution the petitioner in prayer clause No. 10 stated that there was in the Court a deposit of Rs. 1,412 and that he should be given rateable distribution with the decree-holder in regular Darkhast No. 22 of 1948.

The executing Court considered this dispute between the two rival decree-holders and the learned Judge of the executing Court made on March 20, 1948, an order directing that the decree-holder of Darkhast No. 22 of 1948 was entitled to get the whole of his decree satisfied out of the amount lying in Court, and it is the correctness of this order which has been assailed by Mr. Virkar on behalf of the petitioner.

Now, there are certain facts about which there can be no dispute. In the first place, the two decrees are decrees for the payment of money. The decrees in question have been passed against the same judgment-debtor. The two decree-holders have also applied for execution of the money decrees, and the

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question is whether the applicant is entitled to claim rateable distribution in the sum of Rs. 1,412 with opponent No. 2 Section 73 which has a bearing upon this question, so far as material, runs as follows:—

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons."

The words in s. 73 which require construction are (1) "where assets are held by a Court" and also the words "before the receipt of such assets." It is, I think, apparent from the language of s. 73 that the question of rateable distribution must arise, of necessity, in the course of execution proceedings. The decree must be a decree for the payment of money. The decree must be passed against the same judgment-debtor and there must be an application for execution to the Court before the receipt of the assets. Now, in this case the applicant had applied for attachment before judgment. So too opponent No. 2 had applied for attachment before judgment. Each of them had got attachment levied upon the moveable property of the same judgment-debtor, viz. the defendant in the suit, and the attachment was made absolute under each of the two decrees. But Mr. Shah for the second opponent contends that he is entitled to a preferential treatment because the moveable property was attached in his suit, that the moveable property was sold in the course of his suit and that the sale proceeds were credited in his suit. It seems to me that the contention is not well founded. An attachment does not create any interest in the property attached. It does not create any lien in favour of opponent No. 2. It only prevents alienation of the property on the part of the judgment-debtor, so that if the judgment-debtor alienates the property contrary to attachment, then the alienation becomes void as against all claims enforceable under the attachment under s. 64 of the Code of Civil Procedure. Now, in this case since the property had been attached before judgment, it was not necessary to reattach it in the course of execution proceedings, having regard to the provisions contained in O. XXXVIII, r. 11, of the Code. The result is that when opponent No. 2 applied for attachment of the property, the attachment which was originally attachment before judgment became one in execution. But it so happened in this case that the

amount of Rs. 1,412 was lying in the same Court, that is to say, the Custody Court and the Attaching Court were the same. In most cases it is not difficult to ascertain the date of the receipt of the assets. If moveable property is sold and the sale proceeds are realised by the Collector, the amount of sale proceeds is sent to the Court and the date of the receipt of the sale proceeds is the date when the Court receives the assets; so too in the case of sale of moveable property. In this case since the moveable property was of a perishable nature, the moveable property was sold when the suit was pending. Ordinarily, if the property is not attached, the property will have to be attached under O. XXI, r. 43, of the Code, and the property will have to be sold under the provisions of O. XXI, r. 74, of the Code. But in this case there was no necessity of selling the property since the property had been already sold.

The question, therefore, arises as to when the assets can be said to have been received by the Court. Now, in order to entitle a person to claim rateable distribution the assets must be assets held by a Court, and, secondly, the person claiming rateable distribution must have made an application for execution of his decree before the receipt of such assets. It appears from a certified copy of Darkhast No. 22 of 1948 that the sum of Rs. 1,412 was credited in a book called "C" book of the Court on December 8, 1947. It is obvious that the moveable property was sold either on December 8, 1947, or on a date prior to that date. The material date so far as the petitioner is concerned is the date when he filed the execution application, viz. February 19, 1948. In order to succeed Mr. Virkar has to establish that the assets were received by the Court on a date subsequent to the date of his application for execution, viz. February 19, 1948. It is clear from the facts of the case that the sum of Rs. 1,412 was lying in suit No. 191 of 1947 to the credit of the suit of opponent No. 2 and it continued in that state of things until the Court made an order on March 20, 1948, directing that out of the amount lying in Court the opponent's decree should first be satisfied. Mr. Virkar for the petitioner relies upon a decision of the Madras High Court reported in *Nachiappa Chettiar* v. *Subbier*.[1] The facts of that case have, to some extent, a close resemblance to the facts of the present case and it will be convenient to mention the facts in some detail. In that case A, having instituted a suit in a District Munsif's Court, obtained attachment before judgment of certain goods belonging to the defendant. The goods were sold pending the

[1] (1923) 46 Mad. 506.

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suit and the sale proceeds deposited in the Court to the credit of that suit on April 14, 1917. B, another, creditor, instituted a suit in the same Court against the same defendant, obtained attachment before judgment of the amount deposited in Court on April 14, 1917, and went on to obtain a decree on April 19, 1917, and he applied on June 7,1917, in A's suit for payment of the amount in deposit in satisfaction of his decree. C, a third creditor, obtained a decree against the same defendant on June 8, 1917, and applied for payment on June 29, 1917. A obtained his decree on July 2, 1917, and applied on July 3, 1917 for payment out of the whole money deposited in his suit. On August 31, 1917, the District Munsif made an order in his favour, but B objected to the order upon a revisional application preferred by him in the High Court. Upon these facts the Madras High Court held that the amount deposited in Court became "assets held in Court" within the terms of s. 73, Civil Procedure Code, only when the Court passed an order on the application of A for payment in execution of his decree and A, B and C were entitled to rateable distribution under s. 73.

The decision of the Madras High Court arose upon an appeal preferred under the Letters Patent from the decision of Mr. Justice Sadasiva Ayyar, whose opinion prevailed in preference to the view of Mr. Justice Coutts-Trotter. That matter again arose out of the decision given by Mr. Justice Bakewell. Both Mr. Justice Bakewell and Mr. Justice Coutts-Trotter took the view that B was not entitled to claim rateable distribution but that A was entitled to the whole of the amount. It is apparent that there was in the Madras High Court a difference of opinion upon this question, but the three learned Judges in the decision just cited held that all the three decree-holders were entitled to rateable distribution. In our opinion, the principle of the Madras High Court should be applied to this case with the result that the moneys must be taken to have been received by the Court on March 20, 1948, when in this case the lower Court made an order for payment to opponent No. 2. In this case the Custody Court and the Attaching Court were the same. When the two Courts are different there is not much difficulty in ascertaining the date when the money can be said to have been received by the Court. The difficulty arises when both the Courts happen to be the same, and as far as we have been able to gather from the facts of this case the sum of Rs. 1,412 continued to the credit of suit No. 191 all along until the date March 20, 1948, when the Court said in effect: "assets are held

by me and I have now to distribute the same", and it was upon that date that the executing Court made an order directing payment to be made to opponent No. 2.

The decision of the Madras High Court in *Nachiappa Chettiar's* case (supra) was approved in a later decision of the Madras High Court reported in the case of *Imperial Bank of India* v. *Balasubramania Pandia.*[1] In that case the Madras High Court considered the earlier cases reported in *Visvanandhan Chetty* v. *Arunachelam Chetty*[2] *Nachiappa Chettiar* v. *Subbier*[3]. It seems to us, therefore, that in the face of the two authorities just cited, it is not possible for Mr. Shah to successfully contend that merely because the moveable property had been sold in his suit and the money was lying in the Court to the credit of his suit, he was entitled to any preferential treatment. The object underlying section 73 of the Code of Civil Procedure was stated by the learned Chief Justice of the Allahabad High Court in *Bithal Das* v. *Nand Kishore*[4] as follows:

> "The object of the section is two fold. The first object is to prevent unnecessary multiplicity of execution proceedings, to obviate, in a case where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one *separately* attaching and *separately* selling that property. The other object is to secure an equitable administration of the property by placing all the decree-holders in the position I have described upon the same footing, and making the property rateably divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property".

In this case the facts proved are that both the petitioner and the second opponent had obtained decrees for the payment of money and had applied for attachment before judgment and in each case the attachment was made absolute. It so happened that the second opponent obtained his decree before the petitioner obtained his. Consequently, opponent No. 2 applied for execution of his decree before the petitioner could apply for execution of his own decree. But that makes no difference to the application of the principle. As usually happens, a creditor applies for execution of his decree. The property of the debtor is attached and sold in the course of execution proceedings and long after the first application for execution other creditors come in and apply for execution of their decrees and

[1] [1945] A. I. R. Mad. 412.
[2] (1920) 44 Mad. 100.
[3] (1923) 46 Mad. 506.
[4] (1900) 23 All. 106.

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in such cases the Court has to consider whether they are entitled to rateable distribution. They are entitled to rateable distribution provided they apply for execution of the decrees before the receipt of the assets. In our opinion, therefore, the lower Court was wrong in holding that the applicant was not entitled to claim rateable distribution along with the second opponent. Consequently, the application must succeed.

The result is that this application will be allowed, the order of the executing Court dated 20th March 1948 set aside and that the proceedings will be sent back to that Court with a direction that the sum of Rs. 1,412 will be rateably distributed between the applicant and the second opponent and the darkhasts disposed of in accordance with law. The second opponent will pay the applicant the costs of this revisional application and the costs in the executing Court will be dealt with by that Court.

Rule absolute.

K. B. S.

APPELLATE CRIMINAL

Before Mr. Justice Bavdekar and Mr. Justice Chainani.

1951
March 13

HASANALLI MOHOMEDHUSSEIN SHARIFFI, APPLICANT *v.* STATE OF BOMBAY.*

City of Bombay Police Act (IV of 1902), s. 27 (1) (7)†—Constitution of India, arts. 13, 19 (1) (d) (e) and 19 (5), 226—Order externing person

* Criminal Application No. 99 of 1951.

† The relevant provisions are:

27 (1) Whenever it shall appear to the Commissioner of Police.

(a) that the movements or acts of any person in the Greater Bombay are causing or calculated to cause alarm, danger or harm to any person or property, or that there are reasonable grounds for believing that such person is engaged in the commission of an offence involving force or violence, or an offence punishable under Ch. XII, XVI or XVII of the Indian Penal Code, or in the abetment of any such offence, and when in the opinion of the Commissioner witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property;.....