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and will also account to the plaintiff for the recoveries, if any, made by him after the date of the suit, he being in his turn entitled to credit for the disbursements, if any, made by him and the debts, if any, paid by him”.

There will be no order as to costs of the cross-objections, each party bearing its own costs thereof.

Decree confirmed.

K. B. S.

### APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice.

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 July 27

VENILAL RANGILDAS PATEL (ORIGINAL OPPONENT), PETITIONER v. GANDABHAI BHAGWANDAS (ORIGINAL DECREE-HOLDER), OPPONENT.\*

Civil Procedure Code (Act V of 1908), s. 73—Execution of decree for money—Attachment of judgment-debtor's fund lying deposited in another Court—Application by another judgment-creditor for execution after said attachment but before actual receipt of fund by executing Court—Whether latter judgment-creditor is entitled to rateable distribution.

A mere attachment by a judgment-creditor under O. 21, r. 52 of the Civil Procedure Code, 1908, of the judgment-debtor's fund in the custody of another Court without more does not result in the assets being received by the executing Court within the meaning of s. 73 of the Code. If another judgment-creditor of the judgment-debtor makes an application for execution of his money decree after such attachment but prior to the actual receipt of the fund by the executing Court, he is entitled to claim rateable distribution along with the first attaching creditor.

*Narsingh Das v. Gulab Rai*,<sup>(1)</sup> *Dattatraya v. Pundalik*<sup>(2)</sup> and *Galstaun v. Woomes Chandra Bonnerjee*,<sup>(3)</sup> distinguished.

CIVIL REVISION APPLICATION against the decision of R. K. Saklikar, Esquire, Joint Civil Judge (Junior Division) at Surat.

Execution proceedings.

One Venilal (petitioner) obtained a money decree against Gangaram Narsi in Regular Civil Suit No. 55 of 1938 in the Court of the Civil Judge (Junior Division) at Surat. Regular

\* Civil Revision Application No. 990 of 1950.

<sup>(1)</sup> [1935] A. I. R. Pat. 201. <sup>(2)</sup> (1920) 22 Bom. L. R. 1001.

<sup>(3)</sup> (1916) 44 Cal. 789.

Darkhast No. 33 of 1939 was filed by him to recover Rs. 3,085 in execution of that decree. In the course of the execution, the petitioner on January 24, 1939, attached Rs. 3,085 out of an amount of Rs. 3,516 belonging to the judgment-debtor which was lying in deposit in the Court of the City Magistrate at Surat.

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In 1940, Gandabhai (opponent) filed Regular Civil Suit No. 103 of 1940 for a declaration that the sum of Rs. 3,516 lying deposited in the Court of the City Magistrate at Surat was assigned to him by the said Gangaram in 1937, and that, therefore, it was not liable to attachment in the Regular Darkhast No. 33 of 1939. In that suit it was ultimately held that the assignment was good as against the others but it was not binding on the petitioner. In the result the Regular Darkhast No. 33 of 1939 which had been stayed in the meanwhile was revived and proceeded with under a fresh number, viz., No. 239 of 1944. On January 21, 1946, the sum of Rs. 3,516 lying in the City Magistrate's Court at Surat was received by the executing Court in the Darkhast No. 239 of 1944.

In the meantime, the opponent had obtained a money decree in Regular Civil Suit No. 361 of 1940 against the said Gangaram and filed Regular Darkhast No. 203 of 1941 to recover his decretal amount. The opponent claimed rateable distribution in the said sum of Rs. 3,516 received from the City Magistrate's Court, but that claim was opposed by the petitioner on the ground that the assets had been received by the executing Court long before the filing of the Darkhast by the opponent, i.e., on January 24, 1939, when he levied his attachment.

The executing Court upheld the opponent's contention and awarded him Rs. 1,162 out of the total amount by way of rateable distribution.

The petitioner applied in revision to the High Court.

T. N. Walawalkar, for the petitioner.

A. D. Desai, for the opponent.

CHAGLA C. J. This revision application raises a question of rateable distribution under s. 73 of the Civil Procedure Code, and although the facts are complicated, the necessary and essential facts for the determination of this question are very simple. The petitioner obtained a money decree against his judgment-debtor and in execution of that decree he attached under O. XXI, r. 52, a fund of Rs. 3,516 belonging to the judgment-debtor and lying deposited in the Court of the City

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Magistrate, Surat. This fund continued to remain in the City Magistrate's Court and was ultimately sent to the executing Court in 1946. The opponent made an application for attachment under his decree prior to this fund being received by the executing Court in 1946, and the only question that I have to determine on this application is whether for the purposes of s. 73 it could be said that this fund was received by the executing Court when the attachment was levied on January 24, 1939, or whether the fund was received by the executing Court when the amount was actually transmitted to the executing Court in 1946. If the fund can be considered to have been received on January 24, 1939, then the opponent is not entitled to rateable distribution. If, on the other hand, it could be said that the fund was only received in 1946, then the opponent is entitled to rateable distribution. The lower Court held that the opponent was entitled to rateable distribution, and it is from that order that this revision application is preferred.

Now, the effect of levying an attachment under O. XXI, r. 52, is to inform the Court or officer that the property attached must be held by the Court or officer subject to the further orders of the Court. The property attached continues to remain with the officer of the Court, and the property is not at the disposal of the executing Court. Further orders have to be made by the Court before the property is at the disposal of the executing Court and before the executing Court can make any orders with regard to the disposal of that property. Therefore, the only effect of the attachment under O. XXI, r. 52, is to prevent the Court or officer who holds the property of the judgment-debtor from dealing with that property. Apart from authority it is clear that a mere attachment without more would not result in the property or the assets being received by the executing Court within the meaning of s. 73.

Mr. Walawalkar has relied on three authorities in support of his submissions that that attachment under O. XXI, r. 52, does amount to a receipt of assets for the purpose of s. 73. The first is *Narsingh Das v. Gulab Rai*<sup>(1)</sup>. In that case the judgment-debtor had a sum of money in Court to his credit. There was an application for attachment of this money. Then there was another application at a later date and the later attaching creditor contended that as there was no book entry transferring the money to the credit of any execution he was entitled to rateable distribution under s. 73. This contention was rejected

<sup>(1)</sup> [1935] A. I. R. Pat. 201.

and it was held that the actual receipt took place when the moneys were attached by the Court. This case does not help Mr. Walawalkar because here the moneys were lying in the same Court, and as soon as the moneys were attached, it was naturally held that the moneys were received by the Court. There was no question here of money being received from any other Court or any other officer. Under these circumstances it is easy to understand the decision of the Patna High Court that the actual receipt took place by reason of the attachment. The other case relied upon is a decision of this Court in *Dattatraya v. Pundlik*<sup>(1)</sup>. There the Court was considering the case of execution being transferred to the Collector under the Civil Procedure Code and the sale proceeds being realised by the Collector by sale of the property, and the Court held that the sale proceeds must be deemed to have been received when the Collector sells the property and realises the full sale proceeds. It is not necessary that the Collector should transfer the sale proceeds to the executing Court. I fail to see what analogy there is between that case and the case before me. As Sir Norman Macleod, Chief Justice, points out at p. 1003:

“.....there is no reason why, when the Court is given powers by Statute to appoint the Collector as its officer to execute the decree, it may not be said that the Collector is the officer of the Court with certain delegated powers, for instance, he is empowered to confirm the sale although he has no power to set aside the sale.”

Therefore, the *ratio decidendi* of this case is that the Collector when he executes the decree does it as the officer of the executing Court, and when he receives the sale proceeds as the officer, he is receiving it on behalf of the executing Court. Reliance is also placed on a decision of the Calcutta High Court in *Galstaun v. Woomes Chandra Bannerjee*.<sup>(2)</sup> In that case Mr. Justice Mookerjee and Mr. Justice Cuming held that the point of time to be determined under s. 73 of the Civil Procedure Code was when the purchase money has been actually paid by the purchasers. It was immaterial whether the purchase money has been actually paid into the treasury or into the hands of a person employed by the Court to hold the same. Therefore, here also we have a case where the Court appoints an officer to hold the sale and the purchase money is received by the officer. The officer is acting on behalf of the Court and receives the money on behalf of the court.

<sup>(1)</sup> (1920) 22 Bom. L. R. 1001.

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Now, applying these principles to the facts before me, it cannot possibly be stated that the Resident Magistrate, Surat, was an officer of the executing Court or that he had received any money on behalf of the executing Court or that he held the moneys at the disposal of the executing Court as the agent or the delegate of the executing Court. The only result of the attachment was, as I have pointed out, that he was prevented from dealing with the funds or parting with the funds and he had to keep the funds until further orders of the executing Court. Therefore, in my opinion, the learned Judge below was right in holding that the opponent is entitled to rateable distribution.

The second point urged by Mr. Walawalkar is extremely ingenious, but when one analyses it there does not seem to be much substance in that point. Now, what happened was that a suit was filed by the opponent being suit No. 103 of 1940 for a declaration that the fund lying in the Magistrate's Court was assigned to him, and in that suit the Court held that the assignment was good except against the petitioner. Therefore, the Court came to the conclusion that there was a valid assignment as between the judgment-debtor and the opponent, but that assignment was not binding upon the petitioner. Mr. Walawalkar's contention is that if the assignment was a valid assignment, then *quae* the judgment-debtor the fund belongs to the opponent and, therefore, he cannot attach something which belongs to himself and does not belong to the judgment-debtor. Apart from its ingenuity there is really no substance in this contention. Mr. Walawalkar wants to proceed against this fund on the basis that the fund belongs to the judgment-debtor and he wants to satisfy his decree out of this fund, but when the opponent wants to exercise the same right Mr. Walawalkar wants to run against him and say that the fund does not belong to the judgment-debtor but it belongs to him and, therefore, he cannot attach this fund. It is clear that all that the decree of the Court in suit No. 103 of 1940 meant was that the rights of the petitioner under the attachment were saved and he could establish his right to the fund irrespective of the assignment made by the petitioner in favour of the opponent. But if the petitioner could establish his rights under the attachment, there was nothing to prevent the opponent also to establish his rights against the petitioner in execution of his own decree. The opponent is not going against the judgment-debtor because as far as the judgment-debtor is concerned he

is entitled to the whole fund. He is only going against the petitioner who claims to be entitled to the whole fund by reason of his decree. To him the opponent's answer is "I have also applied for execution and I am entitled to rateable distribution along with you under s. 73." Therefore, the claim of the opponent is less than what he would be entitled to under the decree in suit No. 103 of 1940. Therefore, it is difficult to see how the opponent can be prevented from making a lesser claim than what he would be entitled to under the decree in suit No. 103 of 1940.

The result, therefore, is that the application fails. Rule discharged with costs.

*Rule discharged.*

M. W. P.

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## APPELLATE CIVIL

*Before Mr. M. C. Chagla, Chief Justice, Mr. Justice Coyajee,  
 and Mr. Justice Gajendragadkar.*

THE CHIEF CONTROLLING REVENUE AUTHORITY v. NANABHAI  
 HORMUSJI BHIWANDIWALA.\*

1951

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*Indian Stamp Act (II of 1899), sch. I, art. 35—Lease—Whole rent paid in advance—Absence of covenant to pay rent—Whether lease chargeable with stamp duty under sub-cl. (a) (iii) or (b)—Reference to High Court by Stamp authorities—Costs of reference—Change in practice.*

In order that a document of lease may fall under art. 35 (a) (iii) of Schedule I to the Indian Stamp Act, 1899, it is necessary that the annual rent must be reserved under that document. "Rent reserved" in this context means rent in respect of which there is a covenant on the part of the lessee to pay the amount stated in the document. Where there is no covenant to pay rent the whole amount having been paid in advance, and all that the lease provides is that there is an appropriation of the amount actually paid to rent which is stated as being for certain fixed amounts spread over the period of the lease, there is no reservation of rent under the lease. What the lessee really does in making the payment before he is liable to pay rent is to make an advance to the lessor, which advance would satisfy his liability from time to time as he becomes liable to pay rent. Such a case falls under art. 35 (b) and not under art. 35 (a) (iii) of the Stamp Act.

\* Civil Reference No. 4 of 1951.