

**(1968) 06 GUJ CK 0012**  
**In the Gujarat High Court**  
**Case No : First Appeal No. 318 of 1963**

Fulsinh Kesri Sinhji

APPELLANT

Vs

Vallabhdas Hargovandas and Another

RESPONDENT

**Date of Decision :** 19-06-1968

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 11, Order 21 Rule 11(2), 73

**Citation :** AIR 1969 Guj 200 : (1969) GLR 148

**Hon'ble Judges :** D.A. Desai, J

**Bench :** Single Bench

**Advocate :** B.M. Vin, for the Appellant; M.I. Patel, for the Respondent

**Final Decision :** Allowed

## Judgement

D.A. Desai, J.—This is an appeal against an order passed on Ex. 167 in Special Darkhast No. 11 of 1956 on the file of the Civil Judge, Senior Division, Panch Mahals at Godhra.

2. Shortly stated the facts leading to the present appeal are: that the appellant obtained a decree against respondent No. 2 for Rs. 33,476-75. Respondent No. 1 filed Special Darkhast No. 11 of 1956 for executing the decree obtained against respondent No. 2. In this Darkhast some of the properties of respondent No. 2 judgment debtor were attached and sold at a court auction and the sale proceeds were deposited in the court and the sales were confirmed. In the meantime, the present appellant who had obtained a decree against respondent No. 2, the same judgment-debtor filed special Darkhast No. 7 of 1962 on 28-3-1962 for executing the decree. In this Darkhast the relief claimed was that the amount should be awarded by rateable distribution from the amount recovered by attachment and sale of the properties of the judgment-debtor in Special Darkhast No. 11 of 1956 filed by respondent No 1. It was also prayed that Special Darkhast No.7 of 1962 filed by the present appellant should be kept and heard along with Special Darkhast No. 11 of 1956 filed by respondent No. 1 against respondent No.2. Respondent No. 1 in his Special Darkhast No.11 of 1956 gave an application Ex.

167 inter alia contending that the execution application filed by the appellant against respondent No. 2 is not legal and is not maintainable and the appellant would not be entitled to rateable distribution from the assets of the judgment-debtor realised in the Darkhast filed by respondent No. 1, Two contentions were raised in this application: (1) that the decree obtained by the appellant against respondent No. 2 is a collusive decree and (2) that the application for execution in which the only prayer made is one for rateable distribution is not an application for execution according to law and it is not maintainable. A notice of this application was served upon the present appellant and after hearing both the sides, the learned Judge held on the first contention that the decree is not collusive. On the second contention, the learned Judge held that where a decree-holder in his application for execution claimed the only relief of rateable distribution out of the sale proceeds of the assets of the judgment-debtor in another pending execution application against the same judgment-debtor, it is not a mode of execution for which assistance of the Court is sought as envisaged by Order XXI, Rule 11 and therefore, it is not an application for execution according to law and in accordance with this finding dismissed Darkhast No. 7 of 1962 filed by the present appellant. The appellant having been dissatisfied with this order has preferred this appeal.

3. A narrow but interesting question relating to the interpretation of Order XXI, Rule 11(2)(j) and Section 73 of the CPC arises in this appeal. The question for consideration is whether an application for execution of a money decree in which the mode in which assistance of the Court is sought is one for rateable distribution of the assets of the judgment-debtor realised in another pending execution application could be said to be an application for execution in accordance with law as envisaged by Section 73. Order XXI, Rule 11(2) provides that every application for execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case and shall contain in a tabular form the particulars mentioned in Sub-rules 2(a) to 2(j). Sub-clause (j) which is relevant for our purpose is as under :--

"(j) the mode in which the assistance of the Court is required, whether-

(i) by the delivery of any property specifically decreed;

(ii) by the attachment and sale, or by the sale without attachment, of any property;

(iii) by the arrest and detention in prison of any person;

(iv) by the appointment of a receiver;

(v) otherwise, as the nature of the relief may require."

The provision contained in Sub-rule (2) would show that the application for execution must be in a tabular form in which the details as set out in Sub-rule (2) must be mentioned. The heading of the last column of the tabular form is:

"the mode in which the assistance of the Court is required". Clause (j) provides different modes of assistance of the Court which a decree-holder can seek in execution application. Section 73 postulates the filing of an execution application in accordance with law before rateable distribution could be ordered by the Court. Relying on the different modes in which Court could grant assistance to a decree-holder as set out in Clause (j), it was urged that an application for execution to be in accordance with law must seek assistance of the Court in one of the modes provided for in Clause (j) and the Court could grant its assistance only in one or more of the modes as set out in Clause (i). It was also urged that Clause (j) is exhaustive and the Code does not envisage the grant of assistance by the Court in execution of a decree by a mode which would not fall in any of the Sub-clauses (i) to (v) of Clause (j). It was more specifically contended that if the assistance of the Court is sought in a mode not falling within any of the sub-clauses of Clause 2(j), the Court would have no jurisdiction to grant it and, therefore, such an application for execution would not be in accordance with law. Now, Sub-clause (v) of Clause (j) of Sub-rule (2) provides that the decree-holder can seek assistance of the Court in any other mode as the nature of the relief granted may require. Sub-cl, (v) is couched in very wide terms. It would enable a decree-holder to seek assistance of the Court for executing a decree in consonance with the relief granted in the decree. The language of Sub-clause (v) would negative the contention that it is exhaustive and the Court is precluded from granting its assistance in a mode not covered by Sub-clauses (i) to (iv). It appears that Sub-clauses (i) to (iv) enumerates the various modes in which assistance of the Court could be sought and Sub-clause (v) is enacted in wide terms to enable the executing Court to grant its assistance in consonance with relief granted in the decree under execution. Now, if the decree is a money decree, the assistance of the Court may be sought for realising money. While realising the money, belonging to the judgment-debtor it may become necessary to attach it in the hands of a third person or recover from the Court where it is lying. If against the same judgment-debtor another execution application is pending and in which the property of the judgment debtor is brought to court auction and sold, there is no reason both on principle or on authority why the decree-holder cannot seek the assistance of the Court by only praying for rateable distribution. Section 73 empowers the Court to grant rateable distribution between pending execution application against the same judgment-debtor. Mr. Patel, the learned Advocate for respondent No. 1 however contended that even if Sub-clause (v) of Rule 11(2)(j) is very wide in terms it has to be interpreted ejusdem generis with Sub-clauses (i) to (iv) and therefore the mode in which assistance may be sought must be analogous or similar to the modes set out in Sub-clauses (i) to (iv) of Sub-rule 2(j). At one stage, Mr. Patel attempted to urge that a decree-holder can seek assistance of the Court in the manner set out in the first four modes in Sub-clauses (i) to (iv) of Sub-rule (2)(j) and sub-Clause (v) of Sub-rule 2(j) would not enlarge the scope and ambit of the rule so as to grant assistance of the Court in any other mode entirely different and unconnected with those set out in Sub-clauses (i) to (iv). In my opinion,

there is nothing in the language of Sub-rule 2(j) and its Sub-clauses (i) to (iv) which would control or abridge the meaning or scope of Sub-clause (v). In fact, the Legislature has very wisely enacted Sub-clause (v) in wide terms so that a decree-holder would be able to seek the assistance of the Court while executing the decree by a mode which would be in consonance with the reliefs granted to him and would be able to realise the fruits of the decree. In a money decree the assistance of the Court would be sought to realise the decretal amount. The decretal amount or a part of it could be realised by rateable distribution. Section 73 empowers the Court to grant rateable distribution between decree-holders against the same judgment-debtor. Therefore, an execution application in which the assistance of the Court is sought for rateable distribution in the assets of the judgment-debtor by a decree-holder is one of the modes in which the assistance of the Court sought would be covered by Sub-clause (v) being the mode required by the nature of the relief granted in the decree. If the construction suggested by Mr. Patel is to be placed on Sub-clause (v) it would lead to an absurd position. Mr. Patel conceded that u/s 73 the Court can grant rateable distribution. But Mr. Patel urged that even though the decree-holder seeks rateable distribution he must seek the assistance of the Court in one or more of the modes specified in sub-clauses (1) to (iv) and only then Court can grant rateable distribution. It is difficult to conceive that in order to obtain rateable distribution the decree holder must seek assistance in other modes knowing full well "that in the circumstances of the case it is not likely to be available. I see nothing in the language of Sub-rule 2(j) of Order XXI, Rule 11 which would show that the relief by way of rateable distribution in execution application is not the one which would not be covered by Sub-clause (v) of Sub-rule 2(j). Therefore, an application for execution of a money decree in which assistance of the Court is sought by rateable distribution and which in other respects is in conformity with the requirement of Order XXI, Rule 11 is an execution application in accordance with law. This is also borne out by a catena of decisions to some of which I would now refer.

4. Mr. Vin first referred to Kasi Prosad Khaitan Vs. Moti Lall and Others, in which exactly an identical question was raised before the Division Bench of the Calcutta High Court. The question for consideration that was raised in that case was whether an application for execution in which the mode in which the assistance of the Court is required does not mention attachment or sale of property but says that the decree-holder prays for realisation of the decretal duea by rateable distribution of the money that will be realised in another execution application of that Court, can be considered to be an application for execution validly made within the meaning of Section 73 of the Code of Civil Procedure. After considering the provisions contained in Order XXI, Rule 11(2)(j), it was held that a mere application for rateable distribution which does not contain the particulars mentioned In Sub-rule (2) of Rule 11, is not an application for execution but where there is an application which is in all other respects a proper application for execution under Order XXI, Rule 11(2), it does not cease to be a valid

application merely because the mode in which the assistance of the Court required is mentioned as rateable distribution of money that will be realised in another execution case. While reaching this conclusion, the Division Bench of the Calcutta High Court referred to the case of AIR 1929 148 (Nagpur) in which a contrary view is taken and observed that they were unable to agree with the view that where there is an application which is in all other respects a proper application for execution under Order XXI, Rule 11(2), it ceases to be a valid application merely because the mode in which the assistance of the Court required is mentioned as rateable distribution. I am referring to this aspect specifically because the other side has relied upon the case of AIR 1929 148 (Nagpur) .

5. Mr. Vin next referred to the case of Mt. Deoraji Kuer Vs. Jadunandan Rai . In that case, the application for execution was in a printed tabular form and all the particulars required for an application for execution were filled in, in columns 1 to 9 and in the last column which is column No. 10 has a heading "the mode in which the assistance of the Court is required". It was stated that the only property which the judgment-debtor had, has already been attached in execution of the other decrees and was to be put up for sale and it was therefore prayed that the decree-holder should be paid his decretal amount by rateable distribution of the amount realised at the auction sale. A contention was raised whether this application was one for execution in accordance with law and also whether a separate and independent application for rateable distribution u/s 73 is necessary. Disposing of this contention, it has been held that the application is a proper application for execution because one can read an implied prayer for the sale of the property and rateable distribution. It was further held that section 73 does not require a separate application for rateable distribution and accordingly there can be no objection to include a prayer for the rateable distribution, of the assets in the application which is really for execution of the decree itself. The case of AIR 1929 148 (Nagpur) was referred to in this case. It was distinguished on the ground that while the application before the Nagpur High Court was for rateable distribution simpliciter, the application in the case before their Lordships of the Allahabad High Court was one in which all the particulars as required under Order XXI, Rule 11(2) were set out and therefore, it was held that it is an application for execution in accordance with law. It was further observed that even if there was slight defect in the language in which the prayer clause was worded at best it would be an irregularity and on this account alone, it would not be proper to reject the application as one not in conformity with law.

6. Mr. Vin next referred to M. Jambanna v. K. Honnappa AIR 1957 A P 1017 , In that case, the decree-holder filed an application for execution in the tabular form and set out therein all the details and particulars as required by Order XXI, Rule 11. In column No. 10 headed "mode in which assistance of the Court is sought" the decree-holder stated that he should be paid rateable share from and out of the proceeds to be realised on sale and deposited in Court. The executing Court did not grant the relief holding that there was no execution application before the

Court and one filed is not one in accordance with law. Negating this contention, it was held by Subba Rao C. J. (as he then was) that as the decree-holder has filed an application in tabular form setting out therein all the particulars required by Order XXI, Rule 11, it is manifest that the petitioner satisfied both in form and substance the requirements of Order XXI, Rule 11 of the Civil Procedure Code. The case of *Mt. Deoraji Kuer Vs. Jadunandan Rai* was referred to and observed that such an application is one in accordance with law.

7. The next case referred to by Mr. Vin was in the matter of *Mst. Saraswatibai and Others Vs. Govindrao Keshavrao Mahajan and Others*, . The question that was canvassed before a Full Bench of the Madhya Pradesh High Court was whether an otherwise good application for execution can be regarded, for the purposes of Section 73 of the Civil Procedure Code, to be one made in accordance with law even if the only mode in which the assistance of the Court stated to be required is rateable distribution of the assets to be received in another execution case pending in the same Court. After reviewing the case law on the subject it has been held as under:--

"that being so we are of the view that recovery of the money decree by rateable distribution of assets, being a permissible mode of execution is within the ambit of Clause (i)(v) of Order 21, Rule 11(2) of the Code and an execution application which specified it as the mode in which the assistance of the Court is required is one in accordance with law for purposes of Section 73 of the Code."

Now, it may be mentioned that while reaching this conclusion, the Full Bench of the Madhya Pradesh High Court referred to the case of AIR 1929 148 (Nagpur) and differed from it and took a contrary view.

8. Mr. Vin also incidentally referred to *Jugalkishore Saraf v. Raw Cotton Co. Ltd.* AIR 1955 SC 376. The contention that was raised in that case was that the application for execution was defective inasmuch as it did not specify any of the several modes in which the assistance of the Court was required. Disposing of this contention, it was held that even if the application was defective, the Court could have returned the application for amendment but on this account alone, it cannot be said that there was no valid and proper application for execution.

9. As against this, Mr. M. I. Patel learned Advocate for the respondents referred to AIR 1929 148 (Nagpur) . Unfortunately, this was the case which was cited before the learned Judge and though there are number of other cases just taking a contrary view relied upon by Mr. Vin, none was pointed out to the learned Judge and the learned Judge was constrained to observe that no contrary authority had been shown to him. The matter came up before a Division Bench of the Nagpur High Court on a reference made to it. The relevant portion of the question referred to it was as under :--

"Is it necessary for a creditor, claiming on the strength of a money decree rateable distribution from the proceeds of a sale of his debtor's property about to take place at the instance of another creditor, to ask himself for attachment

and sale of that property, or is it sufficient to merely ask for rateable distribution?"

The Division Bench of the Nagpur High Court answered the reference as under:--

"We are of opinion, then, that an application that only prays for rateable distribution is not a valid application for execution within the meaning of Order XXI, Rule 11, that CPC does not recognise an application for rateable distribution as such and that, in order to obtain rateable distribution u/s 73, a decree-holder must have made an application for execution to the Court, praying for execution of his decree in one of the ways mentioned in Order XXI, Rule 11, before the receipt of assets by the Court."

It appears that a contention was put forth before the Division Bench that Sub-Clause (v) of Rule 2(j) is of widest amplitude and would cover the relief by way of rateable distribution. This contention appears to have been negated by a mere observation: "Nor do we think that it can be included in Clause (j)(v)." But even apart from this that case can be distinguished on another cogent ground. The application that was made in that case was not one in a tabular form as envisaged by Order XXI, Rule 11 setting out details and particulars as required by Order XXI, Rule 11, but it was an application simpliciter for rateable distribution. Such an application could by no stretch of imagination be said to be an application for execution at all and that aspect has considerably weighed with their Lordships. With respect, I am unable to accept the interpretation put by the Division Bench of the Nagpur High Court on Sub-clause (v) of Sub-rule (2)(j) of Rule 11 of Order XXI by which it was held that an application praying only for rateable distribution is not a valid application for execution. It may be that this conclusion was reached because what was before the Court was a mere application for rateable distribution and not an application for execution in a tabular form with the prayer clause seeking rateable distribution.

10. Mr. Patel also referred to AIR 1929 148 (Nagpur) .

11. The last case referred to by Mr. Patel is Gopal Parsharam Namjoshi Vs. Damodar Janardan Bhagwat, . Relying on this case, Mr. Patel attempted to urge that the settled view of the Bombay High Court is that an application for execution in which the assistance of the Court is sought by rateable distribution is not one in accordance with law. A cursory reading of this case is likely to support the contention of Mr. Patel. But a close and minute study of this case would show that this conclusion has been reached after recording a finding that the decree that was under execution was not a money decree. The decree under execution in that case was passed on an award and the decree directed the judgment-debtor to pay Rs. 2178/- within five years with running interest at 6% and past interest of Rs. 272/- within one year and if the judgment-debtor committed default the decree-holder would be entitled to recover the whole amount by sale of certain Immovable property on which a charge in respect of Rs. 2178/- was created. An application for executing this decree was filed and it

was resisted on diverse grounds including amongst others, on the ground that it is barred by limitation. In support of their contention it was urged that the previous Darkhast No. 465 of 1934 was not an application made in accordance with law as the decree holder had prayed for rateable distribution alone. It is in these circumstances that the question came up before the High Court whether the execution application in which the assistance of the Court is sought by rateable distribution is an application for execution in accordance with law. With reference to the question whether it was a decree for payment of money within the meaning of Section 73 it has been held that the decree should be regarded as on the same footing as a decree for sale for enforcement of a mortgage or charge and, it is on this footing that the decree had been dealt with in the Courts below. Before finding out whether the particular Darkhast in which the assistance of the court was sought by way of rateable distribution was an execution application filed in accordance with law, the Court has to find out whether it was for execution of a decree for payment of money. It was held in that case that decree under execution was not a money decree but a decree for sale for enforcement of a mortgage or charge. Having first reached this conclusion it was further held that in respect of such a decree if the assistance of the Court is sought by way of rateable distribution, it is not a proper relief which the executing Court could grant and therefore, it was not an application for execution in accordance with law. The test in order to find out whether a particular application for execution is in accordance with law or not is laid down as under:--

"From the above authorities, the main test of an application for execution being in accordance with law would appear to be whether it is possible for the Court to issue execution upon it, i.e. whether it is within the power of the Court to grant the kind of relief asked for, though in the particular case the relief may not on the merits be granted, e.g. owing to some finding on facts, not to the nature of the application itself."

As per the above test where the decree is for enforcement of a charge or realisation of mortgage dues by sale of security, if the assistance of the Court is sought by way of rateable distribution, certainly the Court would not be able to grant the assistance and the application for execution would not be in accordance with law. It must be remembered that Section 73 is confined to money decree only. The Court in that case having reached the conclusion that the decree under execution was not a money decree, the darkhast in which the assistance of the Court was sought for rateable distribution was held not in accordance with law. This decision therefore is not an authority for the proposition as urged by Mr. Patel that an application for execution of a money decree otherwise in conformity with Rule 11(2) but seeking the assistance of the Court for rateable distribution could not be said to be in accordance with law for the purpose of Section 73. The ratio of the decision is that if the decree under execution is a money decree rateable distribution would be one of the modes in which assistance of the Court could be sought. Therefore, the trend of authorities also indicate that an application for execution of a money decree otherwise in conformity with Rule

11(2) but in which assistance of the Court is sought for rateable distribution is an application in accordance with law as envisaged by Section 73 of the Code of Civil Procedure.

12. In the instant case, there is an application for execution of a decree for payment of money. It is in a tabular form. It sets out all the details as required by Order XXI, Rule 11 Sub-rule (2). The only defect that was pointed out was that the assistance of the Court was sought by way of rateable distribution and on this account alone, it was held that the application is not in accordance with law. In my judgment, when a money decree is being executed and the assistance of the Court is sought by way of rateable distribution, it would be seeking one of the reliefs which would be covered by Sub-clause (v) of Sub-rule (2)(j) and the application would be one in accordance with law. If the application for execution is thus in accordance with law, the decree-holder would be entitled to rateable distribution. With respect, therefore, the learned Judge was in error in holding that the application was not in accordance with law and in dismissing Darkhast No. 7 of 1962.

13. The order of the executing court dismissing Darkhast No. 7 of 1962 is set aside and the Darkhast is remanded to the executing Court to proceed further in accordance with law. In the facts and circumstances of this case, the parties to bear their respective costs of this appeal. Costs of Darkhast will be costs in the cases.