

(1924) 12 CAL CK 0019
In the Calcutta High Court

Girindra Nath Ray

APPELLANT

Vs

Kedar Nath Bidyanta and Others

RESPONDENT

Date of Decision : 19-12-1924

Acts Referred:

Citation : AIR 1925 Cal 966 : 87 Ind. Cas. 783

Hon'ble Judges : Ewart Greaves, J;Chakravarti, J

Bench : Division Bench

Judgement

Chakravarti, J.—The Rule No. 1082 of 1924 and the analogous application pending in this Court, raise the question as to the distribution of the assets realised in execution of a decree for money, by the Subordinate Judge of Nadia in Execution Case No. 17 of 1924. The properties of the judgment-debtor, who is Opposite Party No. 9 in this Rule, were sold in three lots. Lot No. 3 was sold for Rs. 283 on the 17th July, 1924, and the whole of the purchase money was deposited on that very day. On the same day lot No. 4 was sold for Rs. 125 out of which Rs. 40 only was deposited and lot No. 5 was sold for Rs. 7,800 out of which only Rs. 2,000 was paid on the date of sale. On the 29th July, 1924, Rs. 5,800, the balance of the price of lot No. 5 was deposited and on the 1st of August, 1924, Rs. 85, the balance of the price of lot No. 4, was deposited. Now the Petitioner in the Rule obtained his decree in the Court of the Subordinate Judge on the 30th July and made his application for rateable distribution on the 31st July, 1924. The applicant, in the analogous petition obtained his decree and made his application on the same day as the Petitioner in the Rule. Besides these two Petitioners, it appears that a decree was obtained by Opposite Party No. 2 and was executed in Execution Case No. 754 of 1924 in the Munsif's 1st Court at Nadia, that Opposite Party No. 3 also obtained a decree in the same Court and executed it (Execution Case No. 1284) and that Opposite Party No. 4 obtained a decree in the Munsif's Court at Ranagbat which was executed in Execution Case No. 1016 of 1924. It appears that the records for execution of all these three decrees passed by the Munsifs were transferred to the Court of the Subordinate Judge, by an order of the Court on the 17th July, 1924, after the decree-holders

in Execution Cases Nos. 754 and 1016 had applied for rateable distribution on the 7th and 4th of July, 1924, respectively. Execution Case No. 1248 was transferred along with the other two executions on the same day; but, it appears, no specific application for rateable distribution was made before such transfer. I ought to have stated that all the three decree-holders holding decrees of the Munsifs' Courts had attached the same properties of the Opposite Party No. 9 in execution of their respective decrees, long before their executions were transferred to the Subordinate Judge's Court. The Subordinate Judge, before whom all these applications were made for participation in the assets which were realised in the manner stated before, held that the Petitioners were entitled to obtain rateable distribution only of the sum of Rs. 85 which was deposited after they had obtained their decrees and made their application for rateable distribution. As to the holders of the three decrees of the Munsif's Court by Opposite Parties Nos. 2, 3 and 4, the learned Subordinate Judge held that they were entitled to rateable distribution out of the entire sum realised after their decrees had been transferred to the Court. Against this order the Rule now before us was obtained and the analogous petition filed and the learned Vakil for the Petitioners contended that their clients were entitled to rateable distribution of the whole of the sale proceeds on the ground that the sale proceeds were not realised until the last deposit was made. Their next contention was that at any rate their clients were entitled to rateable distribution out of Rs. 125, the price realised for property No. 4, on the ground that until the sum of Rs. 85 was deposited, the mere deposit of the earnest money could not be held to be the assets of lot No. 4. Lastly, it was contended that Opposite Parties Nos. 2, 3 and 4 were not entitled to rateable distribution as there were no applications for execution made before the learned Subordinate Judge; and as regards one of the decree-holders, namely, the Opposite Party in No. 1248, there was no application for rateable distribution. As to the first point it appears to us that there is no ground for this extreme contention the properties were sold separately, their sale proceeds were realised separately and the sale of each lot was at any rate completed when the whole of the balance of the purchase money was deposited in Court. As to the second contention, it appears to us that it is sound. The point is covered by express authorities. The earliest of these is the case of Ramjas Agarwala v. Guru Charan Sen (1909) 14 C.W.N. 396 and the case of Maharajah of Burdwan v. Apurba Krishna Roy (1911) 15 C.W.N. 872 also supports this view. The mere deposit of the earnest money cannot be said to be the assets realised by the sale until the balance of the purchase money is deposited and the sale becomes a concluded transaction. In this view we think that the petitioner and the applicant in the analogous case are entitled to the rateable distribution out of Rs. 125 realised for lot No. 4. The third point is, whether the holders of decrees of any inferior Court, the executions of whose decrees had been stayed by the superior Court under the provisions of Section 63, are entitled to rateable distribution of the assets realised by the superior Court under the provisions of Section 63 read with Section 73, C.P.C. As a matter of bare justice to the decree-holders of the inferior Courts, whose execution cases were stayed under the

provisions of Section 63, because the superior Court is the only Court which could realise assets, they are entitled to participate in the assets as they were precluded on that ground from pursuing their own execution sales and bringing the properties which they had attached to sale. But the language of Section 63 which is substantially the same as of Section 285 of the old Code and the provisions of Section 73 which are substantially the same as the provisions of Section 295 of the old Code have been construed differently and in consequence there is a divergence of judicial decisions on the point. The view, which has favoured the claim of the holders of the decrees of the inferior Courts, has in effect held that although the right to distribution arises out of the provisions of Section 63, the distribution in effect is made under the provisions of Section 73 or at any rate on the principles laid down in it. The divergence of views relates to three points: Firstly, whether Section 63 does at all give any right to the holders of decrees of the inferior Courts to claim satisfaction of their decrees out of the proceeds realised by the superior Court and whether the determination of such claim is contemplated by Section 63: secondly, whether the holders of such decrees must apply for execution of their decrees before the superior Court and also apply for rateable distribution to that Court before the assets are realised as provided by Section 73. The second point may be very shortly dealt with. If the holders of such decrees have no right or claim u/s 63 and their only remedy is to apply u/s 73, then it is quite clear that they must comply with the provisions of Section 73 before they can claim benefits under that section. As to the first question, the real point is this :- Do the provisions of Section 63 which prevent the inferior Courts from executing their decrees and direct that the sale should be held by the superior Court leave the holders of such decrees to the remedy of Section 73 which is open to any decree-holder of any Court: or does Section 63 which provides for the methods for realisation of the assets by the superior Court give power to that Court to distribute the assets realised by the sale of the attached properties? It would seem unreasonable to suppose that Section 63 which imposes a bar against the holders of the decrees of the inferior Courts does not contemplate a method by which such decree-holders can ask the superior Court to give them their share of the assets realised by the sale of the properties which they had attached. This question arose in the case of *Clark v. Alexander* (1894) 21 Cal. 200. It is a judgment of Mr. Justice Sale sitting on the Original Side and the learned Judge had long experience of the practice on the Original Side of the Court; therefore his view on a matter of practice is of considerable weight, the present question being really and ultimately a question of practice. The learned Judge at p. 203 laid down the rule in these terms:-"To give Section 295 the signification contended for by the plaintiff would in my opinion have the effect of altogether nullifying Section 285. The duty of the superior Court u/s 285 is to consider and determine the rights of attaching creditors in all the cases to which that section applies whether they have applied to the superior Court or not. There is nothing in that section which requires that before an attaching creditor can have his claim determined he must obtain a transfer of the decree to the superior Court and apply to that Court for execution.

If that were required it would operate with great hardship in case of creditors for small amounts who had attached through the Small Cause Court, especially where the attached property was of small value. The extra expense that would be incurred by reason of the transfer to the superior Court and the re-attachment through that Court would in some cases deprive the Small Cause Court creditors of all benefits arising under their attachments, and the result in those cases would be at the least the practical postponement of the rights of such creditors to those of creditors for larger amounts who had attached through the superior Court. It certainly would be a remarkable result if where property is attached u/s 285 the superior Court, while required by that section to consider the rights of all attaching creditors irrespective of the Courts by which the attachments were made, should at the same time be restricted so as to have no alternative but to apply the rule of exclusion contained in Section 295 to all creditors except those who have applied to the superior Court prior to realisation and so come strictly within the terms of that section. Such a result cannot have been intended and may be avoided if Sections 285 and 295 be read together and due effect be given to each." The learned Judge then considered all the authorities then available and referred to three cases of this Court. Apart from the previous authority it appears to us that the reasons upon which the rule is based are convincing unless there is anything in Section 63 which clearly debars the superior Court from doing what is manifest justice to the holders of decrees of inferior Courts. There is no reason why this rule based upon long practice should not be followed. Turning to Section 63 of the Code we have the words "Court which shall receive or realise such property and shall determine any claim thereto and objection to the attachment thereof shall be the Court of the highest grade." It would be putting a very narrow construction upon the words "shall determine any claim thereto," that is, to the "property, to hold that they exclude the determination of the claim of the holders of the decrees of the inferior Court while providing that all the assets should go into the hands of the superior Court. It may be conceded that all claims coming under Order 21, Rule 60, whether made before the superior Court or the inferior Court should be determined by the former. The determination of the rights of the decree-holders inter se is not in any way excluded, and for the reasons given by the learned Judge, whose words I have quoted above I think that this practice is based upon considerations of justice and simplicity. This question is really more a matter of procedure and practice than of substantive right. The right of all the decree-holders to a rateable distribution is undoubted; the only question is as to the procedure to be adopted. In these matters uniformity is of great practical importance and when a practice has been established it should not be departed from even if there may be some doubt as to its strict soundness. Sir Lawrence Jenkins in the case of *Mondal & Co. v. Fazul Eallahi* (1914) 41 Cal. 825 says :-"Uniformity on questions of procedure under the Code is of such importance that I think I ought to follow the decision." This view of Mr. Justice Sale was adopted in the case of *Bejoy Singh Dudhuria v. Hukum Chand* (1902) 29 Cal. 548 by Mr. Justice Ghose, sitting with Mr. Justice Brett, both of whom had considerable experience in these

matters. In that case the learned Subordinate Judge sent for the execution case from the Court of the Munsif and without further application made a rateable distribution amongst all the decree-holders including the decree-holder of his own Court. This was done under Sections 285 and 295 read together. A similar view was taken in the case of *Har Bhagat v. Ananta Ram* (1897) 2 C.W.N. 126 by Mr. Justice O'Kinealy sitting with Mr. Justice Rampini, both of whom had long experience of the practice of the District Courts, and those learned Judges, even without referring to the earlier cases, took the same view. The only case in which a contrary view was taken is the case of *Ramjas Agarwala v. Guru Charan Sen* (1909) 14 C.W.N. 396. In that case Mr. Justice Mookerjee and Mr. Justice Vincent held that the holders of decrees of inferior Courts were not entitled to participate in the sale proceeds unless they strictly complied with the provisions of Section 295, and the learned Judges further held that Section 285 had no application to the question of determination of the rights of the decree-holders, but that the word "claim" in Section 285 was limited to the claim u/s 278 of the old Code. The learned Judges there decided the case in the light of the authority of the case of *Bejoy Singh Dudhuria v. Hukum Chand* (1902) 29 Cal. 548, but did not follow the rule laid down by Mr. Justice Ghose that the Subordinate Judge was right in making the distribution even in the absence of any application either for execution or for rateable distribution filed before the superior Court. Again the learned Judges were not prepared to differ from the rule laid down by Mr. Justice Sale, but observed: "That the whole question shall have to be re-considered in a case in which the question arises in future." The learned Judges observed as follows: " But we need not express any opinion upon the question whether the decision in *Clark v. Alexander* (1894) 21 Cal. 200 may or may not be justified on the grounds suggested, nor need we discuss whether that decision may not require re-consideration when another case precisely similar to it in fact arises." The view of Mr. Justice Sale was, it appears, also followed in effect in the case of *Krishna Kumar Ghosh v. Pasupati Barterjee* A.I.R 1921 Cal. 87 by Mr. Justice N.E. Chatterjea, sitting with Mr. Justice Newbould. Although in that case their Lordships did not wish to differ from the case at *Ramjas Agarwala v. Guru Charan Sen* (1909) 14 C.W.N. 396 they held that the decree-holder of the inferior Court in which the attachment was prior to the attachment made by the superior Court was entitled to rateable distribution although no application either for execution or for rateable distribution appears to have been made before the superior Court, but not in respect of the decree in which the attachment was subsequent. It is not necessary to discuss that distinction for the purpose of the present case. It is enough to point out that rateable distribution was allowed to holders of decrees of the inferior Courts without any application specifically made u/s 295. The decision of Mr. Justice Sale is still good law and although attempts have been made to distinguish it, it has never been dissented from, much less overruled. On the whole, therefore, on a review of the decisions cited above we do not see any difficulty in following the rule laid down by Mr. Justice Sale, and followed in the subsequent cases that the holders of the decrees of inferior Courts, whose execution had been stopped by the superior Court u/s 63 are entitled to rateable

distribution under that section read with Section 73 without any further applications. The decrees of the inferior Courts were transferred to the superior Court to which applications for rateable distribution were" made in writing in the Cases Nos. 754 and 1016. The rule laid down by Mr. Justice Sale was followed by Mr. Justice" Ghose and Mr. Justice O"Kinealy, and it seems that no further application before the superior Court was thought necessary.

2. In the result, therefore, we vary the order of the learned Subordinate Judge with respect to the sum of Rs. 85 and the petitioner is entitled to share in the rateable distribution not only of Rs. 40 but also of Rs. 125, the entire proceeds of the property No. 4. Under the circumstances we make no order as to costs. This judgment governs the application also.

Greaves, J.

3. I agree.