

(1972) 12 AHC CK 0014

In the Allahabad High Court

Case No : Civil Revision No. 1572 of 1969

State of Uttar Pradesh

APPELLANT

Vs

Kotak and Co. and Others

RESPONDENT

Date of Decision : 14-12-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 73(1), 73(3)

Citation : AIR 1973 All 230

Hon'ble Judges : Om Prakash Trivedi, J

Bench : Single Bench

Advocate : B.D. Agarwala, for the Appellant; V.K. Gupta, for the Respondent

Final Decision : Allowed

Judgement

Om Prakash Trivedi, J.—This petition in revision has been filed by the State and arises from an order dated 3-7-1969 passed by the Additional Civil Judge, Aligarh in the following circumstances.

2. M/s. Kotak and Co., opposite party No. 1 and M/s. Gannon Dunkerley and Co. Ltd., opposite party No. 2 obtained decrees in the sum of Rs. 16,812/- and odd and Rs. 8198/- and odd against the firm Ramchand Spinning and Weaving Mills, Hathras, opposite party No. 3. Both the decree-holders put their decrees into execution. On 21-9-1962 opposite party No. 2 moved an application which purported to be u/s 73(1) of the CPC claiming rateable distribution of the assets of the judgment-debtor held by the Court. It may be mentioned here that in execution of their decree M/s. Kotak and Co., got the Mills buildings, machinery and other assets belonging to the judgment-debtor, opposite party No. 3 sold for Rs. 2,45,000/-. One-fourth of this sale amount was deposited in Court by the purchaser and the remaining three-fourths was deposited subsequently i.e. between 24th and 25th September, 1952. On 22-9-1962 the Court allowed the application for rateable distribution by the following order :

"Allowed rateable distribution as prayed."

On 15-7-1962 a letter had been received by the Court from the Sub-Divisional Officer, Hathras along with a warrant of attachment stating that a sum of Rs. 1,09,536.35 P. was due to the State from the said judgment-debtor, opposite party No. 3, on account of sales tax, Income Tax, Employees' State Insurance dues and Employees' Provident Fund. It was prayed that this amount may be ordered to be paid out of assets of the judgment-debtor held by the Court. This letter, it may be noted, was received before passing of the order of rateable distribution on 22-9-1962. Some further letters were received from the various officers of the State after 22-9-1962 putting out certain further claims of dues for the State against the said judgment-debtor. The total of these claims put out for the State through the various letters received from 15-9-1962 to 29-8-1967 aggregated to a sum of Rs. 2,58,272.52 P. against M/s. Ramchand Spinning and Weaving Mills, Hathras, opposite party No. 3. The decree-holders filed objections resisting the claim of the State to priority on a number of grounds.

3. The Additional Civil Judge maintained his order of rateable distribution dated 22-9-1962 on the ground that by the time of the passing of that order the claim of the State before the Court was only for a sum of Rs. 1,09,536/- and odd against opposite party No. 3 which could be satisfied even after the amounts ordered to be distributed to the decree-holders by the said order had been paid. Learned lower Court placed reliance upon a case of the Madras High Court: *The Official Receiver of Tanjore Vs. M.R. Venkatrama Iyer*, and a case of the Calcutta High Court, *Basanta Kumar Bhattacharjee Vs. Panchu Gopal Dutta and Others*, in support of its view that the claims over Rupees 1,09,536/- and odd having been put forward for the State subsequent to the passing of the order of rateable distribution the assets of the judgment-debtor, opposite party No. 3 could not be deemed to be in the hands of the Court as the decree-holders had become entitled to receive them under the order of rateable distribution. Therefore, the claim of the State for dues of Rupees 1,09,536.55 P. could not be considered and on the view that in any case claim of the State to the tune of Rs. 1,86,616.35 P. could be satisfied even after dues to the decree-holders were paid to the tune of about Rupees 30,000, the full claim of the State for Rs. 2,58,277.52 P. could not be allowed.

4. I have heard arguments of the Standing Counsel and Sri V. K. Gupta appearing for the judgment-debtor opposite party. After hearing arguments of the learned counsel I am of the opinion that this revision is entitled to succeed. Section 73(1) of the CPC is in these terms:

"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 decree for the payment of money passed against the same Judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons."

Then there is Sub-section (3) of Section 73 in the following terms:

"Nothing in this section affects any right of the Government."

It is urged by the learned Standing Counsel that dues of Government must in view of Sub-section (3) receive priority over the dues of private creditors of the same decree. This contention is well founded on authority. In the case of Collector of Aurangabad and Another Vs. Central Bank of India and Another, the Supreme Court considered the question whether the appellants were entitled to claim priority towards payment of sales tax dues according to the Common Law doctrine of "priority of Crown debts" and observed that the Common Law doctrine was evolved in the English Law as part of the Crown prerogative and cited with approval the view expressed by a Full Bench of the Madras High Court in MANICKAM CHETTIAR Vs. Income Tax OFFICER, MADURA., in which it was held that the Income Tax debt had priority over private debts and the Court had inherent power to make an order for payment of moneys due to the Crown, and referred to their own decision in the case of Builders Supply Corporation Vs. The Union of India (UOI) Represented by the Commissioner of Income Tax, West Bengal and Others, in which it was held that the Government of India was entitled to claim priority for arrears of Income Tax due to it from a citizen over debts from him to unsecured creditors and that the English Common Law doctrine of the priority of Crown debts has been given judicial recognition in the territory known as "British India" prior to 1950 in regard to the recovery of tax dues in priority to other private debts of the taxpayer. It was pointed out, therefore, that the English Common Law doctrine having been incorporated into Indian Law, was a law in force in the territory of India and by virtue of Article 372(1) of the Constitution of India, it continued to be in force in India until it was validly altered, repealed or amended. This being the law, in view of Sub-section (3) of Section 73, no order of rateable distribution can be passed under Sub-section (1) of Section 73 which may affect this right of Government to claim priority in respect of payment of its dues against the judgment-debtor against the competing claims of unsecured decree-holders. Sub-section (3) of Section 73 of the Code of Civil Procedure is, therefore, in the nature of a proviso to Section 73 and imposes a limitation on the exercise of power by the Court in the matter of rateable distribution of assets. In view of this limitation on its power the Court will refuse to pass an order of rateable distribution under Sub-section (1) of Section 73 if it is brought to its notice that certain State dues are outstanding against the judgment-debtor and the State's right to a priority of payment in respect of those dues may be affected by an order of rateable distribution. For if in respect of this statutory protection which is given to the right of Government to priority of payment by Sub-section (3) an order of rateable distribution is passed in favour of decree-holders under Sub-section (1) of Section 73, which has the effect of causing prejudice to this right of Government, then such an order will not take effect and Courts will refuse to pass an order which cannot be enforced in law.

The learned Civil Judge appears to have lost sight of the provision contained in subsection (3) of Section 73 of the CPC while deciding the claim of the State

against M/s. Ramchand Spinning and Weaving Mills, Hathras, opposite party No, 3, which totalled Rs. 2,58,277.52 P. The fact that claims beyond Rs. 1,86,616.35 P. were brought to the Court's notice subsequent to passing of the order of rateable distribution did not affect the Court's power to review its order of 22-9-1962 and to pass another order in the light of subsection (3) of Section 73 having regard to the total dues of the State against the Mills, opposite party No. 3. The material fact is that by the time of passing of the impugned order on 3-7-1969 the sale proceeds had not been actually distributed among the decree-holders pursuant to the order of 22-9-1962. The sale proceeds were held by the Court and the Court controlled them. There was no legal impediment in reviewing the order of 22-9-1962 after full claims of the State totalling Rs. 2,58,277.52 P. had been brought to the Court's notice. If the Court did not review and recall its earlier order of 22-9-1962 then it would be acting in derogation of the provision contained in Sub-section (3) of Section 73. The order of 22-9-1962 in view of that provision cannot affect the right of priority of payment to the State in respect of its entire dues and any order in disregard of the protection given to the State would be contrary to subsection (3) of Section 73 and, therefore illegal.

In none of the Madras and Calcutta cases relied upon by the learned Civil Judge the force and effect of Sub-section (3) of Section 73 was considered. The only point decided in *The Official Receiver of Tanjore Vs. M.R. Venkatrama Iyer*, and *Basanta Kumar Bhattacharjee Vs. Panchu Gopal Dutta and Others*, was that after the order of rateable distribution is passed the money in the hands of the Court which has to be distributed to the decree-holders can no longer be treated as money belonging to the judgment-debtor. In *The Official Receiver of Tanjore Vs. M.R. Venkatrama Iyer*, an order of rateable distribution was passed in favour of certain decree-holders more than six years before insolvency of the judgment-debtor and the decree-holders were prevented from drawing out the sums to which they were entitled by reason of litigation instituted by the creditors. The question arose whether the Official Receiver appointed by the Insolvency Court had any right to this money. It is in this connection that it was held that from the time of the order of rateable distribution the money must be treated as belonging not to the judgment-debtor but to the decree-holder in whose favour the order of rateable distribution was passed. It was not a case where the State had put forward a claim for its dues and the Court may have been called upon to decide whether in view of Sub-section (3) of Section 73 the claim of the State must be accepted notwithstanding the passing of the order of rateable distribution.

In the Calcutta case an order of rateable distribution was passed but before the amount could be distributed to the decree-holder a letter was received from the Certificate Officer requesting the Court not to make any payment and subsequently a notice of attachment was also received from the Certificate Officer withholding payment of specified amount until further orders of the Court. In respect of this an order was passed by the Court on 13-11-1954 making an apportionment of the amount to be distributed rateably between the decree-

holders. The Court below took the view that as a result of the notice of attachment the money could not be paid to any decree-holder and held that the claim of the State of West Bengal was entitled to priority. This order of the lower court was challenged before the Calcutta High Court. In deciding this question their Lordships appear to have concentrated solely on the question as to whether effect could be given to the notice of attachment after the order of rateable distribution had already been passed and in deciding as to whether the notice of attachment could be enforced, the view was expressed that after the order of rateable distribution the money, though in the hands of the Court, could not be regarded as money of the judgment-debtor and, therefore, the attachment could not take effect. Their Lordships did not address themselves to the effect of Sub-section (3) of Section 73. Indeed they left that question open by observing:

"The question of priority of the State's claim does not, therefore, fall to be decided."

These two authorities, therefore, provide no assistance in the decision of the main question whether any order of rateable distribution could be legally passed in view of Sub-section (3) of Section 73 when the State had put forward a claim for dues to the tune of Rs. 2,58,277/- and odd before the sale proceeds had actually been distributed to the decree-holders in accordance with the order of rateable distribution passed earlier. I am clearly of the view that no order of rateable distribution prejudicial to the right of Government to priority of payment could be passed under law in view of Sub-section (3) of Section 73 when the money was in the hands of the Court and was not distributed to the decree-holders. In view of Sub-section (3) of Section 73 it is not necessary at all to enter into the question whether this money should be treated as money belonging to the judgment-debtor or the decree-holder. In the case of Income Tax Officer, Ward C, Sangli and Another Vs. Chandanbai Balaram Doshi and Others, similar question arose. On 2-12-1954 the Court passed an order , of rateable distribution of sale proceeds of assets belonging to the judgment-debtor in favour of certain decree-holders. After this date an application was filed by the Income Tax Officer, claiming payment of certain dues out of the sale proceeds. This claim was upheld and the following observations which have relevance were made in para, 2 of the report :

"Now there can be no doubt that on a competition between private unsecured creditors and the State, the claim of the State to payment of a debt due to it prevails. Therefore, the amount in dispute having been realised in execution proceedings by sale of the property moveable and Immovable belonging to the judgment-debtor, if the proceeds were held by the Court on behalf of the judgment-debtor the State must have priority for its claim over unsecured creditors."

5. The only other point urged by learned counsel for the opposite party which remains to be noticed is this: Learned counsel urged that no claim of the State in respect of its dues could be considered by the Court u/s 73 of the CPC unless the

State had obtained a court decree and for this learned counsel relied on two cases; Oudh Commercial Bank Ltd. v. Secy. of State AIR 1935 Lab 319 and Excise and Taxation Officer Vs. Gauri Mal Butail Trust, . In the Punjab case the High Court expressed the view that Section 73 does not apply where the State without obtaining any decree or taking any steps authorised by the Statute for the realisation of its dues from the judgment-debtor on account of property tax under the Punjab Urban Immovable Property Act, 1940 makes an application for payment of its dues out of the amount lying with the Court. In ATR 1935 Lah 319 (2) (supra) the Lahore High Court also expressed the view that the executing Court cannot entertain claim on behalf of Government in the absence of decree in support of it. These authorities no longer propound good law in view of a Supreme Court decision in the case of Builders Supply Corporation Vs. The Union of India (UOI) Represented by the Commissioner of Income Tax, West Bengal and Others, . In that case the Supreme Court cited with approval decision of the Full Bench of the Madras High Court in ATR 1938 Mad 360 to the effect that the Income Tax debt has priority over private debts and that the Court had inherent power to make an order on the application for payment of moneys due to the Crown. The court further held that it was also not necessary for the Crown to obtain a decree against an assessee or to effect an attachment before making such an application. The Court cited also with approval decision of the Bombay High Court in Bank of India Vs. John Bowman and Others, in which case Chagla, C. J. observed that the priority given to the Crown is not on the basis of its debt being a judgment-debt or a debt arising out of statute but the principle is that if the debts are of equal degree and the Crown and the subject are equal, the Crown's right will prevail over that of the subject. I, therefore, reject this argument and hold that the State need not obtain a decree before pressing its claim for payment of dues before an executing court u/s 73 of the Code of Civil Procedure.

6. On the view that the Court was bound to give priority to the State claim for Rs. 2 lacs and odd under Sub-section (3) of Section 73 it is clearly a case where the lower court failed to exercise jurisdiction vested in it by law and, therefore, the impugned order is revisable u/s 115 of the Code of Civil Procedure. For the foregoing reasons the order dated 3-7-1969 is liable to be set aside as also the order of rateable distribution dated 22-9-1962.

7. Accordingly the revision is allowed and the orders of the Additional Civil Judge dated 3-7-1969 and 22-9-1962 are set aside. The executing court is directed to order payment of the entire sale proceeds of the assets of Messrs. Ramchand Spinning and Weaving Mills lying with it in satisfaction of the claim of the State Government. Parties to bear their own costs.