[FULL BENCH.]

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Present: Shaw A.C.J. and Ennis and De Sampayo JJ.

MEYAPPA CHETTY *v.* WEERASOORIYA.

69—D. C. Colombo, 42,694.

Concurrence—Civil Procedure Code, s. 352—Application for execution after sale in execution of debtor's property by another creditor—Payment of balance money by purchaser by cheque—"Realization"—"Assets"—Omission of the name of an appellant from the caption—Appeal.

On November 1, 1915, certain lands were sold in execution of a decree in favour of the plaintiff against W, and one-fourth of the purchase money was paid. On November 17 the purchaser gave the Fiscal a cheque for the remaining three-fourths of the purchase money. On November 20 this was deposited in the Kachcheri. On November 30 the matter was reported to the Court. On November 19 the 1st, 6th, and 7th appellants, who had decrees against W. in the same Court, applied for execution of their respective decrees, and notices of their applications were given in this case. On November 29 4th and 5th appellants applied for execution against W. The 2nd and 3rd appellants applied for execution on December 15.

Held, that the appellants were not entitled to concurrence.

Payment by cheque is a conditional payment, and when the cheque is honoured, that operates as a payment as from the date of the giving of the cheque.

Per SHAW A.C.J. and ENNIS J.—Assets are realized in execution, within the meaning of section 352 of the Civil Procedure Code, at the moment of sale, and not when the money is paid.

DE SAMPAYO J.—The words "prior to realization" in section 352 means "before the receipt of the assets."

THE facts are set out in the judgment.

Drieberg (with him *F. H. B. Koch*), for appellants.—The appellants (1st, 6th, and 7th) are entitled to concurrence as they had applied for execution of their decrees on November 19—before the money was sent to the Kachcheri by the Fiscal. These appellants had applied for execution "prior to realization of the assets." Assets cannot be said to be realized in this case before the entire purchase money was paid.

A cheque should not be regarded as a realization of money. A cheque is not money. In all statute law where the word "money" is used the purposes of the section are not satisfied by the tender of a cheque. The cheque may be dishonoured by the bank. [De Sampayo J. referred to *26 Mad. 179*. "Assets" means proceeds of the sale of property.]

[Shaw A.C.J. referred to *12 Cal. 317*.]

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The stage contemplated by the section is not reached until the assets are before the Court. How is the Court going to divide a cheque or a promissory note? The Code contains no provision for payment by cheque. In essence a cheque and a promissory note are the same.

[Shaw A.C.J.—Would it be right to take away the remedies of the judgment-creditor because the Fiscal accepts a cheque?] Counsel cited Stroud on the meaning of the word "money."

The Court did not hold the assets until it received an intimation from the Fiscal of the deposit in the Kachcheri. All the appellants, therefore, are entitled to concurrence.

Counsel cited *2 C. L. R. 178; 28 Bom. 264; 18 N. L. R. 310; 7 N. L. R. 280; 9 S. C. C. 203.*

E. W. Jayewardene, for respondent.—The Fiscal accepted the cheque on November 17. The Fiscal is an officer of the Court. Once the cheque is accepted and it is honoured it is payment; payment to the Fiscal after the sale is payment to the Court.

"Realization" means the sale of the property by the Fiscal in the case of immovable property.

In *Konamalai v. Sivakolunthu*[1] the appellant had his writ reissued before the money was deposited in the Kachcheri, and yet the Full Court held that he was not entitled to concurrence. That case is a binding authority. Counsel referred to *6 N. L. R. 169; 2 C. W. R. 130; 1 C. W. R. 180; 2 Br. 3; 1 A. C. R. 109; 3 Bal. 258; 18 N. L. R. 310.* If a cheque is accepted and it is subsequently honoured the payment dates back to the date of the acceptance of the cheque. Counsel cited *(1898) 2 Ch. 680; 16 Bom. 97; 11 N. L. R. 83.*

There is no proof when this cheque was cashed, although the proof is that the money was deposited on November 20.

Drieberg, in reply.

Cur. adv. vult.

July 10, 1916. SHAW A.C.J.—

The respondent, having obtained judgment in the District Court of Colombo against H. P. Weerasooriya, took out a writ of execution against him on September 25, 1915.

The Fiscal, on the day of the issue of the writ, seized certain immovable property of the judgment-debtor and sold it on November 1. At this date he had three other writs in his hands for other judgment-creditors against the same debtor in cases Nos. 42,498, 42,704, and 41,094, D.C. Colombo.

Twenty-five per centum of the purchase money was paid to the Fiscal on the day of sale, which amount was deposited by him in the Colombo Kachcheri on November 8, and he made return to the writ on November 15.

[1] *9 S. C. C. 203.*

The balance of the purchase money was paid to the Fiscal by the purchaser's cheque on November 17, and was deposited by the Fiscal in the Kachcheri on November 20, and on November 30 he reported the payment to the Court.

On November 19 the 1st, 6th, and 7th appellants had applied to the District Court for writs against the same judgment-creditors in suits Nos. 43,277, 43,266, and 43,267. On November 29 the 4th and 5th appellants similarly applied in suits Nos. 43,025 and 43,393, as also did the 2nd and 3rd appellants on December 15 in suits Nos. 43,393 and 43,436. These creditors all gave prohibitory notices against the proceeds of the execution being parted with without their claims being dealt with.

On February 3, 1916, the respondent filed a scheme of distribution, by which he reteably divided the proceeds of the execution between himself and the other three writ holders, whose writs had been applied for and were in the hands of the Fiscal at the time of the sale, and moved for an order for payment to him of his proportion. The District Judge, having heard the appellants *contra*, made the order asked for, and from his order the present appeal is brought.

I will first deal with an incidental point which arose.

During the hearing of the appeal it was discovered that the name of the 7th appellant had been omitted from the caption of the petition of appeal, and it was contended on behalf of the respondent that no appeal by him could be heard. The 7th appellant is, however, mentioned throughout the petition of appeal as one of the parties aggrieved by the order desiring to appeal, and the omission of his name in the caption is obviously a clerical error, which has caused no prejudice to any one, and I think the caption should be amended by the insertion of his name.

The appeal brings up again a matter which has been the subject of great controversy in the Courts of this Island, namely, the rights of rival creditors to participate in the proceeds of an execution levied on the property of a common debtor.

By the Roman-Dutch law all creditors were entitled to claim concurrence, regardless of the dates of their decrees or application for execution, or, indeed, whether they had obtained decrees at all. This was, perhaps, suitable to mediaeval times, when litigation was infrequent and financial transactions comparatively few in number, but it was entirely inappropriate to modern conditions, and the rights of execution-creditors were accordingly specifically dealt with by our Code of Civil Procedure.

After strenuous opposition it has been definitely settled by two decisions of the Full Court, in *Konamalai v. Sivakolunthu*[1] and *Mendis v. Peris*[2] that the Roman-Dutch law of concurrence is now no part of the law of this Island, and the rights of rival claimants to

[1] *9 S. C. C. 203.*

[2] *(1915) 18 N. L. R. 310.*

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an execution-debtor's property are solely governed by our Code of Civil Procedure.

Under the law as it stood prior to the alteration, when a creditor had, by means of an execution, levied on his debtor's property an amount sufficient to satisfy his debt, he was liable to have his claim to the proceeds defeated by some other creditor or creditors, who had stood by without enforcing their claims, or, indeed, who had obtained collusive judgments against the debtor, coming in and claiming to share the proceeds of the execution, and, if he recovered his debt at all, it was only by repeated executions against the debtor's property, for the Fiscal could only levy each time on sufficient property to satisfy the amount of the executions actually in his hands.

The object of the enactment contained in section 352 of the Code was clearly, in my opinion, that stated in the judgments in *Konamalai v. Sivakolunthu*[1] namely, to give the creditors who had been to the trouble of realizing the assets of the debtor an advantage over more dilatory creditors.

The question now before us appears to me to be whether the intention of the Legislature is to be defeated by a strict construction being given to the word " realized " used in section 352.

So much of the section as is material is as follows:—" Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons ".

In *Mendis v. Peris*[2] following the decision in *Konamalai v. Sivakolunthu*, it was held that a creditor who had applied for execution after the proceeds of the execution had been paid into the Kachcheri is not entitled to share in the proceeds, and the reason given by the Judges who constituted the majority of the Court was that such creditor had no writ in the hands of the Fiscal at the date of the sale.

These decisions absolutely conclude the case as regards the claims of the 2nd, 3rd, 4th, and 5th appellants, who have not appled for execution of their decrees prior to the proceeds of sale being deposited in the Kachcheri, and the appeal must therefore clearly fail so far as their claims to concurrence are concerned.

There still remains, however, for consideration the claims of the 1st, 6th, and 7th appellants, who had applied for execution the day before the proceeds of the execution was paid by the Fiscal into the Kachcheri. It is contended on behalf of the appellants that " realized " must be read as " converted into cash ", and that, therefore, any creditor who has applied before the proceeds of the sale have been actually paid into the Kachcheri and notified to the Court is entitled to concurreuce.

[1] *9 S. C. C. 203.*

[2] *(1915) 18 N. L. R. 310.*

By sections 260 and 261 of the Code, when the sale is of immovable property, and the purchase price exceeds Rs. 100, a deposit of 25 per cent. only is required at the time of the sale, and the purchaser has thirty days in which to pay the balance. The result is that the whole proceeds are, in such cases, not in the Kachcheri to the credit of the suit until some time after the date of the sale, and that is what has happened in the present case.

Such a construction of the words " realized by sale " as is contended for on behalf of the appellants would, in my opinion, defeat the object of the legislation and revive the old evils it was intended to remedy. It would enable a creditor to stand by and then to come in and defeat, to a large extent at any rate, the original execution-creditor's claim, and it would make it impossible for the Fiscal to sell at the execution a sufficient amount of the debtor's property to satisfy the writs in his hands at the time of the sale, for he would not know what other claims there might be on the proceeds.

We may be driven to such a construction by the words used in the section, but in my opinion we are not.

I can find no direct authority on the point in our local decisions, although there are numerous cases in which the words " realized by sale or otherwise in execution of a decree " contained in section 352 have been considered. These decisions, however, are for the most part cases dealing with the rights of special mortgages (*Meera Saibo v. Muttuchetty*[1], *Vellaiappa Chetty v. Pitcha Maula*[2], *Muttiah Chetty v. Don Martines*[3]), or with the attachment of debts due by other persons to the judgment-debtor (*Soyza v. Weerakoon*[4]), and none of them appear to me to decide the time when the assets can be said to have been realized in the case of a sale under a writ of execution. In *Supramanian Chetty v. Siriwardana*[5], a somewhat complicated case, in which the execution-creditor himself bought the property of the debtor and retained the amount of the purchase money, Middleton J. in his judgment says:—" The amount bid is realized by the sale in execution and is exigible from and payable by the purchaser unless he be acting under section 272, and, being property which may be used to satisfy debts or demands, is therefore an asset within the legal meaning of the word ".

The learned Judge here seems to have been of the same opinion as the majority of the Court in *Mendis v. Peris*[6], that the sale is the realization. In numerous other cases, of which I will mention *Muttiah v. Abdulla*[7], *Letchiman v. Arunasalam Chetty*[8], *Sadayappa Chetty v. Siedle*[9], *Aduma Lebbe v. Sahib*, the Court appears to have been of opinion that only creditors who had their writs in the hands of the Fiscal at the time of the sale are entitled to share in

[1] *3 C. L. R. 37.*
[2] *(1899) 4 N. L. R. 311.*
[3] *2 Bal. 182.*
[4] *2 C. L. R. 178.*
[5] *(1906) 9 N. L. R. 346.*
[6] *(1915) 18 N. L. R. 310.*
[7] *1 C. W. R. 180.*
[8] *2 C. W. R. 180.*
[9] *2 Br. 3.*

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the proceeds of the levy. Numerous cases decided under the corresponding section 295 of the Indian Procedure Code of 1882 have been referred to, but they do not seem to give much assistance on the actual point arising in this appeal.

The early part of the Indian section is in precisely similar words to the part of section 352 of our Code under consideration. The Indian section, however, continues with a provision for safeguarding the interest of mortgagees of property sold in execution, who under our law have to seek their relief under other sections of the Code. That provision contains an enactment that appears to me to have an important bearing on the construction of the earlier part of the section. After providing that the proceeds of sale shall first be applied to defraying the expenses of the sale and discharging the principal and interest due on incumbrances, it goes on to provide that the balance shall be applied " rateably among the holders of decrees for money against the judgment-debtor, who have, prior to the sale of the said property, applied to the Court which made the decree ordering such sale for execution for such decrees and have not obtained satisfaction thereof ".

This seems to make it clear that, with regard to property sold in execution that is subject to mortgage, the right of concurrence of execution-creditors is restricted to those who have applied for execution prior to sale, and to show that the words " realized by sale " in the earlier part of the section refer to the sale itself, and not to the subsequent payment of the money, for it would be quite irrational that the claims of judgment-creditors *inter se* should be different in respect of unmortgaged property to what it is directly declared to be in respect of property subject to an incumbrance.

The Indian cases in which the construction of the words " realized by sale or otherwise in execution " have been considered are, like our local decisions, mostly where money has been attached or other similar methods of execution have been resorted to, and are not cases in which there has been a sale of property in execution; in *Ramanathan Chettiar v. Subramania Sastrial*[1], a single Judge case, it was, however, held that an execution-creditor who had applied for execution after the sale, but before the amount was paid into Court, was entitled to concurrence. On the other hand, I find the judgment of the Appeal Court in *Kashy Nath Roy Chowdhry v. Surbanand Straha*[2] saying, " The provisions of section 295 of the present Code of Civil Procedure show that when a property is sold in execution of a decree, it is sold not only for the realization of the money due under that particular decree, but of all other decrees the holders of which had prior to the sale applied to the Court for execution of their decrees ".

[1] *I. L. R. 26 Mad. 179.*

[2] *I. L. R. 12 Cal. 317.*

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Apart from judicial interpretations, it does not seem to me that the meaning of the word " realized " need necessarily be restricted to " converted into actual cash ". The word means " to make real ", and I think that when property is sold, and, therefore, ceased to be the property of the judgment-debtor, and converted either into cash itself or into a liability of the purchaser to pay the amount to the Fiscal, it may well be said to be realized within the meaning of the section, and it is therefore unnecessary to give the word the interpretation sought to be put upon it by the appellants which would, in my opinion, defeat the usefulness of the section and, to a large extent, the intention of the Legislature.

None of the appellants having applied for execution prior to the date of the sale, I think they are not entitled to concurrence, and I would, therefore, dismiss the appeal, with costs.

ENNIS J.—

On November 1, 1915, certain lands were sold in execution of a decree in favour of the plaintiff, and one-fourth of the purchase money was paid. On November 17 the Fiscal received a cheque for the remaining three-fourths of the purchase money, and on November 20 this was deposited in the Kachcheri (whether in the form of the original cheque or the cash proceeds does not appear). On November 30 the matter was reported to the Court executing the decree. On November 19, however, the 1st, 6th, and 7th defendants-appellants applied for execution of their respective decrees, and notices of their applications were given in this case.

The only question reserved for the Full Court in this appeal is whether the 1st, 6th, and 7th defendants-appellants are, under the Civil Procedure Code, entitled to concurrence.

The first clause of section 352 of the Civil Procedure Code says:—

" Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons. "

It will be observed that the word " assets " is used twice in this clause, and its use in the last paragraph makes it clear that the assets referred to are the " proceeds " of the realization. It was contended for the appellants that there could be no such assets under the Code except money, and sections 218, 226, and 266 were referred to in support of the contention. These sections practically authorize the Fiscal to realize in money the goods seized in execution. I am not prepared to adopt the contention, because, had money only been contemplated, there was no occasion to use the word " assets " in section 352, and I see no reason, in the circumstances, to limit the meaning of the word to money only. A cheque is used to effect a

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transfer of money, and payment of a cheque relates back to the time when the cheque was given (*Hadley v. Hadley*[1]). I can see no reason for not considering it an asset within the meaning of section 352. Inasmuch as the cheque was received by the Fiscal on November 17, and the 1st, 6th, and 7th appellants made no application for execution of the decrees until November 19, they would not, in my opinion, be entitled to concurrence even if the word " assets " were to be given the limited interpretation contended for. But, in addition to this, I see no reason to fix the date of the realization as the day when the money is paid. It seems to me that assets are realized in execution at the moment of sale. A promise to pay money or value has then been accepted in place of the debtor's goods, and so far as the promise is subsequently fulfilled (in whole or in part), assets to that extent can be said to have been realized at the date of the sale. I see no reason to think that the word " assets " used in the section must be in such a form as to be available for immediate distribution. The last clause in section 352 shows that where it is capable of immediate distribution, as in money, a person who has received payment without being entitled to it may be compelled to refund. The whole object of the section seems to me to be to give a creditor who has been vigilant a preference over other creditors who have been less vigilant and the case of *Konamalai v. Sivakolumthu*[2] supports this view. After a sale no further steps could be taken by the execution-creditor to obtain satisfaction of his decree if the assets realized at the sale are apparently sufficient to satisfy his claim. Should the consideration fail, and such a creditor have to take further steps, either against the same property or some other property of the debtor, such steps would be towards a further realization, and other creditors would have time to secure concurrence in the proceeds realized at the later date, but all payments made in pursuance of the original sale can properly be said to be assets realized at the sale, for the payment relates back to the sale. The Indian cases give no material assistance in this case, as the Indian procedure is not altogether the same. I would answer the question reserved for the Full Court in the negative, and consquently none of the appellants could succeed.

DE SAMPAYO J.—

This is a contest to a fund in Court realized by the sale of the defendant's property at the instance of the plaintiff. The appellants, who are execution-creditors in various other actions in the same Court against the defendant, have made claims in concurrence under section 352 of the Civil Procedure Code. The name of one of these creditors is by some inadvertence omitted in the caption of the petition of appeal, though it is clear that he is in fact an appellant, and is designated in the body of the petition as the 7th appellant, and

[1] *(1898) L. R. 2 Ch. 680.* [2] *9 S. C. C. 203.*

I think he should be regarded as a party to this appeal. The question involved in this appeal have arisen on the following state of facts.

The plaintiff, having obtained judgment against the defendant for a certain sum of money, took out a writ of execution on September 25, 1915, and certain landed property of the defendant was sold in execution on November 1, 1915. The purchaser paid down 25 per cent. of the purchase money in terms of the usual conditions, and for the balance he, on November 17, gave the Fiscal a cheque. The Fiscal reported to Court the recovery of the one-fourth purchase money on November 19. On what date he cashed the cheque does not appear, but he lodged the amount in the Kachcheri on November 20, and reported to Court the recovery of that amount on November 30. Besides the appellants, there were certain other judgment-creditors whose claims in concurrence the plaintiff admitted, and accordingly on February 3, 1916, the plaintiff filed a scheme of distribution of the fund in Court between him and these others, and moved for an order of payment for his share. In the meantime the appellants had issued prohibitory notices under section 232 and notified their claims to Court. The Court considered the matter upon notice to all the claimants, and ultimately made order allowing the plaintiff's motion with costs. Of the appellants, the 1st, 6th, and 7th appellants had applied for execution of the decrees in their favour in the several actions and obtained issues of writs on November 19, the 4th and 5th appellants on November 29, and the 2nd and 3rd appellants on December 15. The reason for the District Judge's order was that in his view none of the appellants had applied for execution of their decrees " prior to realization " within the meaning of section 352 of the Civil Procedure Code. The question is whether the District Judge is right as to all or any of the appellants.

The difficulty is to ascertain the exact meaning to be attached to the word " realization " in the above section. It was argued, in the first place, that " realization " meant the sale of property by the Fiscal. I am unable to accede to this argument. The full expression is " realized by sale or otherwise in execution of a decree. " The word " otherwise " manifestly refers to such cases as payment of money on a garnishee order, payment by the judgment-debtor himself on arrest in execution or by any receiver appointed in respect of property under seizure, and similar means of satisfaction of a decree by payment to Court. This is uniformly the view taken in India under the corresponding section 295 of the old Indian Civil Procedure Code. See *Vishvanath Mahesvar v. Vinchand Panachand*[1], *Sorabji Edulji Warden v. Govindi Ramji*[2], *Manilal Umedram v. Nanabhai Maneklai*[3]. It is thus clear that " realization " is advisedly used, and that when the section speaks of " prior to realization ", it does not mean to refer to a Fiscal's sale. It means conversion of property into money or some shape capable of

[1] *I. L. R. 6 Bom. 16.* [2] *I. L. R. 16 Bom. 91.* [3] *I. L. R. 28 Bom. 264.*

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distribution among creditors. Some confusion has been introduced into the discussion by the common use of the word " realize ", to describe also the process of conversion of the judgment-debtor's property. This section does not, however, use it in that sense. It is associated with the word " assets " which are realized by sale of the property or otherwise and to be held by the Court and rateably divided among the creditors. It is manifest that " assets " here mean the proceeds of execution whether by sale or otherwise. The argument can only be justified if " sale " means, as I think it does, not the auction which the Fiscal holds, and which amounts merely to a contract of sale, but a completed sale, that is to say, a sale completed by the auction purchaser by payment of the purchase money in pursuance of the conditions of sale. The case of *Hafez Mohamed v. Damodar* [1] shows that in India even the one-fourth deposit made by the purchaser is not " assets " realized and available for distribution. The reason given is that under the Indian Code the deposit is forfeited to Government in default of payment of the balance by the purchaser, but the case is, nevertheless, useful as showing that " realization " is not the sale itself, but the receipt of the proceeds. In *Ramanathan Chettiar v. Subramania Sastrial* [2] it was held that " assets " were the proceeds of sale and would not be realized until the whole proceeds of the execution were paid into Court. It was even argued on behalf of the respondent that the claimant, in order to be entitled to concurrence, should have had his own writ in the hands of the Fiscal at the time of sale. The sheet anchor of counsel for the respondent for this argument is *Konamalai v. Sivakolunthu*,[3] to which all the other cases cited are referable. That case is very difficult to understand. The facts there disclosed show that the claimant in fact had a writ out in the hands of the Fiscal when the assets were realized by payment into Court of a debt due to the judgment-debtor by a third party, which was the only realization possible in the circumstances of the case, and yet the claim was disallowed. My impression is that the learned Judges who decided that case did not mean to construe section 352 of the Code when they made the observations now depended on. Indeed, there is hardly any reference to its terms, and certainly there is none to the numerous difficulties which surround that section and with which this Court has since had from time to time to grapple. I am inclined to think that in *Konamalai v. Sivakolunthu* [3] the Judges were dealing with a different point, which is indicated in the judgment of Burnside C.J., where he said: " He (the claimant) had no execution in the hands of the Fiscal so as to make the seizure a joint seizure under his as well as the plaintiff's writ. " This appears to have reference to what was held, even before the Code came into operation, in *Atherton v. Avookelebbepody*[4], namely, that where there are several

[1] *I. L. R. 18 Cal. 242.*
[2] *I. L. R. 26 Mad. 179.*
[3] *9 S. C C. 203.*
[4] *7 S. C. C. 173.*

writs in the hands of the Fiscal he cannot purport to sell under one writ only, and give credit to that writ holder in the event of purchase by him, and so deprive the other writ holders of their right to share proceeds. Under section 352 of the Code a joint seizure or sale is irrelevant. It contemplates seizure and sale under one writ, and allows other judgment-creditors to claim in concurrence, provided only they have applied for execution of their decrees before the date of realization. It is no doubt true that by application for execution is not meant the mere fact of such application being made. The party applying should be entitled to execution, and that will undoubtedly be shown if the Court has in fact allowed the application for execution. In my opinion the provision in the Code does not require the further condition that the writ should actually have been taken out and put in the hands of the Fiscal prior to realization. This view is not inconsistent with my judgment in *Muttiah v. Abdulla*[1] and *Letchiman v. Arunasalam Chetty*,[2] which were cited by counsel for the respondent, for there I was only concerned with showing that before the decision depended on was applied the facts should be in accordance. In this connection it has been pointed out that proviso 4 to section 295 of the old Indian Civil Procedure Code, which has regard to the division of surplus proceeds in the event of a sale of mortgaged property, requires the claimants to have applied for execution of their own decrees " prior to the sale " of the property, and it has been suggested that in the main provision the expression " prior to realization " must be the same thing as " prior to the sale ". But I think the difference is explainable by the circumstance that in the case of mortgaged property assets can be realized only by sale, whereas in the cases of ordinary execution assets made be realized otherwise than by sale of the debtor's property. This is made more clear by section 73 of the new Indian Code, in which the expression " before the receipt of such assets " is substituted for " prior to realization ", and in which proviso 4 is left intact. It seems to me that here also " sale " means a sale completed by payment, and that, as when that happens assets are " received ", there is difficulty in reconciling the two ways of putting it. This leads me to say that " prior to realization " in the old Indian Code and in our Code is the same thing as " before the receipt of the assets " in the new Indian Code, and that the alteration in the phraseology is only made in order to avoid the ambiguous word " realization " which has given so much trouble.

When these considerations are applied to the facts of this case, it will be seen that the 2nd, 3rd, 4th, and 5th appellants are at once out of Court, inasmuch as their applications for execution of their decrees were not made till after the proceeds of the sale of the judgment-debtor's property had been lodged in the Kachcheri. For I do not consider as sound Mr. Drieberg's contention on their behalf

[1] *1 C. W. R. 180.* [2] *2 C. W. R. 130.*

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that the money can be said to have been paid into Court and so available for distribution only when the Fiscal reported to Court the fact of the recovery. The 1st, 6th, and 7th appellants stand on a somewhat different footing. They made their applications for execution prior to the lodging of the money in the Kachcheri, though after the receipt of the cheque by the Fiscal from the purchaser. I think that payment to the Fiscal, who is the Court's officer, must be taken as payment to Court, but there remains the question whether the cheque was payment in the sense required. There is nothing to show that the Fiscal did not accept the cheque as payment. Generally speaking, payment by cheque is a conditional payment, and when the cheque is honoured, that operates as a payment as from the date of the giving of the cheque (*Hadley v. Hadley* [1]). That being so, the 1st, 6th, and 7th appellants must also be taken as having come in too late.

For these reasons I agree that the appeal should be dismissed, with costs.

Appeal dismissed.