Present: Fisher C.J. and Jayewardene A.J.

1928

SHAW & SONS *v.* SULAIMAN *et al.*

69—D. C. (Inty.) Colombo, 25,143.

Concurrence—Seizure of money in Court—Order by attaching Court—Appropriation in pursuance of direction—Civil Procedure Code, ss. 232 and 252.

An execution-creditor, who has seized money lying to the credit of his judgment-debtor in another case, is not entitled to resist a claim for concurrence unless he has obtained, prior to such claim, an order of the attaching Court directing that the money be paid over to itself.

The mere issue of a notice under section 232 does not amount to realization. To shut out a judgment-creditor who applies for execution, realization must have reached the stage of appropriation to another decree-holder.

APPEAL from the order of the District Judge of Colombo.

H. V. Perera, for plaintiff, appellant.

Hayley, K.C. (with *Navaratnam*), for 5th, 6th, and 7th respondents.

H. H. Bartholomeusz (with *Rajapakse*), for 1st and 2nd defendants, respondents.

July 10, 1928. JAYEWARDENE A.J.—

In this case judgment was entered for the plaintiff for a sum of Rs. 24,007.82 with interest and costs against the defendants, as prayed for, on February 8, 1928.

On February 11 the plaintiff applied for execution by issue of writ against the properties of the deceased testator, and this application was allowed. According to the journal entries, writ was issued on February 11. On February 13 the Proctor for the plaintiffs made the following motion: " As a sum of Rs. 24,607.82, belonging to the defendants above named, out of the estate of the late S. L. Naina Marikar Hadjiar, and lying in testamentary proceedings No. 3,189 of this Court, has been seized under the writ issued in this action, I move that the said sum of Rs. 24,607.82 be transferred from the said proceedings No. 3,189 to this action to the separate account of the plaintiffs above named."

On this motion the learned Judge endorsed as follows:—

" *Vide* order in D. C. 3,189 " and " *Vide* order on Mr. Akbar's motion in D. C. 3,189."

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The plaintiff says that he obtained a transfer of the amount seized to the credit of this case, and that subsequently to the transfer, the respondents (3 to 14) purported to seize the money lying to the credit of this case under writs issued against the defendants. The plaintiff complains that the learned Judge has refused his application for an order of payment in his favour.

The Code draws a sharp distinction between attachment and realization.

As regards the attachment or seizure of money in Court, the Civil Procedure Code enacts—

> " If the property is deposited in, or is in the custody of any Court or public officer, the seizure shall be made by a notice to such Court or officer, requesting that such property and any interest or dividend becoming payable thereon may be held subject to the further orders of the Court from which the writ of execution authorizing the seizure issues." (Section 232.)

and as to realization—

> " Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one having, prior to the realization, applied to the Court by which such assets are held for execution of decree for money against the judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be divided rateably among all such persons." (Section 352.)

(The Court in whose custody the money is will hereafter be called the " custody Court," and the Court issuing execution, the attaching Court.)

In this case the attaching Court issued a notice under section 232 requesting the custody Court, D. C. Testamentary 3,189, to hold a sum of Rs. 24,607.82, subject to the further orders of the attaching Court.

The mere issue of a notice under section 232 does not amount to realization. To shut out a judgment-creditor who applies for execution, realization must have reached the stage of appropriation to another decree holder. (*Soysa v. Wirakoon.* [1])

In *Suppramanium Chetty v. Mohamadu Bhai,*[2] it was held that both seizure and realization were not effected by the single act of the Court or of the Fiscal in issuing a notice under section 232, but there must be a further act of the Court directing the money to be brought to the credit of the case before there can be realization, where the property is money.

[1] *(1893) 2 C. L. R. 178.*

[2] *(1926) 27 N. L. R. 425.*

The same view has been adopted in India, both under the old Code (*Sirinivasa Ayyangar v. Seetharam Ayyar* [1]) and under the present Code.

In *Visvanathan Chetty v. Arunachalam Chetty*,[2] Wallis C.J. held that it was only when the Court ordered the money to be transferred to the credit of the first attaching creditor's suit which it is engaged in executing, that there can be said to be receipts of assets and that a rateable distribution can be made.

Section 73 of the present Indian Code uses the words " before the receipts of assets " in place of the words " prior to realization " of section 295 of the older Indian Code and section 352 of our Code, but the principle is unaffected.

It was further held in this case that when the attaching Court and the custody Court are the same, an order should be made by the Court as attaching Court for transferring the money from the suit in which it came into Court to the suit in which the attachment took place, and it is only when this is done that the Court, as attaching Court, can properly be said to have received the assets and to hold it within the meaning of section 73, ready for rateable distribution.

According to *Woodroffe and Ameer Ali*,[3] section 295 of the Indian Code was intended to prevent multiplicity of procedure and the scramble by several judgment-creditors which used to take place. It was also meant to secure an equitable administration of the property of the judgment-debtor by placing all the decree-holders on the same footing, and making the property divisible among them, instead of allowing one to exclude all the others, merely because he happened to be the first who seized and sold the immovable property or attached the money of the judgment-debtor.

It was held by the Privy Council in *Mina Kumari Bibi v. Bijoy Singh Dudhuria*,[4] that certain conditions were necessary in order to bring section 295 into play, and one of them was that there should be assets held by the Court.

An examination of the Indian Code shows that there is a progressive tendency to favour rateable distribution and to restrict the rights of the first applicant.

In *Umma Venkataratnam & Co. v. Adamji Usman & Co.*,[5] Seshagiri Ayyar J. said: " The first enunciation of the rule on this subject is to be found in sections 270 and 271 of Act 8 of 1839. Section 270 distinctly declares that a person who first takes out execution of his decree is entitled to be first paid out of the proceeds of the sale. Section 271 introduced the principle of rateable distribution with regard to the surplus proceeds that may be left after the first

[1] *(1895) 19 Mad. 72.*
[2] *(1920) 44 Mad. 100.*
[3] *C. P. C. 310.*
[4] *(1917) 44 Cal. 662.*
[5] *(1919) 42 Mad. 692.*

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attaching creditor had satisfied himself. Apparently under this Code the person who attached the property and brought it to sale was regarded as having claim to priority over other creditors. In the next two Codes of Civil Procedure, namely, those of 1877 and 1882, a further change was introduced in favour of rateable distribution. The priority of the attaching creditor was abolished and the rule was stated to be that where assets are realized by sale or otherwise in execution of a decree and where more persons than one *had, prior to the realization, applied to the Court by which such assets are held*, the assets shall be divided rateably amongst all such applicants. In the Act of 1908 another change in favour of rateable distribution was introduced by omitting the words ' realized by sale or otherwise ' and substituting for them the words ' are held by the Court.' But the essential condition was retained, namely, that persons applying for distribution *pari passu* must have made applications to the Court for execution of decrees before the receipt of assets."

The attaching Court must first direct the money to be paid over to itself. It is only after assets have been realized by such an order that the assets can be said to have been realized for the benefit of one or all the judgment-creditors.

The question arises whether there is an order of the attaching Court directing the money to be brought to the credit of this case.

On the application for the transfer of the sum of Rs. 24,607.82 from D. C. 3,189 to this action to the separate account of the plaintiff the learned Judge has, as I have already observed, made two endorsements:—

" *Vide* order in D. C. 3,189 " and " *Vide* order on Mr. Akbar's motion in D. C. 3,189."

These endorsements merely draw attention to two orders made in D. C. 3,189. They cannot, in my opinion, be construed as orders at all. They are far from orders directing any money to be brought to the credit of this case, so as to prejudice other creditors and to bar any claims they may have to concurrence. An order is defined in section 5 of the Civil Procedure Code as the formal expression of any decision of a Civil Court, which is not a decree. There is no expression, formal or otherwise, of any decision, to be gathered from these endorsements. They do not constitute a step or order in execution of the attaching Court. The fact that a sum of Rs. 24,607.82 was actually transferred to this case from D. C. 3,189 on February 13 does not, to my mind, affect the question. The money has been transferred on the order on Mr. Akbar's motion in D. C. 3,189 as shown by the Journal entry dated February 13, 1928, in this case. There was no order for the transfer made in the present Court, that is in the attaching Court. The last effective

order in the process of execution was the order allowing writ of execution on February 11. That order effected the seizure, and in the absence of any subsequent order directing the money to be brought into Court, there has been no realization, and the plaintiff is not entitled to an order of payment in his favour of the sum of Rs. 24,607.82, and his application has been rightly refused. I would dismiss this appeal with costs.

FISHER C.J.—I agree.

Appeal dismissed.