

**Clark Vs. Alexander**

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**Court :** Kolkata

**Decided On :** Sep-08-1893

**Reported in :** (1894)ILR21Cal200

**Judge :** Sale, J.

**Appellant :** Clark

**Respondent :** Alexander

**Judgement :**

**Sale, J.**

1. This was an application by the plaintiff for an order that a sum of Rs. 975-13-7, now in Court standing to the credit of this suit, be paid to him in part satisfaction of the decree obtained by him in this suit. The money represents salary which was attached in the hands of the Accountant-General of Bengal. There were, it appears, five attachments made by the Calcutta Court of Small Causes, under Section 285 of the Code, in execution of three of its own decrees and two decrees of a mofussil Court sent to it for execution.

2. Under these attachments a moiety of the salary of the defendant, who is in the Pilot Service, was from time to time realized by the Small Cause Court in part satisfaction. Before full satisfaction could be obtained, an attachment was made by this Court in execution of the decree in this suit, which was followed by an order

for payment of the money so attached into this Court to the credit of this suit. That order was made without notice to the outside decree-holders, although there was a certificate of the Accountant-General of Bengal showing that the money was subject to existing attachments on the part of these outside creditors. I therefore thought it right that notice of this application should be given to all these creditors, some of whom have now appeared and claim to participate with the petitioner in the fund which he seeks to have paid out to him. The only other material fact is that the petitioner is the only judgment-creditor who has applied for execution to this Court.

3. Upon these facts it was contended, on the part of the petitioner, that the money had been realized under Section 295 of the Code, and that, as the petitioner was the only creditor who had applied for execution to this Court, he alone was entitled to the whole fund to the exclusion of the outside attaching creditors, who in fact were excluded by the terms of the section.

4. On the other hand, it was said that the section applicable to the facts of this case was Section 285 and not Section 295, and that the realization in this case should be treated as having been made under the former section, which requires the Court to consider and determine the rights of all creditors who have attached the property realized under that section, and that the fund ought to be distributed rateably amongst all of them.

5. In support of the contention on the part of the plaintiff, two cases were cited : the case of Muttalagiri Nayak v. Muttayyar I.L.R. 6 Mad. 357 and the case of Nimbaji Tulsiram v. Kadia Venkati I.L.R. 16 Bom. 683, which followed the former case.

6. After careful consideration of these cases I have come to the conclusion that the contention made on behalf of the outside creditors is the correct one. 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 under Section 285 is to consider and determine the rights of the 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 his

decree to the superior Court and apply to that Court for execution. If that were required, it would operate with great hardship in the 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 benefit 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 under Section 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 realization, 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 given to each. The specific point, whether realization should be treated as having been made under Section 285 alone, or under that section and Section 295, was not, so far as appears, raised in the cases cited on behalf of the plaintiff, or considered by the Courts. In each of those cases it would seem to have been assumed that the realization was under Section 295. On the other hand, there are decisions of this Court in which this point has been considered. The case of *Gopeenath Acharje v. Achcha Bibee* I.L.R. 7 Cal. 553 was a decision under Sections 272 and 295. In that case this was said by the Court--'It may be proper to observe (p. 555 of the report)' that Section 295 of the Code of Civil Procedure has no application to a case of this kind. That section applies only where the decree-holders have all applied to the same Court for execution of their decrees. Now, in this case the plaintiff did not apply to the Small Cause Court Judge for execution of her decree, seeing that that decree was a decree of the Munsif and had never been transferred into the Small Cause Court for execution. Then, with reference to Section 272, we think that the Subordinate Judge has taken a proper view of the proviso, which is merely intended to mean that any question of title or priority is to

be determined by the Court in which, or in the custody of which, the property is, and not by the Court which made the order of attachment.' The contention was between two attaching creditors, one of whom had attached through the Court holding the assets, the other was an outside creditor; and inasmuch as they had not applied to the same Court for attachment, the learned Judges seem to have held that Section 295 did not apply, that is, did not apply so as 'to exclude the rights of creditors under the earlier Sections 272 and 285.

7. The case is referred to in the Madras case *Muttalagiri Nayak v. Muttayyar* I.L.R. 6 Mad. 357 as an authority for the proposition that before an Attaching creditor has a right to rateable distribution under Section 295, he is bound to transfer his execution to the Court holding the assets. I cannot agree that it supports that proposition.

8. In another case, *Bykant Nath Shaha v. Rajendra Naram Roy* I.L.R. 12 Cal. 333, where property had been attached both by an inferior Court and by a superior Court in the same district, and was sold first by the inferior Court and then by the superior Court, it was under all the circumstances held that the first sale by the inferior Court should not be set aside, and that the superior Court should have, accepted the sale and required the purchase money to be brought in and placed under its control, 'so that (as observed by the Court) it might be rateably distributed amongst all the decree-holders.' In that case it was assumed that a rateable distribution was capable of being made without transfer of the execution to the Court holding the assets. And, after the best enquiry I have been able to make as to the practice of this Court, it seems to be in favour of the principle of rateable distribution amongst all the attaching creditors without any such condition as the transfer of the execution proceedings to the superior Court. In illustration of this I will refer to two unreported cases.

9. In a case where money was attached in the hands of a mercantile firm, first by this Court and then by the Calcutta Small Cause Court by direct attachment, and was paid into this Court, the attaching creditors made a joint application to the Court that their rights as to participation might be determined under Sections 285 and 295. It was referred to the Registrar to enquire who under these sections were

entitled to the money, and that distribution be made according to the Registrar's report, after confirmation by effluxion of time or otherwise. The Registrar reported in favour of a pro rata distribution. That report was confirmed and carried out.... Bhugwan Dass Bogla v. Bunko Behary Bajpie (suit 130 of 1884, unreported). It is to be observed that the reference in that case was an open one, though made on a joint application of the attaching creditors.

10. There was another case in which property in Calcutta, attached in execution of a decree of this Court, was taken up for public purposes. The compensation money awarded was in the hands of the Collector of the 24-Pergunnahs, who, at the request of this Court, sent the money to this Court, with the request that it should be received 'for credit' of the suits in this Court, a suit of the Calcutta Small Cause Court and an execution suit in the Alipore Court. That money was attached in the hands of the Collector by a creditor who had obtained a decree in the Alipore Court. It was held by Wilson, J., that the money having been attached within the jurisdiction of the Alipore Court in execution of a decree of that Court, had been irregularly brought into this Court, yet that, having been brought into this Court, it must be deemed to have been realized in all the suits, and the principle of rateable distribution between all the creditors should be applied.

11. For these reasons I prefer to adopt the practice of this Court, supported as it seems to me to be by the authority of the cases decided in this Court which I have cited. I therefore hold that the money realized in this case should be rateably distributed between all the attaching creditors, and that their costs of appearing before me should be added to their claims respectively.