

Surendra Kumar Guha Vs. Jamini Kumar Guha and ors.

Surendra Kumar Guha Vs. Jamini Kumar Guha and ors.

SooperKanoon Citation : sooperkanoon.com/877666

Court : Kolkata

Decided On : Jul-07-1936

Reported in : AIR1936Cal723,166Ind.Cas.178

Appellant : Surendra Kumar Guha

Respondent : Jamini Kumar Guha and ors.

Judgement :

R.C. Mitter, J.

1. The petitioner instituted a suit for recovery of money against opposite parties Nos. 2 to 8 in the Second Court of the Munsif at Feni, being Money Suit No. 501 of 1934. Some immoveable property of the said opposite parties was attached before judgment on 19th March 1934, on his application. He obtained his decree on 4th September 1934, and on 4th February 1935, applied for execution of his decree in that Court (Money Execution Case No. 32 of 1935). The opposite party No. 1 also obtained a money decree against the said opposite parties Nos. 2 to 8 in a suit instituted by him in the first Court of the Munsif at Feni and on 19th November 1934, applied in that Court for execution (Money Execution Case No. 445 of 1934). The properties which had been attached before judgment by the petitioner were attached by the First Court of the Munsif at Feni on 20th December 1934. In the sale proclamation issued by that Court, 11th March 1935 was the date fixed for sale. On 8th March 1935, the petitioner made an application to the Second Court

of the Munsif at Feni, in which Court his application for execution was pending. In that application he stated that the opposite party No. 1 was executing his decree for money against the same judgment-debtors in the first Court and that 11th March 1935 had been fixed for sale. He prayed for rateable distribution. On that application the Second Court passed an order on the same date requiring petitioner 'to show papers' that the judgment-debtors were the same.' The next day the petitioner satisfied the Court that the judgment-debtors were the same and on that the Court (Second Court of the Munsif at Feni) passed order No. 5 dated 9th March 1935, in these terms:

Heard pleader. Prayer for rateable distribution of the assets to be fetched at the sale of the above Money Execution Case No. 445 of 1934 is allowed. Send a copy of this order to the local first Court for favour of passing necessary orders for rateable distribution. The claim of this case is Rs. 270-4-0.

2. On 18th March 1935, the Second Court passed the following order: '(Order No. 6) Put up on 27th April 1935 for rateable distribution with the Money Execution Case No. 445 of 1934 of the local First Court.' The first mentioned order (No. 5) reached the First Court on 11th March 1935, but before its arrival that Court had allowed by its order No. 6, dated 11th March 1935, the decree-holder (opposite party No. 1) to bid at the sale, but on receipt of the said order, it passed on the same date order No. 7 which is in these terms:

Received the copy of Order 5 dated 9th March 1935, passed in Money Execution Case No. 32 of 1935 of the local Second Court. It appears that the decree-holder of the above execution case prayed for rateable distribution of the assets to be fetched at the sale of immoveables. The Nazir is accordingly directed to realise the purchase money in cash, so as to have the same rateably distributed between the decree-holders of both the cases.

3. Opposite party No. 1 did not proceed with the sale of lot No. 1. The sale of the other lots by the First Court could not be held on the 11th or 12th March, but it was held on 13th March 1935. Opposite Party No. 1 purchased one lot and the rest were purchased by a stranger, Sudhir Kumar Bhowmik. Earnest money of 25 per cent was deposited on that date, and the balance in April, within 30 days of the

sale. An application to set aside the sale was made but was dismissed on 23rd September 1935. Thereafter the purchaser failed to deposit the landlord's transfer fee in respect of lot No. 5 with the result that the sales of lots Nos. 2 to 4, 6, 7 and 8 were confirmed and the first Court passed an order on 26th September 1935 stating that the petitioner would get by way of rateable distribution the sum of Rs. 131-5-9. The said sum of money was placed to his credit and the second Court was informed by the first Court. Opposite Party No. 1 thereafter filed on 26th September 1935 in the second Court an objection to the claim for rateable distribution which had been made by the petitioner in the Court and had already been allowed. On 28th November 1935, the Second Court allowed this objection and recalled its order No. 5 dated 9th March 1935. It held that (a) it had no jurisdiction to order rateable distribution as the assets were held not by it, but by the First Court and (b) that the petitioner had no right to rateable distribution as he had not made an application for execution of his decree to the first Court which held the assets. It is against this order that the petitioner has moved this Court. He maintains that Order No 5 dated 9th March 1935, is the correct order and prayed for its restoration.

4. The question involved depends upon the interpretation of Sub-section 63 and 73, Civil P. C. There is a mass of case law on the subject and the High Courts have taken divergent views, and as I read the case law, there is sharp conflict of opinion in the decisions of the Madras and Bombay High Courts, but so far as this Court is concerned except for one or two decisions, a well-marked, definite and consistent course has been taken. Before reviewing the important decisions of the different High Courts, it is necessary that the precise scope of Sub-section 63 and 73 should be examined. At the outset one fundamental identity and one fundamental distinction are apparent. The scope of both the sections is the fair distribution of the proceeds of sale among the judgment-creditors of the common judgment-debtors, certain conditions being fulfilled by the former. That is the common feature. But the fundamental distinction is that the fund available for distribution under Section 73 among those creditors is the entire fund realized or received by the executing Court. (I am not considering the proviso which may be left out of consideration for the present purpose.) The funds available for distribution under Section 63 are the proceeds of common property attached by

the judgment-creditors. It is the fact of attachment and attachment of the identical properties by the several judgment-creditors that bring into operation Section 63. To make the point clear, the following two illustrations are helpful: (1) A, who has a decree for payment of money against J, executes his decree in the Court of a particular Subordinate Judge and sells the judgment-debtor's properties, X Y and Z. If other persons B, C and D who have decrees for payment of money against the same judgment-debtor apply for execution of their decrees in the Court of the said' Subordinate Judge before the receipt of the proceeds of the sale of X, Y and Z, the whole of the proceeds of the sale will have to be rateably distributed amongst A, B, C and D under Section 73. B, C, and D need not have proceeded further beyond making their application for execution in that Court. A, who has a decree for payment of money against J, executes his decree in the Court of a particular Subordinate Judge and attaches and sells properties X, Y and Z the proceeds of which are received by that Court. B, C and D, who have decrees for payment of money against J, proceed to execute their respective decrees in other Courts, say the first, second and third Court of the Munsif of a particular place, and attach respectively X, Y and Z. These attachments are effected before the sale proceeds are received by the Subordinate Judge. They do not apply for execution of their decrees in the Court of the Subordinate Judge, nor are their executions transferred to that Court before the receipt of assets by that Court, but they bring the fact of the attachments to the notice of the Subordinate Judge. The entire proceeds of the sale of X, Y and Z cannot be distributed by the Subordinate Judge amongst A, B, C and D rateably under Section 63, but the proceeds of the sale of X has to be distributed rateably between A and B, those of Y between A and C and those of Z between A and D. This view which I am taking of the scope of Section 63 has been advanced by Abdur Rahim, J. in *Arimuthu Chetti v. Vyapuripandaram*, (1912) 35 Mad 588. The relevant passage in the judgment is at p. 590 and runs as follows:

What the decree-holder of the Munsif's Court is entitled to, when there is no transfer of his decree to the District Court, is not a general execution of his decree by the District Court or rateable distribution in all the assets of the judgment-debtor received by the District Court but only to share by virtue of his attachment in the proceeds of the attached property realized. To a relief, so limited, it appears to me

to be not essential that the decree of the Munsif's Court shall have been previously transferred to the District Court, though this view runs counter to the observations in *Muttalagiri v. Muttayyar* (1883) 6 Mad 357 as to the need of transfer.

5. Section 63 contemplates the case where attachments of the same property have been made by different Courts at the instance of the different decree-holders of the common judgment-debtor and provides for the distribution among them of the proceeds of the attached property by one of Courts only. The principle underlying it is the principle of convenience, the principle of avoiding multiplicity of proceedings, the principle of fair distribution and not the principle of exclusion. The distribution is to be made by the superior Court, and if all the Courts be of the same grade, the distribution is to be made by the Court which first attached the property. Any other view of Section 63 would make the position manifestly unjust. A person obtains a decree for money over Rs. 5,000 in the Court of the Subordinate Judge, applies for execution there and attaches a property. Another person obtains a decree for money against the same judgment-debtor for Rs. 500 in a Munsif's Court, applies for execution there and attaches the same property. The Munsif being unaware of the attachment effected by the Subordinate Judge, sells the property before the Subordinate Judge could put it up for sale. The sale by the Munsif would be a valid one. If Section 73 is to be regarded as the only section for rateable distribution, the person who obtained the decree for over Rs. 5,000 in the Subordinate Judge's Court would not be able to claim rateable distribution, if the terms of Section 73 be strictly construed and Section 63 be not looked into, because he would not, as has been pointed out in *Nilkanta Rai v Gosta Behary* 1919 Cal 545 and *Deckappa v. Chanbasappa* 1925 Bom 420, be able to apply for execution of his decree in the Munsif Court, by reason of the limited pecuniary jurisdiction of the Munsif.

6. Cases of such sales by Courts of inferior grades, where the property was under attachment effected by a Court of superior grade or where the Courts are of the same grade by the Court which attached later in point of time, had come before the Courts when the Code of 1882 was in force. A provision corresponding to Sub-section (2), Section 63 was not in Section 285 of the Code of 1882. So far as this High Court is concerned, it has consistently held that such sales are valid, but this

Court has pointed out that in such cases it is the duty of the Court of inferior grade or the Court of same grade which had attached last of all, as the case may be, to send the sale proceeds to the Court of superior grade for distribution, or if all the Courts be of the same grade, to the Court which first attached the property. This was pointed out first by Pontifex, J., in *Obhoy Churn Kundu v. Golam Ali* (1881) 7 Cal 410 at p. 413 and this principle has been almost consistently followed in this Court, which has held that the Court of superior grade or of the same grade which had first attached the property, as the case may be, is to distribute the sale proceeds amongst all the attaching decree-holders: *Bykanta Nath Shaha v. Rajendra Narayan Roy* (1886) 12 Cal 333; *Clark v. Alexander* (1894) 21 Cal 200; *Har Bhagat v. Annadaram* (1898) 2 C W N 126; *Bhugwan Chandra v. Chandra Malla* (1902) 29 Cal 773 and *Nilkanta Rai v Gosta Behary* 1919 Cal 545. The Bombay and Madras High Courts, which in the matter of distribution of sale proceeds in such cases had taken different views, ultimately veered round to the same position: *Shidappa v. Guru Gumsanggya* 1931 Bom 350; *Arimuthu Chetti v. Vyapuripandaram*, (1912) 35 Mad 588; *Narasimachariar v. Krishnamachariar* 1914 Mad 454; see also *Sarju Ram v. Pratap Narain* 1933 All 563, where most of the earlier cases are noticed. When such assets are not sent by the Court holding the sale to the Court which is given the right to distribute the same under the provisions of Section 63, there is a difference of opinion in the matter of procedure only.

7. This Court and the Bombay High Court have held that the District Judge is to be moved for asking the Court holding the sale to send the sale proceeds to the proper Court, but some of the other High Courts have held that the Court of superior grade or the Court which first attached the property, as the case may be, can of its own motion make the requisition. So far as the case before me is concerned it makes no difference because I can direct, as was done in *Nilkanta Rai v Gosta Behary* 1919 Cal 545, the sale proceeds to be sent by the first Court of the Munsif at Feni to the second Court of the Munsif of that place and direct the last mentioned Court to distribute the sale proceeds rateably among the petitioner and the opposite party No. 1. In my judgment the correct principle in such cases has been formulated by Wallis, J. in *Narasimachariar v. Krishnamachariar* 1914 Mad 454 in the following passage:

What however where the attachments are in different Courts and the property is received or realised by the Court of the highest grade under Section 63? In such a case there is no receipt at all by the other Courts unless the receipt by the Court of highest grade can be deemed to be a receipt by the other creditors as well. (The word 'creditors' in the report is obviously a slip for the word 'Courts'). In my opinion this is the correct view and it is only for the purposes of convenience that the highest Court is made the collecting Court, and the Court to adjudicate on claims and objections and the property received or realised must be deemed to have been received or realised by or on behalf of all the Courts in which there have been attachments in execution of money decrees prior to the actual receipt of assets. If this be so, then the decree holders in the other Courts are entitled to rateable distribution under the very terms of Section 73.

8. It is in this view that it can be said, as has been said in *Kwai Tong Kee v. Lim Chaung Ghee* 1928 Rang 157 and *Gourgopal De Sarkar v. Kamal Kalika Datta* 1934 Cal 559, that Section 73 must be read in conjunction with Section 63. I accordingly make the rule absolute, set aside the order complained of and restore the order No. 5 of the Munsif, Second Court, Feni, dated 9th March 1935. The sale proceeds to be sent by the first Court of the Munsif at Feni to second Court of the Munsif of that place, in order that the last mentioned Court may make the rateable distribution among the petitioner and opposite party No. 1. The petitioner will have his costs of this Court and of the Court below from opposite party No. 1. Hearing fee 1 gold mohur.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com