

(1921) 03 CAL CK 0030**Calcutta High Court****Case No:** Rev. No. 4 of 1921

Krishna Kumar Ghosh

APPELLANT

Vs

Pasupati Banerjee

RESPONDENT

Date of Decision: March 19, 1921**Judgement**

1. The Petitioners in this Rule obtained two decrees for money in the Calcutta Small Cause Court against the judgment-debtors. They attached before judgment certain goods belonging to the judgment-debtors in the custody of certain Navigation Companies. Applications for execution of the decrees were made in the Naraingunj Munsif's Court for realizing Rs. 1,449 and odd due under the two decrees, and sale proclamation was issued fixing the 7th October 1920 for the sale of the goods. The Opposite Parties had also obtained a decree against the same judgment-debtors in the Calcutta Small Cause Court, and had attached the goods before judgment. Their attachment was prior to the attachment under one of the decrees obtained by the Petitioners but subsequent to the attachment under their other decree. The Opposite Parties executed their decree in the Dacca Subordinate Judge's Court and got the sale fixed for the 7th October in the Munsif's Court (in execution of the Petitioners' decrees) stayed. The Petitioners thereupon asked the Subordinate Judge to direct the Munsif to hold the sale and send the assets which might be realised to the Dacca Court for rateable distribution. The application was refused and the Dacca Court issued proclamation for sale fixing the 23rd November for sale, which was postponed to the 6th December. On the 22nd November the Petitioners submitted a petition to the Subordinate Judge of Dacca, in which they stated that under the law that Court had the power to execute decrees and determine claims, etc., in connection therewith, that the goods had been attached under sec. 65 of the Code, and that the Petitioners were entitled to rateable distribution out of the assets. They prayed that the execution cases pending in the Naraingunj Munsif's Court might be transferred to Dacca and that the assets which would be realised by the sale of the goods which had been first attached by them might be rateably distributed between them and the Opposite Parties. The Subordinate Judge

thereupon made an order that "on the sale of the moveables ordered in this case let the records of the execution cases be called for rateable distribution as prayed for." The sale took place in the Dacca Court on the 8th and the Subordinate Judge, by his order, dated the 11th December, disallowed the prayer of the Petitioners for rateable distribution.

2. The Subordinate Judge relied upon the case of *Ramjas Agarwala v. Guru Charan Sen* 14 C. W. N. 396: s. c. 11 C. L. J. 69 (1909) in holding that the Petitioners were not entitled to rateable distribution as no application was made by them for execution in the Subordinate Judge's Court, Dacca, which realised the assets as laid down in sec. 73 of the Civil Procedure Code.

3. The Petitioners rely upon the case of *Clark v. Alexander* I. L. R. 21 Cal. 200 (1893) and some other cases in support of the contention that the superior Court can, under sec. 285 (sec. 63 of the present Code) deal with the question of rateable distribution although no application had been made under sec. 295 (sec. 73 of the present Code). The case of *Clark v. Alexander* I. L. R. 21 Cal. 200 (1893) and the other cases on the point were discussed in *Ramjas Agarwala v. Guru Charan Sen* 14 C. W. N. 396: s. c. 11 C. L. J. 69 (1909) and the learned Judges observed that they could not agree" with the decision in that case if it was intended to hold that a creditor who was not entitled to rateable distribution under sec. 295 because he did not apply for execution to the Court which held the assets realised, or because such application had not been made prior to the realisation of the assets, was yet entitled to the same benefit under sec. 285. The case of *Bhugwan Chundra v. Chundra Mala* I. L. R. 29 Cal. 773: s. c. 1 C. L. J. 97 (1902) would seem to support the view taken in the case of *Clark v. Alexander* I. L. R. 21 Cal. 200 (1893). On the other hand the view taken in the case of *Ramjas Agarwala v. Guru Charan Sen* 14 C. W. N. 396: s. c. 11 C. L. J. 69 (1909) is supported by some of the decisions cited in that case in the case of *Ramjas Agarwala v. Guru Charan Sen* 14 C. W. N. 396: s. c. 11 C. L. J. 69 (1909) the learned Judges referred to a decision of the Burma Court, in which the case of *Clark v. Alexander* I. L. R. 21 Cal. 200 (1893) was distinguished on the ground that the attach merit in the inferior Court had been made before the attachment by the superior Court, and it was suggested that in such a case, the question might perhaps be treated as one for determination of an objection by the creditor who had obtained the earlier attachment in the inferior Court of the money deposited in Court or for the determination of a claim thereto. Mr. Justice Ashton of the Burma Court put forward the following line of reasoning in support of his suggestion : "as an execution creditor who has first got the property attached is not to get less than a rateable share of the assets merely because his execution proceedings are not taken in the Court which actually realise the assets and he accordingly makes no application under sec. 295 before realisation in the latter Court, the Court holding the assets may, without transferring the prior attaching decree-holder's decree to itself for execution and without any application being made before the realisation of the assets, give recognition to the above extent of the claim of the prior attaching

creditor as a claim contemplated by one or other of the sections preceding sec. 285, such for instance as secs. 279, 280 or 282, by deciding under sec. 285 to realise and hold for the satisfaction of the prior attaching creditor's decree, on the proper steps being taken for it to be so executed, a rateable share of the assets already realised." The learned Judges in the case of *Ramjas Agarwala v. Guru Charan Sen* 14 C. W. N. 396: s. c. 11 C. L. J. 69 (1909) after quoting the above passage observed : " But we need not express any opinion upon the question whether the decision in *Clark v. Alexander* I. L. R. 21 Cal. 200 (1893) may or may not be justified on the grounds suggested, nor need we discuss whether that decision may not require reconsideration when another case precisely similar to it on the facts arises. . . . In the present case . . . the attaching creditor in the inferior execution Court obtained his attachment long after the attaching creditor in the superior Court had obtained his attachment. This ground alone is sufficient to differentiate the case before us from the decision in *Clark v. Alexander* I. L. R. 21 Cal. 200 (1893)." The question is not free from difficulty, but so far as one of the decrees of the Petitioners is concerned, viz., that in which there was a prior attachment by the Petitioners, we think, we may adopt the reasoning of Mr. Justice Ashton quoted above, and hold that they are entitled to rateable distribution. With respect to the other decree, in which the attachment was subsequent to that effected at the instance of the Opposite Parties, we think, having regard to the present state of the authorities, that we should follow the decision in the case of *Ramjas Agarwala v. Guru Charan Sen* 14 C. W. N. 396: s. c. 11 C. L. J. 69 (1909) which appears to be the latest decision on the point.

4. It is contended that application had been made to the Subordinate Judge, Dacca, by the Petitioners for the transfer of the execution cases from the Munsif's Court, and for rateable distribution and that the only defect was that the application was not in the form for application for execution of decree. But no application for execution was made to that Court, and we are unable to hold that the Petitioners are entitled to rateable distribution in respect of both the decrees. The result is that the order of the Court below will be modified, and the Petitioners will be entitled to rateable distribution only in respect of the decree under which the goods were attached prior to, the attachment effected at the instance of the Opposite Parties. But in making the rateable distribution, any amount paid by the Opposite Parties as freight and demurrage charges will be first deducted from the assets realised and paid to the Opposite Parties and the balance rateably distributed as directed above. Each party to bear its own costs in both Courts. Let the records be sent down without delay.