(1975) 02 BOM CK 0024

Bombay High Court

Case No: C.R.A. No. 244 of 1974

Apollo Electric Industries		APPELLANT
	Vs	
Silka Electric Corporation and another		RESPONDENT

Date of Decision: Feb. 27, 1975

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 2, 3, 73

Citation: (1976) MhLj 872

Hon'ble Judges: R.K. Joshi, J; M.S. Apte, J

Bench: Division Bench

Advocate: S.T. Tijoriwala with N.S. Shastri, for the Appellant; G.K. Vora for opponent No. 1, for the Respondent

Judgement

R.K. Joshi, J.

This application has been referred by the learned Chief Justice to the Division Bench and the only question involved is whether section 73 of the CPC which deals with rateable distribution can be successfully availed of by the petitioners. The question arises in this way.

2. Respondent No. 1 Messrs. Silka Electric Corporation obtained a money decree in City Civil Court Suit No. 4205 of 1971 against Respondent No. 2 Shri Jayantibhai Amlani, Proprietor of Messrs. Vithaldas Mathuradas Gujarat Society, Vile Parle, in the amount of Rs. 4342-50 on 29th July 1971. The present petitioners Messrs. Apollo Electric Industries obtained a money decree in the amount of Rs. 17,000 and odd together with costs and future interest in Suit No. 9009 of 1972 of the Bombay City Civil Court on 13th February 1973 against the same Respondent No. 2 Shri Jayantibhai Amlani. We are not concerned with the earlier payments made by Shri Jayantibhai to Respondent 4 No. 1 Messrs. Silka Electric Corporation; but the dispute centres round three items. Respondent No. 2 Jayantibhai Amlani deposited with the

Sheriff of Bombay, Rs. 1,000, Rs. 965, Rs. 325-50 respectively on 14-12-1973, 27-12-1974 and 13-3-1974. The aggregate deposits were to the tune of Rs. 2290-50. These deposits were made by Shri Jayantibhai after his property, which was said to be a running concern with the stock-in-trade, was attached by Respondent No. 1 Messrs. Silka Electric Corporation on 26-2-1973.

3. The present petitioners Messrs. Apollo Electric Industries made an application for execution of their aforesaid decree in accordance with Order 21, Rule 11 on 28-9-1973 inter alia for the following reliefs :

By taking plaintiff''s claim on record in the negative index for rateable distribution of the assets that may be realised as against the judgment-debtor (defendant) u/s 73 of the Civil Procedure Code, 1908, and the same is registered in the negative index of the register.

The petitioners sought execution of the said decree in the aforesaid manner. It appears on 27th March 1974 there was another application for attachment of this property by the present petitioners under Order 21, Rule 52 of the Civil Procedure Code. On 10th of April 1974 the petitioners took out a chamber summons for rateable distribution and the same came to be dismissed by the learned Judge of the City Civil Court on 20th April, 1974. This order is impugned by the present Petitioners Messrs. Apollo Electric Industries.

4. In the affidavit in reply filed by Respondent No. 1 Messrs. Silka Electric Corporation raised three principal contentions. In the first instance it pleaded that a similar chamber summons was taken out in the past on 22nd March 1974 and it was dismissed. The next contention taken was that the provisions of section 73 of the CPC for rateable distribution cannot be successfully availed of by the present petitioners. On admitting that the petitioners had made an application for execution on 28th September 1973 of which a note was taken in the negative index, it contended further that Shri Jayantibhai had specifically paid the aforesaid amounts for the purpose of raising attachment in view of the proclamation of sale, and for preventing the sale. As the payments were made for a specific purpose and accepted as such by the Sheriff, the petitioners cannot claim rateable distribution. Another ground to reinforce this contention put forth was that these amounts were realised by the office of the Sheriff of Bombay, without putting the property to sale or auction and a certificate was issued to Respondent No. 1 to that effect on 16th March 1974 intimating the payments for the said purpose. As these assets were not realised by the Court, nor were they held by the Court in execution of a decree, the petitioners cannot lay hands thereon. The rest of the contentions are not material for the disposal of this application.

5. The learned trial Judge, relying upon a couple of rulings of our High Court to which we would make a reference shortly, took the view that when the amounts are paid by the judgment-debtor for a specific purpose, they would not be available for

rateable distribution. The same line of reasoning has been adopted by Mr. Vora, the learned Advocate appearing for respondent No. 1, whereas Mr. Tijoriwala, the learned counsel for the petitioners, on distinguishing these authorities and pointing out what to his mind the real ratio of the said authorities is, relied upon the decisions of various other High Courts to emphasise that the principal aim and object of section 73 is that the assets which are in the custody of the Court, in whatever manner they are realised, should be equitably distributed amongst the various decree-holders of the same judgment-debtor. The intention of the Legislature is not only to pay the various decree-holders of the same judgment-debtor pro rata, but to save them from undertaking the very ordeals which the decree-holder, first in point of time takes out the execution. Ultimately these are the assets of the judgment-debtor and they are meant for the satisfaction of the claims of the various decree-holders. It is immaterial in what manner they are realised or come in the custody of the Court. Once the assets are held by the Court and the other conditions of section 73 are fulfilled, there is no escape from the rateable distribution. The cases relied upon by the learned Advocate for respondent No. 1 which emphasise the aspect of specific purpose, have no bearing, argued Mr. Tijoriwala further, on the facts before us.

6. Now, section 73 of the Civil Procedure Code, the interpretation of which is the guide for the solution of the problems presented by both the sides, runs thus:

(1) Where assets arc held by a Court, and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducing the costs of realization, shall be ratably distributed among all such persons:

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The proviso, in particular, and the rest of the provisions contained in sub-sections 2 and 3 are not material for our purpose. An analysis of this section would point out that it entitles a decree-holder to rateable distribution on the fulfilment of certain conditions. The conditions embodied are that the applicant, for rateable distribution, must have obtained his decree and applied for execution of the decree to the appropriate Court. Secondly, the application should have been made prior to and must be a subsisting and pending one at the time of the receipt of the assets by the Court. Thirdly, the assets of which rateable distribution is claimed, must be assets held by the Court Fourthly, the attaching creditor as well as the decree-holder claiming to participate in the assets should be holders of decrees for payment of money, and finally the decrees should have been obtained against the same judgment-debtor. If these conditions are fulfilled, it seems to us, it would be difficult for the decree-holder who comes to the Court first in point of time and takes some

steps for the realisation of the amount or threatens to take some steps, and to stave off the evil day the judgment-debtor who makes the payment voluntarily or involuntarily, cannot escape the inevitable result of this section. The object as well as the intention of the Legislature in making this salutary provision is quite patent. It is to prevent multiplicity of execution proceedings while at the same time to ensure equitable distribution of the assets between various decree-holders who have a right to have their decrees satisfied out of those assets. The object is to secure an equitable distribution of the property by placing all the decree-holders on the same level and making the property rateably divisible among them.

7. A passing reference in this context need be made to change in the wording of this section by the amending Act of 1908. The corresponding section under the Code of 1882 was 295 and it read thus:

Whenever assets are realised 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.

The word ''realized'' or ''realization'' used in the old section 295 gave rise to a conflict of decisions and did not admit of any precise meaning. Therefore this section was amended which is now numbered as 73 and the word ''receipt'' is substituted for the word ''realization''. The expression ''receipt'' can seldom admit of any ambiguity. It has little bearing on the mode or manner in which it is acquired by the Court or has come into the custody of the Court. Moreover, in dropping the old expression ''realization'', the conflict is done away with. ''Realization'' may connote some agency to act or some measure taken out either by the decree-holder or the Court to collect the amount or to get it into the custody of the Court. It may be by various modes of execution laid down in Order 21 of the Code of Civil Procedure, to which a reference would be made shortly. In simplifying (he section what the Legislature has contemplated is that the assets must be held by the Court. The manner or the method of realization, the efforts of the decree-holder vis-a-vis the other or the steps taken by the judgment debtor are points not now germane for rateable distribution. The only condition imposed upon another decree-holder who seeks rateable distribution is that he should make an application for execution before the receipt of such assets. It is needless to recount the other essentials viz. that the decree should be for payment of money and against the same judgment-debtor, and non-satisfaction of their decrees.

8. Although not pleaded in so many words nor argued before the lower Court, a feeble attempt was made by Mr. Vora for Respondent No. 1 to introduce certain questions of facts to which we may make a passing but brief reference. According to him the first payment of Rs. 1,000 dated 14th December 1973 was made by the judgment debtor (Respondent No. 2) in pursuance of a chamber summons for raising attachment and on making such deposit an injunction was granted to the decree-holder. Regarding the subsequent two payments respectively of Rs. 965 and

Rs. 325, the submissions were that the judgment-debtor had made these payments to the Sheriff with a covering letter in which he submitted that the payments were being made for a specific purpose viz. the raising of the attachment levied by respondent No. 1 over the property of respondent No. 2 Unfortunately these submissions are not borne out by any written record, nor had the petitioner any opportunity to meet them. We are conscious that in paragraph 7 of his affidavit in reply to this application, Shri Madhusudan Vallabhdas Negandhi, a partner of Messrs. Silka Electric Corporation, has stated that the deposits were made for the purpose of raising attachment in view of the proclamation of sale or to prevent the sale. There is an addenda to the effect that a certificate was issued by the Sheriff of Bombay intimating the judgment-debtor, probably of the note taken by the Sheriff, of the contents of his letter. Those letters, as observed just now, are not before the Court, nor is there anything on the record to uphold the first part of Mr. Vora''s argument that Rs. 1000 were paid pursuant to the chamber summons for raising the attachment and on certain conditions or understanding between the decree-holder, the judgment-debtor and the Court. He introduced these factual aspects for the first time, probably as we now look back and realise, to bring his case within the four corners of the two reported authorities in 41 Bom. L R 176 upon which reliance is placed by the learned trial Judge. But this being an application in revision and there being no evidence before us, it would be hazardous on our part to canvass these questions which are purely of fact. We have to proceed as the record stands and to put it in a nut-shell, it does not support these contentions pressed into service by Mr. Vora. With these prefatory observations on the factual aspects, we may now proceed to refer to few more details before touching the legal points.

9. We have already noted in one of the foregoing paragraphs that both these decree-holders have obtained money decrees in the same Court against the same judgment-debtor, although in different amounts. Respondent No. 1 levied attachment on the property of the judgment-debtor and before he could get his execution petition struck off on full satisfaction. This amount was lying with the Court or the Court was holding the same. It may be with the Sheriff for the time being, but ultimately the custody would be of the Court and in the words of section 73 they would be the assets held by the Court. On this background, the next question that falls to be determined is whether the bare allegation in paragraph 2 of the petition that an application for execution was made by the present petitioner under Order 21, Rule 11 and a note was taken in the negative index. The argument presented by Mr. Vora on this aspect was that such a move as adumbrated in paragraph 2 of the petition and reproduced in one of the foregoing paragraphs, is strictly speaking no compliance with the provisions of Order 21, Rule 11. The very basic idea of rateable distribution is that there must be a pending application for execution of the decrees in accordance with law, and as to how such an application is to be made is laid down in Order 21, Rule 11 to which we may refer at this stage.

10. Rule 11 of Order 21 envisages oral application for execution in certain cases with which we are not concerned in the present application. Sub-rule 2 prescribes the form or the particulars to be given in an application for execution of a decree. Clause (j) of sub-clause (2) deals with the mode in which the assistance of the Court is required. Clause (v) of clause (j) is somewhat omnipotent and it lays down that the decree-holder may mention the mode in which the assistance of the Court is required in a suitable manner as the nature of the relief granted may require. Such an inclusion is quite essential because it is very difficult to comprehend what assistance a particular decree-holder may need from the Court while executing his decree. No doubt the other modes enumerated in the other sub-clauses are delivery of property, attachment and sale, arrest and detention in prison, appointment of a receiver and the last is "otherwise, as the nature of the relief granted may require". This clause is not exhaustive and by using the expression "otherwise" in clause j (v) it gives the decree-holder a further avenue of seeking an appropriate relief. For instance, a relief of the present type viz. rateable distribution may fall under this sub-clause. Therefore, it cannot be said that the application made by the present petitioner is not in conformity with Order 21, Rule U of the Civil Procedure Code. As a matter of fact in paragraph 2 of the petition, the relief claimed is stated in so many words and in the affidavit in reply these contentions are admitted to be correct by Respondent No. Vs partner Shri Madhusudan Vallabhdas. Therefore, where the decree-holder like the present petitioner seeks rateable distribution, his case would be covered by the abovesaid clause and this is further admitted by Respondent No. 1.

11. However, relying upon certain rules prevailing on the Original Side of the High Court and those adumbrated in Bombay City Civil Court Rules, 1948, a point was made by Mr. Vora that the bare mention of the Petitioner''s claim in the negative index for rateable distribution is not an application in conformity with Rule 11 of Order 21. The answer would be two fold. From the observations in Jamnadas v. Bai Soonabai 34 Bom. L R 1405., which was a case from the Original Side of the High Court of Bombay, it would appear that an application for making an entry in the negative register kept by the Prothonotary of the Bombay High Court is tantamount to an application for execution and if made before the sale, entitles the applicant to rateable distribution. The point is elaborately dealt with on page 1409 of the report and His Lordship Kania J. made reference to Rules 318 and 323 made under the Code for the working of the Original Side of the High Court. His Lordships further pointed out that the effect of an application to make an entry in the negative register is the same as that of an application for execution of the decree, and if a party applied for rateable distribution u/s 73 of the Code, the Prothonotary''s Office would only make an entry in the negative register. An entry in the negative register would, under Rule 323, entitle the applicant to share in the rateable distribution of the decree under which the property is sold. Having regard to this practice, the application of the applicant would amount to an application for execution of the

decree. These observations mutatis mutandis apply not only to the present facts but to the practice prevailing in the Bombay City Civil Court.

12. May it be mentioned in this context that the Bombay City Civil Court Rules, 1948, are largely drawn upon the lines of the rules prevailing on the Original Side of the Bombay High Court. Before the establishment of the City Civil Court for this city all such applications were heard and decided on the Original Side of the Bombay High Court. Chapter XV of the Bombay City Civil Court Rules, 1948, deals with execution of decrees and orders. Rule 146 lays down that an application has to be made to the Registrar, and it could be made either by an advocate or party in person. The subsequent Rules 147 to 153 deal with the transmission of decree to the other Court, which are not very relevant for our purpose. Rule 154 speaks of the form of application for execution. On making a reference to Order 21, Rule 11 (2), it says that the application for execution should be on a sheet of durable paper, fool-scope size and in addition to the particulars laid down in Rule 11 it will contain some more particulars. For instance, it has to mention if necessary, whether the land sought to be attached is not registered in the Collector''s Office or otherwise. The other Rules 156 to 166 deal with the procedure to be followed by the Registrar, how the notices are to be issued, in what forms warrants should be drawn and if the payment is made outside, how the payment is to be notified under Order 21, Rule 2. Then comes Rule 167 which says that when the Registrar refuses an application for execution, the matter would be referred to the Judge and in such a case the Registrar shall pass suitable orders.

13. This brings us to Rules 168 to 174 which are most pertinent. No doubt all such decrees are to be executed by the Sheriff and they are transmitted to him. It is needless to refer to the establishment of the Sheriff''s Office and its working. Suffice it to mention that the Sheriff is clothed with all the powers of the executing Court which are circumscribed by certain limitations. Rule 168 which has a direct bearing on the point at issue runs thus :

When the Sheriff has certified to the Court that he has realised assets by sale or otherwise from the property of the judgment-debtor, the Registrar shall file the certificate, and shall, at the request of the judgment-creditor, at whose instance the realisation was made, certify what persons have applied to the Court for execution of decrees for money against the same judgment-debtor or have been declared entitled to share in such assets together with the amount appearing in the Register of suits to be payable under such decrees.

Pausing for a while here, we may emphasise that it is the duty of the Registrar on getting the Sheriff''s certificate to turn the pages of his register and in particular what is known as negative index register and then prepare and place before the Court a sort of a chart as to how many execution applications are pending against the same judgment-debtor and what their respective claims are. If rateable distribution could be worked out under the law, then the subsequent rules deal with

the procedure to be followed. In the first instance, the Registrar has to issue a notice to all persons claiming a share in the assets certified by the Sheriff to attend the Judge in Chamber on the day named in the notice. The Judge, upon proof of due service, has to proceed to deal with such claims and make such orders as he deems fit. These two rules read together, make it clear that the principle embodied in section 73 has to be implemented and worked out by the Judge on the Registrar putting up the details before the Judge on getting the Sheriff''s certificate about the realisations made by him. In other words, the Registrar is supposed to indicate to the Court what are the assets held by the Court within the meaning of section 73 of the CPC and the Judge has to adjudicate upon the claims of the other decree-holders for rateable distribution. If the Registrar certifies that there is no person who has made any such application for the execution of a decree for money against the same judgment-debtor, then the decree-holder can at once apply to the Registrar for an order directing the Sheriff to pay him the amount realised. In case of doubt or difficulty, the Registrar is left with the option to obtain the fiat of the Judge in Chambers to the application, or refer the matter into Chambers for argument. The very scheme of this chapter and the language of these rules make it abundantly clear that the procedure laid down is virtually the same which is followed in mofussil Courts. In the mofussil Courts only one register known as Darkhast Register is maintained. The moment an execution petition is presented, a note is required to be taken in the suit register. It is the duty of the Court Nazir or Clerk of the Court as well as of the other decree-holders who are desirous of claiming distribution, to mention in the execution application or otherwise that they intend to have rateable distribution. The matter is then dealt with by the Judge and if all the conditions laid down in section 73 are fulfilled, he makes suitable orders. On principles there is no variance in the procedure to be followed either in the mofussil or in the City Civil Court at Bombay. Only the officers who handle such matters at initial stages differ. In the mofussil every matter is dealt with by the presiding Judge and the Nazir plays the role of a ministerial officer, who is a substitute for the Sheriff in the city with his subordinate staff. Therefore, to our mind, when a note is taken in the negative index for rateable distribution, there would be an application in accordance with Order 21, Rule II and such an application was presented in the instant case. Therefore, these technical objections raised by Mr. Vora for respondent No. 1 do not defeat the Petitioner''s claims if they are otherwise tenable at law.

14. This takes us on to the crucial question and the ambit of enquiry u/s 73. A reference is already made to the wording of section 73 and the only debatable point is whether the amount paid by the judgment-debtor for a defined or specific purpose, could be diverted for rateable distribution. On this point apparently there may seem to be a divergence of opinion, but the basic principle or the ratio adopted seems to be the same. However, great reliance has been placed by Mr. Vora on a couple of authorities of our High Court which had weighed with the lower Court and to that a reference would be ''necessary at'' the outset to find out what really the

ratio of the said cases is.

15. The ''first ''case strongly relied upon by Mr. Vora is of Lalchand Radhakisan v. Ramdayal Ramnarayan 41 Bom. LR 176 (D B). The facts of the said case were somewhat singular. The appellant before; the High Court Lalchand had sued the Respondent Ramdayal and others for a money claim and'' had obtained an ex parte decree in Thana Court. He applied for execution of the said decree in the Court at Ahmednagar where the respondent was ordinarily residing. The defendants-respondents asked fora stay of the executing and the Court granted a stay on terms that respondent No. 6 before the High Court became a surety for the judgment-debtor. A surety bond'' was executed which stated ''that the defendants had applied'' for stay of execution in 1 Thana- Court and the learned First Class '' Subordinate Judge of Thana'' had passed an order that if the defendants furnished a solvent surety for the decretal amount in the First Class Court at Ahmednagar, the execution proceedings should be stayed. Accordingly, Respondent No. 6 stood surety for the defendants to the tune of Rs. 3,400 and agreed with the Court that the defendants should submit to and discharge their liabilities on the decree or order, which decree or order would be passed in the suit in the Thana Court. It was also provided that if the defendants failed to act accordingly, the surety would himself pay into Court Rs. 3,400; and that the bond was taken by the Court of Ahmednagar to secure the plaintiffs against any loss by reason of the execution of their decree being stayed. The plain intention of the bond was that if the plaintiffs ultimately became entitled to the amount of the decree, it could be satisfied out of the money in Court and the plaintiffs would, therefore, not lose on account of the execution being stayed. Unfortunately for the judgment-debtor, not only the ex parte decree was set aside, but the suit was again decreed in a larger amount. Execution was again taken out and the surety was called upon to deposit Rs. 3,400. The surety did deposit Rs. 3,400 in two installments, one of Rs. 700 and the other of Rs. 2,700. In the meanwhile another decree-holder who had obtained a money decree against the same debtor, applied for rateable distribution by presenting an application under Order 21, Rule 11 of the CPC read with section 73 of the Code. On those facts, the primary question that arose for the determination of the Court was whether the amount deposited by the surety could be said to be assets held by the Court and secondly, when they were deposited for a specific purpose, they could be diverted for the benefit of another decree-holder or whether rateable distribution could be allowed. Speaking for the Court, the learned Chief Justice Sir Beaumont on the first point viz. ''assets held by the Court'' observed that they connoted assets received in execution and the section does not apply to monies paid into Court in a suit when no question of execution arises. In other words, assets which are held by a Court should be the assets received in execution. However, while dealing with the second aspect as to what should be the fate of such assets when they have been paid for a specific purpose and whether they could be applied generally in execution so as to defeat the specific purpose, His Lordship made two pertinent observations which

read thus :

In the present case, the monies were paid into Court for a particular purpose. The Court was being asked to stay execution of the plaintiff''s decree, which was being challenged, but which at the moment was executable. The Court granted a stay on terms which ensured that the plaintiffs'' debt was secured. That is what it comes to. Having entered into an arrangement with the surety that he would pay the amount of the plaintiffs'' debt, and having taken security from him, the Court stayed the execution of the plaintiffs--decree. It is obvious that if, when the plaintiffs ultimately come to execute their decree, the Court holds that creditors who have obtained their decrees long after the money was paid into Court by the surety are entitled to share in it, the Court is not carrying out the arrangement which was intended to secure the original decree-holders. The original decree-holders are being very seriously prejudiced by the stay of execution of their decree. If the execution had not been stayed, the decree could have been executed in 1930, and there would then have been no question of rateable distribution.

These two important considerations have weighed with the Court. To recapitulate, the surety who had undertaken to indemnify the decree holder; had paid the amount to fulfil his promise. But for the Court''s intervention he would never have figured in those proceedings nor could he be called upon to1 deposit the amount. Secondly, as observed by the learned Chief Justice, but for the stay the decree-holder who had obtained an ex parte decree, could have executed the decree in 1930. The other decree-holders who had sought rateable distribution, had obtained their decrees long after 1930 and they could have had no shadow of claims over these amounts. But for the stay the decree-holder could have realised his entire assets. To divert his assets to the: benefit of the other decree-holders whose claims were not in existence after the decree was made on contest in the year 1933 and execution was taken out, would prejudice the first decree-holder Lalchand. On these two equitable1 considerations and the tacit understanding between the decree-holder and the judgment-debtors on the one hand and the Court on the other, it took the view that the assets, although held by the Court, could not be said to be the assets held in execution of a decree or realised in execution of a decree and secondly they were meant for a specific purpose. On this background it was observed" that when the assets are paid into the Court for a specific purpose, they cannot be applied generally in execution, so as to defeat the specific purpose. The section does not apply to moneys paid into Court in a suit when no question of execution arises. These two contingencies which weighed, with the provision Bench, do not arise in the instant case at all. The surety paid the amounts not in execution proceedings but under certain directions of the Court. On the other hand in the case before us the assets are realised in execution of the decree taken out by Respondent No. 1 against Respondent No. 2. Moreover, the amount is not paid for a specific purpose. There the surety had make it clear that if the judgment-debtor Ramdayal failed to obey the decree of the. Court, he would make good the loss. That

is not the case here. If section 73 were to be applied to the facts of the reported case, the surety would have beet) hard hit and would have been required to pay much more than what he undertook by the terms of the bond. To make ourselves more clear we may add that if Rs. 3,400 were rateably distributed amongst the decree- holder Lalchand and others who had set up their claims and if Lalchand had secured only Rs. 1700 for working out the rateable distribution, Lalchand could have successfully called upon the surety to make good his Joss. In other words, the surety would have been unnecessarily penalised and indirectly the Court would be enforcing the terms against the surety which he never undertook to fulfil. Such and similar calamities were foreseen and they would have be fallen on the surety. To relieve him of these calamities the Court emphasised the aspect of specific purpose in that context. Therefore, this case is distinguishable on facts and so far as the property is concerned, as we would shortly point out, it does not really conflict either with the spirit or language of section 73 and the scheme was underlying the idea of rateable distribution.

16. Another authority relied upon by Mr. Vora is to be found in the very volume. It is the case of Ningappa Neelappa Katti v. Adiveppa Shivappa Tuppad 41 Bom. L R 997, decided by Lokur J. Following the observations in Lalchand''s case referred to above, His Lordship Lokur J. declined to make an order for rateable distribution; but there also the facts were quite distinct. Respondent No. 1 Adiveppa obtained a decree, in the Court of the First Class Subordinate Judge at Dharwar for Rs. 5,847 against Ningappa, the judgment-debtor in Suit No. 73 of 1934. Adiveppa presented Darkhast No. 60 of 1937 for the execution of the decree. One Manekchand had filed a Civil Suit No. 623 of 1932 against the same defendant Ningappa in the Court of the Second Class Subordinate Judge at Gadag, and had obtained a money decree for Rs. 6,000 and odd. Manekchand presented a Darkhast No. 240 of 1936 to recover the decretal amount by attachment and sale of defendant''s property. The property was attached and was ordered to be sold by auction on 31st August, 1937. On 28th August 1937 i.e. three days before the date fixed for the sale, the judgment-debtor Ningappa made an application to the Gadag Court that he was prepared to pay Rs. 3,000 in Court for payment to the decree-holder Manekchand, on condition that the sale should be postponed till the end of June 1938 for nearly a year. The Court ordered the amount to be produced in Court and when it was produced, the Court passed an order that it should be paid to Manekchand. The plaintiff Adiveppa then made an application in Darkhast No. 60 of 1937 in Dharwar Court for an order of rateable distribution of Rs 3,000 which were lying in Gadag Court. The First Class Subordinate Judge allowed rateable distribution and against that order the judgment-debtor Ningappa went in appeal before the Court.

17. The points raised before the High Court were that Ningappa, the judgment-debtor, had paid Rs. 3,000 for a specific purpose viz. of securing the postponement of the sale and secondly, the Court had passed an order that the amount be accepted and when it was produced in Court it passed a further order

that it should be paid to the decree-holder. These two developments make the whole difference on principle. Ningappa, but for the demand made by the decree-holder and the promise held out by the Court or assurance given by the Court, would never have deposited Rs. 3,000 three days before the scheduled date for the auction sale. Secondly, in making the deposit Ningappa got time of nearly ten months to make good the deficit or to clear the remaining dues of Adiveppa. The executing Court at Gadag, feeling that it was a fair offer that the decree of Manekchand was being satisfied partly, made this concession in his favour. It was only under the orders of the Court that the amount would be paid to the decree-holder Manekchand, Ningappa had deposited it. When the claim by Adiveppa was being pressed into service for rateable distribution, the Courts were placed on the horns of a dilemma. The executing Court at Gadag had made certain orders. As a matter of fact Manekchand also made a concession in favour of Adiveppa in the larger interest of justice. This order came to be made and to reverse the said order would have amounted to denying justice to the judgment-debtor Ningappa, nay, doing injustice to him. The well-known principle of approbate and reprobate seems to have weighed with the Court although it has not said so in so many words. Having committed itself to a certain position, the Court could not have varied its own order. Therefore, under these peculiar facts and circumstances the order made could be justified. But the ratio sought to be deduced from these authorities, as we read them in extenso, does not in broad terms lay down that where the judgment-debtor pays the decretal amount in Court for a specific purpose, it cannot be regarded as assets held by the Court liable to rateable distribution u/s 73 of the Civil Procedure Code. The question of payment being made for a specific purpose and it qualifying the holding of assets for rateable distribution stand on altogether different footings. They cannot be mixed with each other. Section 73, as it stands, lays down that where assets are held by a Court and when the other conditions are fulfilled, rateable distribution must, as a rule, follow. The question of specific purpose would gain some footing or significance if they are likely to offend the general principles of law or equity in given cases. Therefore, we are of the opinion that these two cases having been decided under the peculiar facts and circumstances enumerated above, they do not lay down a broad proposition of law as contended by Mr. Vora.

18. On the other hand, we find the observations of a learned single Judge Mirza J. in Indaji v. Cooverji 28 Bom. L R 237, to be more apt and in consonance with the scheme of section 73 of the Civil Procedure Code. In this case on 24th March 1925 Loyalka had obtained a decree for Rs. 16,000 against the respondent Cooverji and had applied to execute it on 22nd July 1925. On 11th July 1925 Madhavji Govindji & Co. obtained a decree for Rs. 3728-11-0 against the same judgment-debtor and applied to execute it on 30th July 1925. The appellant Indaji Majaji had also obtained a decree for Rs. 3289-7-0 against the said judgment-debtor Cooverji on 10th August, 1925 and applied on 19th August, 1925, to execute the decree. On 22nd August he

had an attachment placed on the judgment-debtor''s moveable properties consisting of motor-cars etc. under Order 21, rule 43. The very next day Cooverji paid up Rs. 3451-11-1 to the Sheriff and got the attachment raised. A question arose whether rateable distribution could be allowed to the other decree-holders. On referring to an earlier decision of this Court in Sorabji Cooverji v. Kala Raghunath ILR 36 Bom. 156, which had taken a view somewhat similar to those reported in the above two cases, the learned Judge Mirza J. pointed out that the observations in Sorabji'' s case to which we would shortly refer, were obiter and he was not bound to follow them. He further observed that moneys paid by a judgment-debtor to release his property from attachment under Order 21, Rule 43, are assets held by the Court and are liable to be distributed rateable among all persons who have applied to the Court for execution before the receipt of such assets, u/s 73 of the Code. Pausing for a while here, if we are to extend the logic of Mr. Vora that in the instant case before us the judgment-debtor paid various amounts for getting the attachment of his immovable property released and that amounted to a specific purpose, therefore rateable distribution could not be allowed, the same logic could be extended to the case which was before Mirza J. But with respects, Mirza J. rightly points out that when the judgment-debtor makes the payment in Court or tries to stave off an evil day by getting the attachment raised, he is simply carrying out or obeying the decree. The amounts are not being paid for getting the attachment raised as such. Virtually they are paid as deposit in satisfaction of the decree which is put in execution by one of the decree-holders. When such assets come in the custody of the Court, they would amount to assets held by the Court. At the point of time when the question of paying the said assets creeps in, there were other decree-holders who were entitled to rateable distribution and they could claim their pro rata share. In coming to this conclusion the learned Judge emphasised the fact that there should be an equitable distribution of the funds paid by the judgment-debtor between all his decree-holders; otherwise there was no point in bringing section 73 on the statute and giving some solace to decree-holders standing on a common platform vis-a-vis the same judgment-debtor, the principle of equity and justice should prevail, of course, subject to the fulfilment of other conditions. While dealing with contrary observations in Sorabji''s case, the learned Judge said that they were obiter and not binding on him.

19. A passing reference to Sorabji''s case reported in I L R 36 Bom 156 which, to a certain extent, was relied upon by the Division Bench in Lalchand Radhakisan v. Ramdayal Ranmarayan as well as by Lokur J., would be necessary. In the course of the judgment in Sorabji''s case, on referring to the provisions of section 73 it was said by the learned Chief Justice Scott that in the concluding portion of section 73 there was a reference to the costs of realization which gave an indication that the Legislature contemplated that the assets referred to should be assets held in the process of execution. The next observation is most pertinent and it has been capitalised by Mr. Vora for the respondent. It runs thus :

If we were to hold that money paid into Court under Order 2", Rule 55, was assets held by the Court within the meaning of section 73, we should be only nullifying the provisions of Rule 55; for, there would be no inducement to any judgment-debtor to procure a payment into Court of the amount of the claim of his attaching creditor if the money could at once be absorbed by rateable distribution amongst a number of other creditors.

Mirza J., with respects, differed from the learned Chief Justice and following the observations in another case in Nathmal v. Maniram 21 Bom. L R 975 decided by Pratt J., came to the conclusion that this logic was somewhat fallacious. Both the learned Judges Mirza J. and Pratt J. in their respective judgments treated these observations as obiter and not binding on them. With respect, we are in agreement with the views expressed by the learned single Judges. We would shortly refer to Order 21, Rule 55; but we fail to understand how the question of inducing the judgment-debtor to make an admission in Court arises in such cases. There is no promise held out to any judgment-debtor by the Court to procure an admission. The moment the decree is passed, the judgment-debtor is under an obligation to satisfy the same irrespective of their being any inducement or otherwise, if at all there be any inducement, and if we arc permitted to say so, it is the inducement of which the judgment-debtor himself dreams and feels that he would be relieved of the coercive process to evade the attachment of his moveables or immoveables or detention in civil prison or to escape the coercive process of the Court he of his own volition makes the admission. When a decree-holder puts in an application for execution of the decree, he does not hold out any inducement to the judgment-debtor nor does he persuade him to make the payment. If he pays under certain singular circumstances as has been observed in Lalchand Radhakisan v. Ramdayal Ramnarayan and referred to above, then they would be the assets held by the Court and the other decree-holders would be entitled to rateable distribution.

20. In this context a reference would be necessary to Rule 55 of Order 21 of which much was made by Mr. Vora for the Respondent. To recapitulate, we may mention that respondent No. 1 had obtained attachment of the immovable property of respondent No. 2 under Rule 54 of Order 21 of the Civil Procedure Code. The next rule 55 speaks of the effect of the removal of attachment after satisfaction of the decree. In terms what it lays down is that where the judgment-debtor pays the amount in full satisfaction of the decree through the Court or otherwise, the attachment shall be deemed to be withdrawn. In the case of immovable property, the withdrawal, if the judgment-debtor so desires, could be proclaimed at his expense. According to Mr. Vora, the moment the present judgment-debtor i.e. Respondent No. 2 deposited- these three items, his entire decree stood satisfied and there was an automatic release of the property attached. But for such release the judgment-debtor would not have paid the amount in Court or to the Sheriff.

21. In the payment made Respondent No. , 2 is put to a double loss. As the decree will not stand satisfied, the attachment would continue and his primary object was to pay respondent No. 1. Both these arguments do not appeal to us. On the second point, we have said much in one of the foregoing paragraphs. We have observed that this is a question of fact and. there is no evidence to share the views of Mr. Vora. So far as the second aspect is concerned, it is the inevitable result of the satisfaction of the decree, or it is a corollary of Rule 54. The moment the decree is satisfied, the attachment automatically falls through, because nothing remains to be recovered by the sale of the property. The judgment-debtor does not pay either in Court or to the Sheriff just to get rid of the attachment. The payment is made to satisfy the decree. : The1 attachment is only a via media. They are the means of recovering the dues under the decree. Even if the attachment continues because of the rateable distribution or sharing of the dues of the other decree-holders, it cannot be said that anybody has induced the judgment-debtor to make the payment or that because the judgment-debtor is put to a further loss, the other decree -holders cannot claim rateable distribution.

22. By parity of reasoning, Mr. Vora argued at great length that there are other modes of executing the decree, e. g. by attachment and sale of moveables, detention in civil prison, by getting the sale set aside on making payment under Rule 89 of Order 21 or by serving an order on the garnisnee. In all such modes of execution the payment is made for a specific purpose and when the specific purpose is established or stands proved, the executing Court cannot divert the funds to the benefit of the decree-holders. All these arguments overlook, to our mind, the basic principle embodied in section 73 to which a reference is already made and which we do not think necessary to repeat.

23. There is a consistent current of the authorities of different High Courts which have taken the view that payment made by a judgment-debtor under such circumstances, viz. to satisfy the decree of a given creditor, and if the assets come in possession of the Court, and if there be other decree-holders who can ultimately claim rateable distribution, their claims must be taken into account and the amount be distributed between them. We do not think it necessary to set out the facts of each and every case, but in brief we may mention that this is the view taken in the following cases : Satnarain Prasad Choudhury and Others Vs. Mahabir Prasad Choudhury and Others, , AIR 1941 239 (Nagpur) , Bhola Nath Vs. Chunni Lal and Another, . Out of these cases, those decided by Patna, Madras and Allahabad High Courts are Division Bench cases, and with advantage we may quote the observations of Seshagiry Ayyar J. in one of the old cases reported in Thiraviyam Pillai v. Lakshmena Pillai I L R 41 Mad. 616. While commenting on the language of section 73 and the intention of the Legislature, the learned Judge observed :

.... The intention of the Legislature is to afford every creditor equal opportunities of obtaining a rateable advantage in the available assets of the judgment-debtor.

Therefore unless there is something clear in the language of the provisions of the Code to exempt a payment from being applied to the benefit of all the creditors. Courts should incline to the view that monies in the hands of the Court should be shared by all decree-holders rateably.

Incidentally we may add that these observations were approved by His Lordship Vivian Bose J. (as he then was) in Khairullah''s case.

24. An elaborate discussion on the scope of section 73 and its wider import is considered at great length by the Patna High Court in Satnarain''s case. A couple of pertinent observations which we are disposed to follow with respects, read thus :

.... The words of the new section (section 73) are wide enough to cover not only the money which a judgment-debtor is compelled to pay, but also money voluntarily paid into Court by him to satisfy a decree under execution. The words "assets held by a Court" obviously mean any fund in possession of a Court or at its disposal which may be applied by it for the payment of a judgment-debtor''s debt.

Pausing for a while here, we may add that what is emphasised is the ulterior object viz. satisfaction of the judgment-debtor''s debt and not the decision of the race between the various decree-holders or creditors of the same judgment-debtor. In such cases the Courts are not called upon to decide which of the decree-holder has a preferential claim or who should be given top priority where all of them satisfy the conditions laid down in section 73. The next few observations run thus :

Section 73 is imperative. The assets are so distributable by the operation of law and there is nothing in this section or any other provision of the Code to show that the Court must deal with them in accordance with the wishes of the judgment debtor. When there are several decrees outstanding against a judgment-debtor, and all the requirements of section 73 are complied with, the judgment-debtor cannot prevent rateable distribution by merely earmarking his payments for the benefit of one of the decree-holders.

In that case also the Court had to deal with the effect of Rule 55 of Order 21 which is the after-effect of the satisfaction of the decree viz. of the attachment of the immovable property coming to an end. On this aspect their Lordships proceeded to observe as follows :

The Legislature has never stated that a mere deposit will satisfy the decree. Ordinarily a decree will be satisfied if the deposit is made of the amount of the decree and there is no obstacle whatsoever in the decree-holder receiving it. In cases where the law intervenes and directs that although the full amount was intended to be paid to the decree-holder, but it has to be diverted by reason of section 73 or some other provisions of the Code, obviously the decree has not been satisfied in full even though there had been a deposit of the full decretal amount. Clause (a) of Rule 55 ought to be read in such a way so that the provisions of section

73 and Order 21, Rule 55 do not conflict with each other.

With these observations we are in agreement and to our mind they seem to lay down the correct proposition of law and interpret section 73 properly, taking into account the scheme of the Code as well as the intention of the Legislature.

25. Incidentally we may point out that if the logic of Mr. Vora, the learned Advocate for respondent No. 1, is to prevail viz. when the judgment-debtor pays the amount or makes a deposit mentioning a specific purpose, then section 73 is not attracted, invariably the result would lead not only to anomalies but virtually would uproot section 73. An astute judgment-debtor, with a little art of drafting ingeniously and Skillfully can bargain with the decree-holder and persuade the Court to accept the amount for a specific purpose by giving it a tinge that it should not be diverted to any other purpose. If such a strategy is adopted by the judgment-debtor, there would belittle scope for implementing the principle laid down in section 73 to which a detailed reference is made in one of the foregoing paragraphs. Therefore, this line of reasoning stayed in general, and even specifically making it applicable to the present facts, does not appeal to us. As we read the two judgments in Lalchand Radhakisan v. Ramdayal Ramnamyan and Ningappa Neelappa v. Adhiveppa Shivappa, they do not attempt to lay down any broad proposition of law as such. Under the facts and circumstances alluded to therein, these decisions may be right and with respect we are not trying to overrule them in any manner, but desire to add that the ratio of the said rulings is not the one which is propounded by Mr. Vora and pressed into service. For these reasons, disagreeing with the learned trial Judge, we are disposed to allow the chamber summons taken out by the petitioner and direct rateable distribution of the amount of Rs. 2290.50 according to law in the light of the provisions contained in section 73 of the CPC giving priority to respondent No. 1 for the costs incurred by him in realizing this amount, if any.

26. In the result, the rule is made absolute without any order as to costs, throughout.