B. Nana Rao Vs. M.U. Arunachalam Chettiar and ors.

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Court : Chennai

Decided On : Nov-24-1939

Reported in : AIR1940Mad385; (1940)1MLJ482

Appellant : B. Nana Rao

Respondent : M.U. Arunachalam Chettiar and ors.

Judgement :

Alfred Henry Lionel Leach, C.J.

1. The question which has been referred for decision is this:

In a private transfer made after and during the pendency of an attachment in one suit, void against the title of an auction-purchaser in execution of a decree in another suit under an attachment made after the transfer but while the decree in the former suit remained unsatisfied and the attachment therein was subsisting?

2. The circumstances which have given rise xo this reference are these. On the 25th October, 1924, one Appu Chetty obtained a money decree in O. Section No. 497 of 1923 of the Court of the District Munsif of Salem. The decree was transferred to the Court of the District Munsif of Krishnagiri for execution. On the 5th March, 1925, the decree-holder applied in Execution Proceedings No. 132 of 1925 for the attachment and sale of the property, There was then due under the decree a sum of Rs. 2,399-4-6. An order of attachment was passed on the same day and the attachment was effected two days later, the 7th March, 1925. On 20th May, 1926, the judgment-debtors' mortgaged the attached property to respondents 1 to 4 to secure a loan of Rs. 1,200. Appu Chetty had previously agreed with his judgment-debtors to accept payment of the amount due under his decree by instalments. On the 22nd August, 1923, Appu Chetty's petition for execution was dismissed in accordance with the agreement arrived at, but the attachment was continued pending the payment of the remaining instalments. On the 15th August, 1925, one Pedda Sambayya Chetty obtained a money decree against the same judgment-debtors in the Court of the District Munsif of Krishnagiri, and on the 15th April,' 1926, Pedda Sambayya Chetty applied for the attachment of-the same property in Execution Proceedings No. 322 of 1920 of that Court. Pedda Sambayya Chetty's application for attachment was granted on the 10th June, 1926 and the attachment was effected on the 29th of that month. On the 12th December, 1926, Appu Chetty, to whom there was still owing under his decree a sum of Rs. 568-4-0 applied in the execution proceedings of Pedda Sambayya Chetty for rateable distribution and his application was granted on the 16th December, 1926, the date on which the property was sold under Pedda Sambayya Chetty's attachment. Out of the sale proceeds Appu Chetty received a sum of Rs. 105-14-9, being the amount payable to, him on the rateable basis. The purchaser at the auction held in

Pedda Sambayya Chetty's execution proceedings is the appellant in the appeal in which this reference has been made. On the 11th November, 1931, the mortgagee respondents filed a suit on their mortgage in the Court of the District Munsif of Krishnagiri. The suit was defended by the appellant and the question was whether the mortgagees or he had the better title. The appellant claimed that he had the better title by reason of the provisions of Section 64 and Section 73 of the Code of Civil Procedure. The District Munsif relying on the decision in Annamalai Chettiar v. Palanalai Pillai : AIR1918Mad127 granted the respondents a mortgage decree and his decision was upheld by the Subordinate Judge of Salem. The correctness of these decisions was challenged in a second appeal, which came before Krishnaswami Aiyangar and Somayya, JJ., who after hearing the arguments made this reference.

3. From the narration of the facts it will be observed that the property was sold in Pedda Sambayya Chetty's execution proceedings, which were instituted after the mortgage had been created. The appellant says that the mortgage was invalid by reason of the provisions of Section 64 of the Code. The reasoning as this. The mortgage was created during the attachment obtained by Appu Chetty and Section 64 renders the mortgage void notwithstanding that this sale took place in Pedda Sambayya Chetty's execution proceedings. The answer to the question therefore depends on the effect to be given to the wording of Section 64, and this involves the consideration, not only the decision in Annamalai Chettiar v. Palamalai Pillai : AIR1918Mad127 , but of numerous other authorities.

4. Before proceeding to discuss the authorities which have bearing on the question before us I will set but the relevant statutory provisions. Section 64 reads as follows:

Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein, and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation. - For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

5. This section is the corresponding section to Section 276 of the Code of 1882 which said:

When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt, or dividend, or a delivery of the share, to the judgment-debtor during the continuance of the attachment, shall be void as against all claims enforceable under the attachment.

6. The wording is somewhat different, but so far as this case is concerned there is no material change, unless it is effected by the explanation to the section in the present Code. Both Section 276 of the Code of 1882 and Section 64 of the present Code rendered a private alienation void as against claims enforceable under the attachment.

7. The section which provides for a rateable distribution is Section 73, eliminating the provisoes which have no bearing here Section 73 says:

Where assets are 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 deducting the costs of realisation, shall be rateably distributed among all suph persons.

8. Therefore in order to entitle a creditor to rateable distribution all that is necessary is that he shall have made, before the Court executing the decree has received the assets of the judgment-debtor, an application for the execution of his decree. If he has made an application to a Court of competent jurisdiction, although not to the Court executing the decree, he is entitled to rateable distribution without any other application, although as a matter of prudence he should notify the Court actually executing the decree of his claim. If heroes not, distribution may be made by the executing Court without knowledge of the claim and he may find that the Court has parted with all the assets. The corresponding section in the Code of 1882 to this section. was Section 295. Here again, the latter Code made verbal alterations, but these verbal alterations did not so far as the present case is concerned materially alter the Code of 1882.

9. The adding of the explanation to Section 64 of the Code of 1908 appears to have been the result of conflicting High Court decisions. In Ganga Din v. Khushali I.L.R. (1885) 7 All. 702, the Allahabad High Court held that an application for rateable distribution was not a claim 'enforceable under the attachment' within the meaning of Section 276 of the Code of 1882, but in Sorabji Edulji Warden v. Govind Ramji I.L.R. (1891)16 Bom. 91, Telang J., held that a claim for rateable distribution did come within the purview of Section 276. Telang, J., said (page 100 of the report):

I cannot doubt that the claims of those execution creditors who under Section 295 are entitled to claim the benefit of a distribution of the fruits of the attachment ought to be treated as falling within the words 'all claims enforceable under the attachment.

10. The wording of the explanation follows the wording of Telang, J.'s judgment and did put an end to the controversy. Whether on a true construction of the provisions of the Code of 1882 claims for rateable distribution should have been regarded as 'claims enforceable under the attachment' it is not necessary to decide. In drafting the present Code the Legislature considered that claims for rateable distribution should be included in this category and as the result added the explanation to Section 64. The Court has to decide whether an attachment in proceedings which do not result in the sale of the attached property enures for the benefit of a person who sells in other execution proceedings as the result of an attachment effected after the property has been alienated privately.

11. In my opinion the judgment of the Privy Council in Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 has great bearing on the question under discussion, in fact in my opinion it really decides it. It is true that there the Judicial Committee was considering a case under the Code of 1882, but the appeal was heard in 1916, eight years after the present Code had come into force and their Lordships referred to the judgment of Telang,, J., in Sorabji Edulji Warden v. Govind Ramji I.L.R.(1891) 16 Bom. 91, which in effect read into Section 276 of the Code of 1882 what has now been added by the explanation to Section 64 of the present Code. In Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 , the appellant claimed under two deeds of sale

executed in her favour on the 15th July, 1907, by a judgment-debtor. The respondent was the transferee of a money decree obtained against the judgment-debtor on the 3rd January, 1901. He was also the transferee of a money decree obtained against the judgment-debtor on the 24th August 1896. On the 13th June 1902 execution proceedings were instituted in respect of the decree passed in 1896. These proceedings were numbered as execution case No. 8 of 1902. The property which was the subject-matter of the suit which gave rise to the appeal to the Privy Council was attached, but no further step in execution was taken here. In 1907 an application for execution of the decree of the 3rd January, 1901, was filed and this application led to the attachment of the same property on the 16th July, 1907, the day after the property had been sold privately to the appellant. The later execution proceedings, which were No. 16 of 1907, were persisted in and the property was sold to the respondent at a Court auction held on the 23rd August, 1907. The question for decision was whether the title obtained by the appellant under the two sale deeds of the 15th July, 1907, prevailed over that obtained by the respondent at the Court auction on the 23rd August, 1907. The execution proceedings of 1907 having been instituted after the alienation to the applicant the respondent was not able to say that the alienation was void as against that attachment, but he claimed that inasmuch as there was a subsisting attachment under the decree of 1896 that attachment enured to his benefit and rendered the alienation void. The Privy Council held that the respondent's title rested entirely on the attachment in the execution case No. 8 of 1907, but as the alienation to the appellant has taken place before that attachment was effected it was not void under Section 276. The respondent could not invoke Section 295 as there were IJO assets in Court when the alienation took place. At page 672 of the report Sir Lawrence Jenkins who delivered the judgment, of the Board said:

But then it is urged for the decree-holder that the sales to the plaintiff, even if executed on the date the kabalas bear, are, nevertheless void under Section 276 of the Code of Civil Procedure. That section provides that when an attachment has been made as there, described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment Ex hypothesi, the alienation to the plaintiff was not during the continuance of the attachment in execution case No. 16 of 1907, or, in other, words, the attachment under which the execution sale to the decree-holder was made. Therefore it cannot be avoided by that attachment.

12. Later in the judgment Sir Lawrence Jenkins said:

He (the respondent) relies on Section 295 of the Code of Civil Procedure as entitling him to the benefit of Section 276, and for this purpose he calls in aid his application for attachment in execution case No. 8 of 1902. To bring Section 295 into play certain conditions are necessary, and one of them is that there should be assets held by the Court. It has not been shown that there was such assets, and the indications in the record point the other way. But apart from this, Section 295 cannot help the decree-holder. Though the word 'attachment' occurs three times in Section 276, the reference is to one, and only one, attachment; that one in this case is the attachment in execution case No. 16 of 1907. All that can be done is to employ that attachment for the purpose of impugning the private alienation, for it is on that alone that the decree-holder's title to the property in suit at present rests. So that even if it be assumed, for the sake of argument, that the view which prevailed in Sorabji Edulji Warden v. Govind Ramji I.L.R.(1891) 16 Bom. 91 is correct, and that the conditions of

Section 295 have been satisfied, it cannot advance the decree-holder's case.

It still is the attachment in execution case No. 16 of 1907, that is, the only weapon of attack, and it is not made more effective by the earlier attachment in execution case No. 8 of 1902. All that earlier attachment can do in the circumstances of this case is to entitle the decree-holder to the benefit of the later attachment He cannot claim to be in a better position than the decree-holder in execution case No. 16 of 1907, nor does it strengthen his position that it is the same person who is the decree-holder in both cases. To claim a higher right because the attachment in execution case No. 8 of 1902 is of an earlier date rests on an obvious confusion of thought.

13. The Judicial Committee did not accept the decision of Telang, J., in Sorabji Edulji Warden v. Govind Ramji I.L.R.(1891)16 Bom. 91 as being correct, but assumed for the sake of argument that it was correct and went on to say that on this assumption the only weapon of attack was the attachment in execution case No. 8 of 1902. In other words the private alienation could only be avoided in the execution proceedings which led to the sale. The execution proceedings which led to the sale in that case were the execution proceedings in which the attachment had been effected after the alienation had taken place. As the judgment of Telang, J. in Sorabji Edulji Warden v. Govind Ramji I.L.R.(1891)16 Bom. 91 was to the effect that the words 'all claims enforceable under the attachment' in Section 276 of the old Code included claims for rateable distribution and as the judgment of the Privy Council in Mina Kumari Bibi v. Bijoy Sinah Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 proceeded on the assumption that Sorabji Edulji Warden v. Govind Ramji I.L.R. (1891)16 Bom. 91 had been correctly decided it seems to me that Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 must be regarded as having direct application in the matter now before us.

14. The decision in Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 was considered by a Full Bench of this Court (Wallis, C. J., Ayling and Kumaraswaini Sastri, JJ.) in Annamalai Chettiar v. Palamalai Pillai : AIR1918Mad127 , and as I read the judgments the Full Bench regarded Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 , as applying to the present Code. In Annamalai Chettiar v. Palamalai Pillai : AIR1918Mad127 , a decree-holder attached land in execution of his decree. Other persons had obtained decrees against the judgment-debtor and they applied for rateable distribution without attaching the land in execution of their decrees. Subsequently the judgment-debtor alienated the land and paid off the decree-holder who had attached. It was held by the Full Bench that the other decree-holders who had applied for rateable distribution were not entitled to question the alienation under Section 64. In the course of his judgment, in which Ayling, J., concurred, Wallis, C.J., said:

Section 64 of the present Code affords no greater protection to the attaching decree-holder than Section 276 of the old Code, and if he cannot protect himself against an alienation after attachment unless the attached property is brought to sale in execution of the decree in respect of which the attachment was made, it necessarily follows that other decree-holders who have applied for execution cannot be in any better position.

15. Kumaraswami Sastri, J., who delivered a separate but concurring judgment after quoting from the judgment in Mina Kumari Bibi v. Bijoy Singh Dudhuriai (1916) 32

M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 said:

There can be little doubt that Section 64, as it stands at present, can protect decree-holders entitled to rateable distribution against private alienation only where assets have been realised, in which case they will be entitled to share the proceeds in preference to the alienee. This can happen only in a every limited class of cases, e.g., where the garnishee pays the attached amount into Court. In the numerous and important class of cases relating to attachment of immovable property the amendment would be of no use to decree-holders entitled to rateable distribution. Assuming that the legislature intended the attachment under Section 64 to enure for the benefit of all persons entitled to rateable distribution who had applied for execution prior to the private alienation, it has not gone far enough when it introduced the explanation to Section 64 worded as it is and made no provision for the continuance of the attachment in Order 21, in cases where the attaching creditor was paid off. The result is not very happy, but the remedy is in the hands of the Legislature.

16. These observations are clearly based on Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 and they were made on a case under the present Code.

17. We have been asked to disregard the decision in Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 , because in Nur Mohammad Peerbhoy v. Dinshaw Hormasji Motiwalla (1922) 45 M.L.J. 770 , the Judicial Committee did not decide whether the former case had bearing on the latter. The facts in Nur Mohammad Peerbhoy v. Dinshaw Hormasji Motiwalla (1922) 45 M.L.J. 770 were that on the 19th August, 1911, the property of the judgment-debtor was attached in execution proceedings, and in June of the following year it was sold in those proceedings. On the 9th August, 1912, the judgment-debtor, the first defendant, paid in the whole of the decretal amount and costs and as the result the sale was not confirmed and the execution proceedings were struck off on 1st October, 1912. Before the payment of the decretal amount, another application for execution was filed by another decree-holder and on the 10th August, 1912, the property was attached in those proceedings. On the 12th August, 1912, an application for rateable distribution was filed by the decree-holder who had instituted the latter execution proceedings but it was refused on the ground that the money which had been lodged in Court was not money realised in execution. Thereupon the second decree-holder applied for the sale of the attached property. The sale was carried out on the 25th April, 1913, and the property was purchased by the second defendant in the suit. On the 17th July, 1912, the judgment-debtor entered into a contract with the plaintiff for the sale of the same property. The suit out of which the appeal arose was a suit by the plaintiff for specific performance of the contract. Their Lordships did not think it necessary to consider whether Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 had any bearing on the question or whether that case was rendered inapplicable owing to the difference of phraseology of Section 64 of the present Code from Section 276 of the old Code under which that case was determined. The remarks of their Lordships in Nur Mohammad Peerbhoy, v. Dinshaw Hormasji Motiwalla (1922) 45 M.L.J. 770 cannot, however, be read as casting doubt on the effect of Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 . They can only be read as expressing their Lordships' opinion that it was not necessary to consider the question of the application of Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 :

L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 to 'the case then before them. For the purpose of answering the present reference the question of its application to the present Code has to be considered and I have stated my reasons for holding that it does apply.

18. The question has also been considered by the Calcutta, Bombay, Allahabad, Patna and Nagpur High Courts and they have all applied Mina. Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 to cases under the present Code and they have all accepted as being correct the decision of the Full Bench of this Court in Annamalai Chettiar v. Palamalai Pillai : AIR1918Mad127 .

19 In Provosh Chandra Mullick v. Debendra Nath Dutt 39 C.W.N. 1076, a Division Bench of the Calcutta High Court (S. K. Ghose and Me Nair, JJ.) had to consider a case in which the facts were these. One Monomoy Banerjee in March, 1933, obtained an attachment in execution of his money decree. On the 28th August, 1933, one Provosh Chandra Mullick, another judgment-creditor of the judgment-debtor applied for rateable distribution. On the 7th September, 1933, during the pendency of Monomoy Banerjee's attachment the judgment-debtor sold the property ' privately to Debendra Nath Dutta. Out of the sale proceeds Monomoy Banerjee was paid part of his decretal amount whereupon his petition in execution was dismissed and the attachment came to an end. On the 16th September, 1933, Provosh' Chandra Mullick himself applied for attachment and sale of the property. The question which the Court was called upon to consider was whether the private alienation to Debendra Nath Dutta was valid. It was held that it was. Ghose, J., who delivered the judgment of the Court, said:

Now Mina Kumari's case (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 assumes that the view taken in Sorabji Edulji Warden's case I.L.R.(1891) 16 Bom. 91 is correct and on that assumption it points out that, in ofder, that the claims of non-attaching decree-holders for rateable distribution' might be enforceable, it was necessary to bring S, 295 (now Section 73) into play, but that certain conditions should be fulfilled and one of them was that there should be assets in the hands of the Court. I fail to see how this decision can be affected by the fact that the explanation to Section 64 was not then in existence. Bakewell, J., who was one of the referring Judges in the Madras case, took the view that the Privy Council case in the decision under the old Code was no authority on the question which was raised under the new Code with the explanation added. But the learned Judges who heard the Reference all took the view that the question was governed by the decision in Mina Kumari's case (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 on the principle that a claim in order to be enforceable must comply with the conditions laid down in Section 73 and that certainly is the import of the decision in Mina Kumari's case (1916) 32 M.L.J. 425 : L.R. 44 I.A : I.L.R. 44 Cal. 662 . In that view we see no reason to differ from the decision of the Full Bench in the Madras case.

20. The Bombay decision is Chindha Rupla Patil v. Chhaganlal Shivlal Sheth : AIR1928Bom545 . In that case one Bhila obtained on the 13th April; 1920, an attachment before judgment. Chhaganlal, the respondent in the appeal, obtained an attachment before judgment of the same property on the 28th May, 1920. On the 8th June, 1920, the judgment-debtor sold the property to the respondent. Out of the amount of the consideration the respondent paid himself the amount due under his decree and also paid to Bhila the amount payable to him. Consequently, on the 15th June, 1920, the respondent's suit was dismissed and on the 22nd of that month, Bhila's suit was dismissed. On the 19th June, 1920, that is four days after the dissolution of the respondent's attachment by reason of the dismissal of his suit and

three days before the dissolution of Bhila's attachment, Chindha Rupla Patil, the appellant, also attached the property and in the execution proceedings instituted by him the property was sold on the 1st July, 1921, at a Court auction. The respondent filed the suit out of which the appeal arose for a declaration that the property could not be sold in execution of the appellant's decree. It was held that the appellant could not claim the benefit of either of the two earlier attachments. After referring to Annamalai Chettiar v. Palamalai Pillai : AIR1918Mad127 and Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 I.A. 72 : I.L.R. 44 Cal. 662, Patkar, J., said:

The attachment before judgment in the defendant's suit in execution of which the sale was held was subsequent to the alienation of the plaintiff. There were not, therefore, any claims enforceable under the previous attachments under Section 64 of the Code of Civil Procedure. It is also clear that the claim of the present defendant does not fall under the explanation to Section 64, for there were no assets held by the Court in order to entitle him to the benefit of Section 73 of the Code of Civil Procedure. It follows, therefore, that the claim of the present defendant was not a claim falling under Section 73 of the Code of Civil Procedure, and therefore, not a claim enforceable under the attachment within the meaning of Section 64 of the Civil Procedure Code. We think, therefore, that the contention of the appellant that the sale deed is void under Section 64 is not sustainable.

It is urged on behalf of the appellant that though his case might not fall strictly within Section 64, the principle of Section 64 might be applied in considering his claim under the attachment of 19th June, 1920. The argument cannot be accepted. According to the decisions in Jetha Bhitna and Co. v. Lady Janbai (1912) I.L.R. 37 Bom. 138 and Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 , the sale deed in favour of the present plaintiffs cannot be affected by the attachment of the defendant which was levied eleven days after the sale deed. The previous attachments must be considered to have been withdrawn on account of satisfaction of the claims in respect of which the attachments were effected. The moment the attachment comes to an end by reason of satisfaction of the decree, all claims under the attachment cease to be enforceable.' (See Khushalchand v. Nandram Sahebram (1911) 35 Bom. 516)

21. Baker, J., concurred in the judgment of Patkar, J.

22. The Allahabad High Court considered Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 I.A. 72 : I.L.R. 44 Cal. 662 and Annamalai Chettiar v. Palamalai Pillai : AIR1918Mad127 in Mehar Chand v. Joti Prasad (1935) 33 A.L.J. 4. There one Roop Chand obtained a money decree and attached the immovable property of the judgment-debtor in March, 1927. On the 8th June, 1927, Joti Prasad who had also obtained a money decree against the judgment-debtor applied for rateable distribution. On the 21st January, 1928, the property was sold in pursuance of Roop Chand's attachment. On the 21st February, 1928, the judgment-debtor sold the property privately to one Lala Mehar Chand and out of the sale proceeds paid off the amount due to Roop Chand under his decree. The sale in execution was consequently set aside. On the 28th February, 1928, Joti Prasad without riling a separate application for execution, but merely. relying on his application for rateable distribution asked the Court to sell the property, which the Court did and confirmed the sale on the 31st July, 1928. Lala Mehar Chand then filed a suit for a declaration of his title and succeeded. Rachpal Singh, J., in the course of his judgment referred to

Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 and Annamalai Chettiar v. Palamalai Pillai : AIR1918Mad127 and quoted with approval from the judgment of Wallis, C.J., in the latter case. Sulaiman, C. J., who concurred in the judgment of Rachpal Singh, J., considered that the explanation to Section 64 emphasises that the private, alienation which has to be void must be 'contrary to such' attachment.

23. The Patna High Court applied Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 (P.C.) and approved of Annamalai Chettiar v. Palamalai Pillai : AIR1918Mad127 in Radha Mohan v. Musammat Wahidan and the decision of the Nagpur High Court to the same effect was given in Kastur Chand v. Wazir Begum I.L.R. (1937) Nag. 291.

24. The learned Judges who have made this reference have indicated that in their opinion Section 64 is sufficiently widely worded to give Pedda Sambayya Chetty the benefit of Appu Chetty's attachment. They have read Section 64 as operating to protect all judgment-creditors who have applied for execution before any assets of the judgment-debtor are brought into Court, irrespective of the fact that the attachment which results in the sale has been effected after the private alienation. If it were the intention of the Legislature to embody in the Code this broad principle, the language used has not effected it and the Court can only have regard to the language used. I am unable, however, to accept the proposition that the Legislature had in mind what the learned Judges consider it had in mind. The principle which they say is expressed in Section 64 is a principle which runs contrary to the common law and contrary to the provisions of the Code of civil Procedure of 1859. Under Section 270 of that Code the creditor who attached first was given priority. He was entitled to be paid in full. Section 271 provided merely for the rateable distribution of the balance. It seems to me more probable that the Legislature has said what it intended to say. The learned Judges, while they have considered the decisions in Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 I.A. 72 : I.L.R. 44 Cal. 662 (P.C.) and Annamalai Chettiar v. Palamalai Pillai : AIR1918Mad127 have not examined the decisions of the other High Courts which have applied the judgment in the former case to the present Code and have approved of the judgments in the latter case. The learned Judges were impressed by the decision in Durga Churn Rai Chowdhury v. Monmohini Dasi I.L.R.(1888) 15 Cal. 771. In that case the Calcutta High Court accepted the view of the Allahabad High Court in Ganga Din v. Khushali (1885) I.L.R. 7 All. 702 and observed that to hold that claims under Section 295 of the Code of 1882 were claims enforceable by attachment against which assignments made under Section 276 were void, would perhaps be carrying out the intention that might have been in the mind of the Legislature when the old Code, which did not provide for a rateable distribution, was suddenly modified by the introduction of that perfectly new principle, but the sections of the Code relating to execution were not re-cast so as to be fully adapted to the new state of things, and it appeared to the learned Judges who decided Durga Churn Rai Chowdhury v. Monmohini Dasi (1888) I.L.R. 15 Cal. 771, that in this respect Section 276 had not been successfully framed with the object of protecting rateable distribution amongst claimants under Section 295. With the addition of the explanation to Section 64 of the present Code, the learned Judges who have referred the present question have indicated that in their opinion the section has been framed in such a way that all claimants for rateable distribution have been protected, notwithstanding that the proceedings leading to the sale of the judgment-debtor's property have been instituted after the private alienation. They say that otherwise the protection which the. Legislature intended to afford to claimants for

rateable distribution would be meaningless. Their argument, however, overlooks the fact that were it not for the explanation the controversy which led to conflicting decisions would remain unsettled. With great respect I am unable to share the opinion expressed in the Order of Reference.

25. The answer that I would give to the reference is this. Section 64 provides that where a property has been attached any subsequent alienation is void against all claims enforceable under that particular attachment, but it does not go beyond this. An attachment effected after a private alienation is not assisted by an attachment before the alienation. If the execution proceedings in which the second attachment has been made, have been instituted before assets have been brought into Court, the creditor will be entitled to rateable distribution if the property is sold in the earlier execution proceedings, but if the sale takes place as the result of the attachment effected after the private alienation a person who buys the property at the Court auction will not obtain a good title.

26. I would make the costs of this reference costs in the appeal.

Pandrang Row, J.

27. I agree with my Lord.

Patanjali Sastri, J.

28. I agree with the answer given by my Lord the Chief Justice.

Abdur Rahman, J.

29. The question to decide is whether the mortgage executed by the judgment-debtors was, in the circumstances mentioned, valid as against the appellant who had purchased the property in Court sale in course of execution (E.P. No. 322 of 1926). It has been contended on behalf of the appellant that inasmuch as the mortgage deed was executed by the judgment-debtors in favour of the respondent during the subsistence of the attachment effected in April 1925 and by making his application for execution (E.P. No. 322 of 1926) the second decree-holder's claim had become enforceable under the said attachment, the mortgage must be held to be void as against the appellant. This necessitates an examination of the provisions contained in Sections 64 and 73 of the Code of Civil Procedure. To take up Section 73 first, it provides that:

Where assets are held by a Court and more persons than one have, before the receipt of such assets, applied; to the Court for the execution of decrees against the same judgment-debtor, the assets shall be rateably distributed amongst all such persons.

30. In other words it provides for rateable distribution of assets held by a Court amongst those unsatisfied holders of decrees for money who have applied to the Court for execution before the assets have been received by the Court. It may be observed that this section was amended by the Code of 1908 and is not confined in its operation to the assets which are realised by sale or by any other process in execution. It is immaterial now how the assets are received by a Court so long as they are held by it although the Court may have done nothing to realise them. Whatever argument might have been advanced before the amendment of this section in regard

to the assets realized by sale or otherwise in execution of a decree being distributable between the creditors rateably, it cannot now be contended that that it is only the assets which have been realised in that manner that are capable of being distributed under Section 73 of the Code of Civil Procedure. This would suggest that the connection existing between an attachment and sale of the property by Court before 1908 was done away with by the amendment made in the present section. A perusal of the language of this section would also show that it does not require a decree-holder to make an application for a rateable share in the assets. Indeed it has been held that a simple application for a rateable distribution is not enough and would not entitle the petitioner to get the same.

31. 'The duty of distribution is', as observed by Varadachariar, J., in V.E.N.K.R.M.V.R.M. Somasundaram Chettiar v. Alamelu Achi (1937) M.W.N. 480:

Cast on the Court whenever 'more persons than one' have applied for execution of decrees passed against the same judgment-debtor.

32. No assets can, it is true, be distributed before they are received by the Court and that is how the section has been drafted, but the claim to receive a rateable share must have been in existence and made before they are so received and it is the claim made before the receipt of assets by putting in an application for execution which entitles a decree-holder, who has a money decree against the judgment-debtor, to receive his share. If a decree-holder does not apply for execution before the receipt of assets by the Court, he cannot obviously get a rateable share of the assets under this section, although they could be actually distributed only after they had been received by Court.

33. A judgment-debtor loses the power of alienating his rights in the property on its attachment to the extent of the claims enforceable under the attachment. This is a legal consequence of the attachment and should have been provided, as it is in fact provided by the Code, before an application for execution entitling a person to a rateable share could be thought of. That is why in the scheme of the Code Section 64 precedes Section 73.

34. So far as this case is concerned an attachment of the property in dispute was effected on the 14th April, 1925, in the first instance in E.P. No. 132 of 1925 and an application for execution was made by the decree-holder in O.S. No. 237 of 1925 to the same Court during the subsistence of the above attachment and before the receipt of any assets by that Court. The question is if the second application for execution (E.P. No. 322 of 1926) must be held to be inconsequential or useless for the purposes of Section 64 of the Code of Civil Procedure simply because the execution Court did not proceed to sell the property in pursuance of the attachment effected in April, 1925, but did so under the later attachment made in June, 1926. This takes me to Section 64 of the Code of Civil Procedure which reads as follows:

Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to tile judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation:--For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

35. This section renders a private transfer of a property or of any interests therein during the continuance of an attachment ineffectual as against all claims enforceable under the attachment if the transfer was contrary to such attachment.

36. Without taking the decided cases into consideration and placing a purely grammatical construction on the words of the section my answer to the question whether an alienation is hit by this section would depend on the reply to the following questions:

(a) Was there an attachment?

(b) Was the alienation contrary to (such) attachment or did it affect any claim enforceable under such attachment?

37. If the answers to the above questions happen to be in the affirmative, I would say that the transfer was invalid as against the persons whose claims were enforceable under the attachment. It cannot be disputed that a transfer by a judgment-debtor after an attachment at the instance of an attaching creditor would be contrary to the attachment effected at his instance, and to use the language of the section, 'void' as against him. The question is if it would also be 'void' as against the claims of the persons who did not attach but had merely applied for execution after the first attachment although before the receipt of assets and had thus become claimants for a share in the rateable distribution of the assets under Section 73 of the Code of Civil Procedure. There is no doubt that if they had asked for attachments in their applications they would have got them and any alienation contrary to such attachments would not have effected these decree-holders. This would have caused multiplicity of proceedings and meant unnecessary duplication of legal machinery in issuing several attachments. Are the claimants for, rateable distribution then to be debarred from getting the protection which attachments in their own applications for execution would have afforded them, and do they not by making an application for execution get an additional advantage of going back to the date of the first attachment effected at the application of another decree-holder and saying that any alienation by the judgment-debtor after the first attachment would not be voidable at the instance of the first decree-holder alone but at their instance as well

38. In adding the Explanation to Section 64, I feel that the Legislature has, instead of confining the benefit of the attachment to the attaching creditor only, extended it to such other creditors also whose claims were 'enforceable' under the attachment. The use of the word 'enforceable' in Section 64 is very significant. It means 'capable of being enforced' and has to be distinguished with the word 'enforced'. As soon as an application for execution is made by a person holding a decree for the payment of money against a judgment-debtor to the Court which had already attached the property of the same judgment-debtor, the person making the application for execution would be entitled to rateable distribution if the application was made before the receipt of assets and his claim or decree would be enforceable under the attachment although it would not be enforced until the assets were actually received in Court. But we are not considering any question of actual distribution of assets, for which their receipt is naturally a condition, but the effect of such an application under Section 64 of the Code of Civil Procedure. A claim for rateable distribution has now been included, by the explanation to Section 64 in the claims enforceable under an attachment. It would therefore follow that as soon as an application for execution is made by a person in circumstances which would entitle him to claim rateable

distribution, his claim would fall within the category of claims enforceable under the attachment. He would then be entitled to claim the benefit of Section 64 and to treat the alienation of the property by his judgment-debtor as 'void' not only against the attaching creditor but also as against himself. In other words, if the alienation by his judgment-debtor was contrary to the attachment effected at the instance of the attaching creditor, it would be void as against his claim which has by virtue of the Explanation become enforceable under the attachment. For ascertaining the effect of Section 64, it appears to be unnecessary to consider whether the assets were actually realised, by the Court subsequently or not. This may be vital when the Court wishes to dispose of the various applications and distribute the assets but has, to my mind, no bearing on the validity or otherwise of the alienation made pending an attachment. But it has been contended that unless the attachment effected on the property results in a sale, the application for execution which would entitle a party to rateable distribution could not be brought within Section 73 of the Code of Civil Procedure and would not therefore entitle him to take advantage of the attachment effected at the instance of the attaching creditor. Section 73 provides how the assets are to be actually distributed and has thus to define persons who are entitled to share in the rateable distribution but it is beyond the province of that section to say as to what the effect of an attachment would be on an alienation not only in regard to the attaching creditor but also in regard to the claims of persons who are entitled to a share in the rateable distribution. For this purpose we will have to go to Section 64; but there is nothing in that section which makes the sale of property or even the receipt of assets as a condition precedent for either the validity of the attachment or for voidability of the alienation effected during its pendency. The explanation to Section 64 makes it clear that for the purpose of that section, there would be no difference between an attaching creditor and an applicant for rateable distribution. The claims of both have been declared now to be enforceable under the attachment. If that be so, where is the justification for adding a condition that the first attachment should necessarily have resulted in a sale failing which another decree-holder, who was not the attaching creditor, could not take advantage of the attachment effected before he made his application for execution and could not impugn the transfer of property made by the judgment-debtor during the subsistence of that attachment

39. It was argued on behalf of the respondent that their Lordships of the Privy Council take the view in Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 I.A. 72 : I.L.R. 44 Cal. 662 (P.C.) that such a sale in the first attachment is essential and hold that,-

to bring Section 295 into play certain conditions are necessary and one of them is that there should be assets held by the Court.

40. On these assumptions it was contended that since the property was not sold in E.P. No. 132 of 1925 and there were not assets held by the Court in that execution, the decree-holder cannot be said to have complied with one of the essential conditions of Section 73 of the present Code and cannot take advantage of the provisions contained in that section. I shall consider the question whether the sale of the property under attachment is a condition precedent before a subsequent decree-holder can take advantage of Section 64 of the Code when I am examining the Full Bench decision in Annamalai Chetti v. Palamalai Pillai : AIR1918Mad127 , but should like to observe at this stage that a claim for rateable distribution was not included in the claims enforceable under an attachment in the Code of Civil Procedure of 1882, under which the decision was given by their Lordships and in the absence of such a

provision the applicability of Section 295 of the old Code was made to depend on the condition that the assets were held by the Court. Section 295 of the old Code provided and its successor Section 73 in the present Code now provides for the actual distribution of assets amongst the various decree-holders under certain conditions and one of these conditions was held by their Lordships to be the actual presence of assets in Court. But the effect of the decree-holder being a claimant of a share for rateable distribution was not considered by their Lordships as on the date (that is, 16th June, 1907) on which he had in that case made an application for execution No. 16 of 1907, the attachment effected in Execution Case No. 8 of 1902 had come to an end by virtue of an order passed on the 29th March, 1905 and the private alienation of the property had been effected by the judgment-debtor more than two years after, that is, on the 15th July, 1907. How could the decree-holder call in aid then his application for attachment in Execution Case No. 8 of 1902 when the attachment had ceased to exist in 1905 and the other application for execution of another decree was not made by him prior to the alienation of the property %v the judgment-debtor? The prior attachment was not taken into consideration as it had ceased to exist in 1905 and the subsequent attachment was considered to be of no avail as the alienation by the judgment-debtor was before the second application for execution was made. It cannot therefore be said that their Lordships were called upon to decide or decided that an application for execution would or would not entitle a person to take advantage of a subsisting prior attachment effected on the property; although it may be conceded that in the absence of the Explanation the argument that on a subsequent application for execution a decree-holder would have been able to claim that advantage was in spite of Telang J's decision in Sorabji Edulji Warden v. Govind Ramji (1891) 16 Bom. 91 a little far fetched. It will also be observed that although a reference was made to Section 64 of the present Code by one of the Counsel in his arguments, their Lordships appear to have scrupulously avoided any reference to that section apparently because the law applicable to the facts of that case was what existed before 1908 and they must have evidently considered it unnecessary to consider the effect of the addition of the explanation to Section 64 of the Code of Civil Procedure in that case. It is needless to add that the Privy Council decision is no authority on the facts of the present case where the first attachment was in force both when the alienation was made by the judgment-debtor and when the application for execution was made by the second decree-holder. In these circumstances it is impossible to ignore the addition of the Explanation to Section 64 of the present Code. In fact when a similar question came up for consideration before their Lordships in Nur Mohammad Peerbhoy v. Dinshaw Hormasji Motiwalla (1922) 45 M.L.J. 770 (P.C.), they happen to observe:

The point raised by the learned Judge seems to their Lordships to be one of considerable difficulty, and not as easily to be disposed of as was done by the learned Judges of the Court of Appeal. In particular, it would have - to be considered whether what was said in the case of Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 I.A. 72 : I.L.R. 44 Cal. 662 (P.C.) has any bearing on the question, or whether that case is rendered inapplicable owing to the difference of phraseology in Section 64 of the Code of Civil Procedure of 1908 from Section 276 of the Code of Civil Procedure of 1882, under which that case was determined. It would also have to be considered whether at any given moment the plaintiff was able to get specific performance. Their Lordships, if it had been necessary to determine these questions, would have required further argument. But they do not now think it necessary to decide the question, because they think the plaintiff's case fails on another ground.

41. The next case on which reliance was placed by the learned Counsel for the respondent is a Full Bench decision of this Court in Annamalai Chetti v. Palamalai Pillai : AIR1918Mad127 , which was on a difference between Seshagiri Aiyar, J. and Bakewell, J., referred to a Bench of three learned Judges. This case has been followed by various High Courts and it was with the object of reconsidering this decision that the present Bench was constituted. The question for reference in that case was:

Whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment which has since been raised by the satisfaction of the decree or otherwise are entitled to question a private alienation made during the continuation of such attachment.

42. The answer to this question was given by the Full Bench in the negative and in view of the fact that the attachment was raised by the satisfaction of the decree, learned Counsel for the appellant appeared to concede that the decision might have been justified on its own facts but he asked us to reconsider the reasons given by the learned Chief Justice and another learned Judge of this Court. Coming now to the Full Bench case we find that starting with the proposition that the decree-holders other than the attaching decree-holders acquired no right to rateable distribution under Section 295 (now Section 73) of the Code until assets had been realised or as it might now be said received, a statement to which no exception could be taken - the learned Chief Justice observed that the Judicial Committee seemed to have held in Mina Kumari'S case (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : I.L.R. 44 Cal. 662 (P.C.):

that the attaching decree-holder himself cannot object to a private alienation by the judgment-debtor subsequent to the attachment unless the attached property has been brought to sale in execution of the decree in respect of which the property was attached.

43. Now if I may say so with great respect to the learned Chief Justice, the relevant observation made by Sir Lawrence Jenkins at page 672 towards the end of the following passage was not correctly appreciated:

But then it is urged for the decree-holder that the sales to the plaintiff, even if executed on the date the kobalas bear, are nevertheless void under Section 276 of the Code of Civil Procedure. That section provides that when an attachment has been made as there described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. Ex hypothesi, (the alienation to the plaintiff was not during the continuance of the attachment in execution case No. 16 of 1907, or, in other words, the attachment under which the execution sale to the decree-holder was made. Therefore it cannot be avoided by that attachment.

44. If I understand the observation correctly, Sir Lawrence Jenkins after describing the provisions of Section 276 of the old Code applied the same to the facts before him and said that the alienation to the plaintiff could not ex hypothesi be affected as it was not made 'during the continuance of the attachment in Execution Case No. 16 of 1907.' Had he stayed here, his observations could not have been misunderstood but in order to make himself clearer in regard to the attachment to which he was referring he added:

or in other words the attachment under which the execution sale to the decree-holder

was made.

45. I cannot understand Sir Lawrence Jenkins to be laying down what the learned Chief Justice felt he was. The expression 'or in other words' is important and was undoubtedly employed by his Lordship to avoid any possibility of mistake in regard to the attachment to which a reference was made just before. It must not be overlooked that in that case the alienation had been effected on the 15th July, 1907, while the application for execution No. 16 of 1907 was presented a day later, that is, on the 16th July, 1907 and the attachment under which the sale to the decree-holder was made must have been effected subsequently. Again the learned Chief Justice's observation in the next sentence that,

the decree-holder was held not to be entitled to defend his title as against the alienee from the judgment-debtor under Section 276 by relying on the fact that before the date of the alienation he had attached the suit property in execution of another decree without bringing the property to sale in execution of that decree,

does not seem to be correct. The italicised words do not appear in the Privy Council decision and the decree-holder was held not to be entitled to defend his title as against the alienee by relying on the previous attachment simply because it had ceased to exist in March 1905 and not because, the property was not brought to sale in execution of that decree.

46. The observation in the next paragraph that,

Section 64 of the present Code affords no greater protection to the attaching decree-holder than Section 276 of the old Code and if he cannot protect himself against an alienation after attachment unless the attached property is brought to sale in execution of the decree in respect of which the attachment was made, it necessarily follows that other decree-holders who have applied for execution cannot be in a better position,

is based upon the same misconception in regard to the actual sale of the property, which is nowhere to be found in the Privy Council decision. It is not contended that Section 64 places the decree-holders who have applied for execution subsequently in any better position than that of the attaching creditor. The section places both the attaching creditor and other decree-holders who have applied for execution in the same position so far as the alienation of the attached property is concerned and if the alienation is made during the continuance of the attachment it would be voidable not only against the attaching creditor but also against the other decree-holders. It appears to me, although it is not quite necessary to decide it in this case, that the attaching creditor cannot after the addition of this Explanation steal a march over the other decree-holders and the judgment-debtor cannot, by paying to the attaching creditor alone, free the property from the claims of those who have already applied for execution during the subsistence of the first attachment. Anyhow even if one may not go to that length, it is at least clear that by adding the explanation to Section 64 the Legislature has succeeded in sufficiently expressing itself and declaring the alienations to be ineffectual not only against the attaching creditors but even against those who were entitled to rateable distribution under Section 73 of the Code of Civil Procedure. It is true that the words 'contrary to attachment' used in Section 64 in the present Code are narrower, hence more exact, than the words' during the continuance of attachment' occurring in Section 276 of the old Code and were taken

from the judgment of their Lordships of the Privy Council in Dinobundhu Shaw Chowdhury v. Jogmaya Dasi (1901) 12 M.L.J. 73 : L.R. 29 IndAp 9 : I.L.R. 29 Cal. 154 , but this does not mean that Section 64 is less favourable now than its corresponding provision in the previous Code in other respects. The Explanation to this section has, indeed, by bringing the decree-holders other than the attaching creditors in the category of persons whose claims are enforceable under the attachment made it more difficult for the judgment-debtor to alienate the attached property without paying his debts for which decrees have been obtained and applications for execution presented. It may be that as a result of payment by the judgment-debtor to the attaching creditor or on the latter's certifying the satisfaction of his decree in accordance with the provisions of Order 21, Rule 55 or on account of a default of the decree-holder as mentioned in Order 21, Rule 59 of the Code of Civil Procedure the attachment may cease or be deemed to have been withdrawn, but this does not mean that it is not capable of being revived at the instance of the other decree-holder and even if it is held to be incapable of being brought to life - a point which does not arise for determination in this case as the attachment was never withdrawn here and still stands - there appears to be no reason to hold that the alienation would not be void as against those who had become by making applications for execution entitled to rateable distribution. This is the plain language of the section when it is read with the explanation and there appears to be no reason why a grammatical construction should not be placed on the words of that section particularly when by placing that interpretation the apparent intention of the Legislature in adopting the suggestion made in Durga Churn Rai Chowdhury v. Monmohini Dasi I.L.R. (1888) 15 Cal. 771 and giving effect to it by adding the explanation to Section 64 is fulfilled.

47. Let me consider the case by giving an illustration from a slightly different point of view. A obtains a decree against B in the Court of a District Munsif on the 1st March, 1930 and the decree-holder in execution of that decree attaches B's property in April, 1930. But before the property is brought to sale, C gets a decree on the 1st July, 1930, against B in the Court of a Subordinate Judge and attaches it a fortnight later. There is no doubt that under the provisions of Section 63 of the Code of Civil Procedure it will be the Court of the Subordinate Judge out of the two Courts which would be entitled to realise B's property or determine any claim thereto. Let us also suppose that B had alienated the. attached property in May, 1930, to a third party. It cannot be disputed that the alienation would not be binding on A. C then applies to the Subordinate Judge for the sale of the property in July, 1930. It is clear from the provisions of Section 63 of the Code of Civil Procedure that it is the Subordinate Judge who would be entitled to bring the property to sale and realise the sale proceeds. The District Munsif would have to stay his hands and cannot after knowing of the attachment by a higher Court proceed to bring the property to sale. Is the alienation voidable against A only in the circumstances or against C as well? Obviously against both, and that only because A who was the first attachment creditor has now been placed in the position of a claimant for rateable distribution and the sale must be held in accordance with the provisions of Section 63 of the Code of Civil Procedure by the Subordinate Judge in the decree obtained by C although for the benefit of both A and C. It was held by a Division Bench of this Court in Narasimhachariar v. Krishnamachariar : AIR1914Mad454 , to which Wallis, J., as he then was, was a party that when a property was attached by different Courts and money was realised in accordance with Section 63 of the Code of Civil Procedure by the Court of the highest grade, the attaching creditors would be entitled to share rateably irrespective of the fact that their decrees have not been transferred to that Court. In delivering the judgment of the Court he put the following question to

himself:

What however when the attachments are in different Courts and the property is received or realised by the Court of the highest grade under Section 63.

48. He then gave the following answer:

In such a case there is no receipt at all by the other Courts unless the receipt by the Court of the highest grade can be deemed to be a receipt by the other creditors as well. In my opinion this is the correct view,

and added later:

The difficulty is obviated if the payment into the Court of the highest grade is treated as payment into Court in all the suits and this in my opinion is the true construction of Section 63....

49. If the payment as held in the above case is to be regarded as payment in the illustration given by me in the decrees passed in favour of A and B, both of them will share rateably and will stand exactly in the same position. It was in the latter execution (E.P. No. 322 of 1926) that the property was sold. The first decree-holder in O.S. No. 497 of 1923 actually applied for rateable distribution in E.P. No. 322 of 1926 and got a share of the sale proceeds. It was exactly what the decree-holder of the District Munsif's Court would have done in the illustration above. The position would have been the same even if the property was sold, in the illustration by the District Munsif. The Subordinate Judge could have chosen to accept the sale and asked the District Munsif to transfer the sale proceeds to-his Court. The alienation not being binding on A, the whole property would have been sold by the District Munsif. Once the sale proceeds were received by the Subordinate Judge, they would have been distributed by him amongst the various holders of decree in accordance with the provisions contained in Section 73 of the Code of Civil Procedure. But the point is that A the holder of the decree in the District Muusif's Court would have come to the Subordinate Judge's Court as a claimant for rateable distribution and the alienation which was effected by his judgment-debtor after his attachment would have been avoidable not only against him but also against C.

50. A number of cases were cited during the course of arguments by the learned Counsel for the respondent in support of his contention that the appellant could not assail the alienation by the judgment-debtor during the continuance of the first attachnecnt successfully vide Bhupal v. Kundan Lal I.L.R.(1921)43 All. 399, Mehar Chand v. Joti Prasad (1935) 33 A.L.J. 4, Provosh Chandra Mullick v. Debendra Nath Dutt 39 C.W.N. 1076, Chindha Rupla Patil v. Chhaganlal Shivlal Sheth : AIR1928Bom545 , Radha Mohan v. Musammat Wahidan I.L.R.(1934)13 Pat. 446 and Kastur Chand v. Wazir Begum I.L.R. (1937) Nag. 291 and they have to be examined to ascertain the extent to which they help him. Having gone through them carefully, however, I am of opinion that they cannot be regarded as authorities in the present case where attachment has continued to subsist on all material dates and has not been removed really up to this day. In all the cases on which the reliance was placed by the learned Counsel for the respondent the alienations were not found to be contrary to the attachments which had ceased to exist either by orders of Court or by operation of law under Order 21, Rule 55 of the Code of Civil Procedure on the dates on which the alienations were made or on the dates on which the applications were

presented by other decree-holders who but for such cessation would have been entitled to rateable distribution. Let me now examine these cases.

51. In Bhupal v. Kundan Lal I.L.R.(1921) 43 All. , the decree in favour of the attaching creditor was satisfied on the 2nd April, 1913 and under the provisions of Order 21, Rule 55 the attachment must be deemed to have come to an end on that date. The private alienation was made on the 26th May, 1913, while the second attachment in which the property was sold was made on the 20th June, 1913. In a case like this it could not be urged that the alienation was made during the subsistence of the first attachment and there was no scope for the application of the Explanation to Section 64.

52. In Mehar Chand v. Joti Prasad (1935) 33 A.L.J. 4, the attaching decree-holder was paid privately on the 21st February, 1928, by the sale of the property. Although the subsequent decree-holder had applied for rateable distribution in June 1927, yet on the decree being satisfied the attachment came to an end and, the subsequent decree-holder who purchased the property in July 1928 without any further attachment, was held not to be entitled to defeat the title of the purchaser who had bought the property in February, 1928. This case might have been of use to the respondent if the attachment had in the present one ceased to exist but cannot help him when the attachment was in existence at the time the property was purchased by him. This case is an authority against the extreme contention that a claimant for rateable distribution, who would have been entitled to get a share if the assets had come into Court, is still entitled to contest the alienation either on the ground that the attachment has no in spite of the attaching creditor's satisfaction come to an end or that his claim had become enforceable under the attachment at the time when it was existing and cannot be defeated by paying the attaching creditor out of Court. It is unnecessary to say anything about this position in this case but the view taken in the Allahabad case may be capable of being defended on the ground that the existence of an attachment is sine quo won for the claimant for rateable distribution to attack the alienation successfully. The learned Chief Justice, it may be noted, agrees that if a private alienation is contrary to an attachment, claimants for rateable distribution of the assets would be equally protected. He then proceeded to say at page 11:

It would follow therefore that where the attachment has not fallen to the ground but subsists and property has been sold in pursuance of it, the assets which are realised are liable to be distributed among the decree-holder as well as the claimants for rateable distribution, in spite of the fact that a private alienation has previously taken place.

53. This is all right so far as it goes but he does not take into consideration the case where the property has not been sold in spite of the subsistence of the attachment. The next sentence in his judgment deals with a case where the attachment has fallen to the ground. The result is that a case such as the present one was not considered by him. But the only sentence in his judgment to which one may with great deference take exception appears in the next paragraph. He says:

It would be impossible therefore to hold that there are claimants for rateable distribution of assets before any assets have been received.

54. The only reason which he gives for this conclusion is that Section 73 does not make it necessary for a decree-holder to make any formal application for a rateable

share in the assets and an application for execution is all that is required. He therefore states that there may be cases where no formal application for rateable distribution may have been made. I concede that there, would be. But then follows the conclusion which has been noted above. With great deference to the learned Chief Justice I am not prepared to agree that this conclusion follows from the premises enunciated by him. The relief of rateable distribution need not have been asked for but has to be granted if an application for execution has been given by a decree-holder before the assets are received by the Court. The result of his being a claimant for rateable distribution would follow from the application for execution which he has made and not from the fact that the relief has been eventually granted to him or that the Court has been, on the receipt of assets, placed in a position to grant the relief to him. The distinction between a claimant and a recipient should not be lost sight of.

55. In Provosh Chandra Mullick v. Debendra Nath Dutt 39 C.W.N. 1076, the application for execution by the subsequent decree-holder was made on the 28th August, 1933, but the previous attachment came to an end on the 7th September, 1933, as the decree-holder at whose instance the attachment was effected was paid privately. It is therefore similar to the case in Mehar Chand v. Joti Prasad and does not advance the position any further.

56. In Chindha Rupla Patil v. Chhaganlal Shivlal Sheth : AIR1928Bom545 , two attachments before judgment were obtained by two persons. The judgment-debtor sold the property on the 8th June, 1920, to pay off these two persons. A third creditor brought a suit and obtained attachment before judgment on the 19th June, 1920 and after obtaining his decree got the property sold through Court and purchased it himself. It was held that he could not avail the title of the purchaser who had purchased the property for payment to the first two attaching creditors and in any case before the third person had applied for attachment. It was also observed in the case that:

Under Order 38, Rule 10 of the Civil Procedure Code the attachment before judgment could not affect the rights existing prior to the attachment, of persons not parties to the suit.

57. The plaintiffs were not parties to the third suit and the private sale in their favour could not be said to have been contrary to the attachment before judgment in the defendant's suit.

58. In Radha Mohan v. Mst. Wahidan (1935) 33 A.L.J. 4 (1934) 13 Pat. 446, a property was attached by a decree-holder on the 17th December, 1930. The property was sold privately by the judgment-debtor on the 29th January, 1931, while the attachment was subsisting. The same decree-holder got another decree against the same judgment-debtor subsequently and applied for rateable distribution on the 11th May, 1931. But before the sale the purchaser applied to the Court offering to pay the decretal amount and costs in the first execution case and to have the property released from attachment. The decree-holder agreed to this course and the first execution case was struck off on full satisfaction and the attachment was released. The decree-holder contended (i) that the amount deposited must be considered to be 'assets' held by the Court and liable to rateable distribution and that therefore neither the first nor the second decree could be said to have been satisfied and (ii) that the private sale of the property was void as against the claim under both the decrees.

This case was decided on the question of consent given by the decree-holder to the deposit of the decretal amount and on his failure to raise any objection in the execution proceeding. But on principle it does not go further than the Allahabad or the Calcutta cases cited above. In view of the fact that the attachment had come to end, the same decree-holder who was asking for rateable distribution could not assail the alienation. What would have been the result if the attachment had not ceased, this case does not decide.

59. The last case was the one reported in Kastur Chand v. Wazir Begum I.L.R. (1937) Nag. 291. The facts in this case were that a property was attached on the 14th June, 1926. The judgment-debtor made a gift of the same on the 19th May, 1927, although it was not registered till the 13th July, 1927. In the meantime however another decree-holder attached the same property on the 11th July, 1927. It was held in that case that the gift of the property was completed in May, 1927. It is not stated in this case when the first attachment was removed although it is stated at the top of page 297 that it continued after July, 1927.

60. Relying on the decision in Annamalai Chettiar v. Palamalai Pillai : AIR1918Mad127 the learned Chief Justice observed that:

According to that decision a person in a position similar to the decree-holders here is not entitled to rely on a third party attachment even where the proceeding has reached the stage of an application for rateable distribution.

61. He adds:

Here there is no application for rateable distribution, so that there are two links at least missing in the chain : (1) the attaching creditor under the attachment made in 1926 never got the assets into the executing Court; and (2) the present attaching creditor under the attachment in 1927 never applied for rateable distribution. That earlier attachment was subsequently raised and passes out of the story.

62. From what has been stated above, it would appear that the earlier attachment was not raised until after July, 1927, but it was raised subsequently. If it was raised, the decision could be justified on the ground that the subsequent decree-holder could not object to the alienation made prior to his attachment when the first attachment was raised and had passed out of the story. The reasons given by the learned Chief Justice however are not convincing. The subsequent decree-holder under whose decree the property was attached in 1927 need not have applied for rateable distribution at all. This matter has been dealt with in an earlier portion of this judgment. As for the other reason given by the learned Chief Justice that the attaching creditor under the attachment made in 1926 never got the assets into the executing Court, I have already expressed my opinion that it is not necessary for the purposes of Section 64 that the property should have been sold or that the assets must have come into the executing Court although this may be necessary for the purposes of Section 73.

63. In almost every case cited above a reference has been made to Annamalai Chettiar v. Palamalai Pillai : AIR1918Mad127 , but the Fuji Bench ruling has not been closely examined and with due respect to the learned Judges who decided that case 6r who followed it, I am of opinion that even if the actual decision in that case might have been correct, the reasoning given in that judgment is not supported either on

principle or by the language employed in Sections 64 and 73 of the Code of Civil Procedure or even by the decision of their Lordships of the Judicial Committee in Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 IndAp 72 : (P.C.).

64. My answer to the reference must for the above reasons be in the affirmative. I agree that the costs of this reference be made costs in the appeal.

Krishnaswami Aiyangar, J.

65. It is not without regret, that I feel myself obliged to express my dissent from the view accepted by a majority of my learned brothers on this reference. That view which is essentially different from mine has indeed made it necessary that I should go over the ground once again, and test the soundness of every link in the chain, every step in the reasoning by which I was persuaded to accept the opinion expressed in the order of reference. Having done that, and having given my careful and anxious attention to all that has been urged at the bar since, I regret to say that I still remain of the same opinion. In the order of reference, I have endeavoured to explain at some length the considerations which influenced me in forming my opinion. A briefer and a more pointed statement is all that is now necessary and may perhaps be more to the purpose to explain the reason why I have felt obliged to differ from my learned brethren.

66. That the Legislature had an object in adding the Explanation in Section 64 is undeniable. Whether that object was to introduce a change, or remove a doubt, it is bootless to enquire. Whichever it was, it is manifest that it concerned claims to rateable distribution, a subject on which the Code of 1908 has made at least one important change. Under the old Code, such claims were linked up with execution, and were recognised only when made in respect of assets realized in execution. That link has been removed under the new Code, and the right is no longer dependent on the mode by which the assets reach the hands of the Court. In whichever way now, the assets are received, whether by execution or otherwise, it makes no difference. Look at the consequence, which necessarily follows from this change. Rateable distribution is entirely dissociated from attachment in execution. True, the claim to rateable distribution may arise, as it often does, even now, in respect of assets realized in execution. But the necessity which had existed for the assets being realized by the process-of execution has definitely ceased under the new Code. The claim, may now arise in respect of, assets brought into Court in either of two ways : (i) by attachment in execution, or (ii) by other means without any connection with execution. The right to rateable distribution, in Section 64, must comprehend both varieties, and there, can be no warrant for limiting it to only one of the two.

67. I have said that the purpose behind the explanation to Section 64 was either to effect a change, or remove a doubt, in respect of claims to rateable distribution. The plain object of the section was to prevent the successful perpetration of fraud by the debtor against the just claims of a diligent creditor even after adjudication by Court. The law favours equal distribution of a debtor's assets among his creditors provided they exhibit some degree of diligence and sets its face against an unnecessary multiplicity of proceedings so far as it can be avoided. When the creditor properly moves the Court, it helps him by attaching the debtor's property, that is, it takes the property into its own custody. Thereafter the attaching creditors' rights are safe and cannot be defeated by any subsequent dealing by the debtor with the property

attached. In this respect, the present Section 64 does not differ from the old Section 276, the object of both being to throw a protection round the creditor who had attached. Under the old section however the protection was a more limited one and was confined to claims truly enforceable under the attachment which must also be one placed on the property at his instance, and not at the instance of any other creditor. In the referring order I have attempted an explanation of the expression, 'claims enforceable under an attachment.' It is now enough to say that only such claims fulfil the description as are necessarily traceable to and integrally connected with the attachment relied on for avoiding the alienation. A prior attachment, and enforceability under it were thus the two essentials on which the old Code insisted before it extended its protection. If these conditions were satisfied, Section 276 of the old Code stepped in and annexed to such claims, a power and potency, of sufficient strength to avoid a subsequent private alienation. So far the position remains unchanged even under the new Code.

68. To explain the matter still further, a bare claim for rateable distribution arising out of an application for execution which had not got to the stage of an attachment was under the old Code ineffectual against a private alienation. Until an attachment was made by the claimant, he could not prevent the debtor from dealing with his property to his (the claimant's) prejudice. That there was a subsisting attachment at the date of the alienation, at the instance of another creditor, was a circumstance from which the claimant could derive no benefit, as his claim was not one which could properly be regarded as enforceable under that attachment. Not possessing this quality, his claim could not affect the alienation, in spite of its taking its origin in an execution application of a prior date.

69. An application for execution was and is all that is necessary to entitle a decree-holder to rateable distribution, Somasundaram Chettiar v. Alamelu Achi (1937) M.W.N. 480 (486) and Abdul Salam v. Veerabhadra : (1929)57MLJ97 , provided the application is made in time. But under the old Code the capacity to avoid a later alienation, was the peculiar attribute only of a prior attachment, and not that of a bare application for execution, which though prior in date, did not carry with it, anything more than what may be called a limited and contingent right. If the prior attachment progressed to a sale, the alienation was destroyed. But the destruction was wrought not by the naked claim for rateable distribution founded on a mere execution application but by a prior attachment taking effect according to the positive provisions of Section 276. It is the sale alone following the attachment that produced this result. In the resulting proceeds, the claimant who had put in his application in time had no doubt the right to share given to him by Section 295. But until the sale actually took place, he had to wait in patience and had but a mere contingency in his favour. For it was the right solely of the prior attaching decree-holder to proceed further with the execution or abandon the attachment. If he was minded to do the latter, nobody could prevent it, though that step would put an end to the expectations of the bare claimant for rateable distribution. The latter could not help such a culmination coming to pass, as he had no sort of control over the attaching decree-holder who had the right at his will to determine what he would do, regardless of the consequence of his action or inaction on the expectations of other decree-holders. This, I consider, was the state of the law under the old Code, and was recognised by the Privy Council as such in Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 I.A. 72 : I.L.R. 44 Cal. 662 (P.C.). Their Lordships emphasised the position first by saying that the prior attachment was alone the weapon of attack, and secondly by indicating the necessity for the contingency being converted into an

actuality by the assets being actually realised by the sale.

70. The position then under the old Code, of a decree-holder who had not attached, but who had merely qualified himself for rateable distribution by an execution application was thus attended with risk. He had a chance, but not a certainty of getting even a partial satisfaction, and his doubtful position seems to have evoked the ineffective sympathy of the Calcutta High Court in Durga Churn Rai Chowdhury v. Manmohini Dasi (1935) 33 A.L.J. 4 (1891) 16 Bom. 91, managed by, if I may say so without meaning the slightest offence, a fallacious reasoning to give him a protection where the other Courts with stricter adherence to the language of the old Code found themselves powerless to give. He argued, wrongly as I think, that there was such a necessary connection between the attachment of one decree-holder and the bare claim for rateable distribution of another, that the claim of that other could be regarded as a claim enforceable under the attachment. The connection could not however be maintained unless the attachment fructified in a sale and led to the actual receipt of assets by the Court. It is this handicap that has been sought to be removed by the explanation added to Section 64 under the Code of 1908.

71. The explanation has it seems to me extended the protection of the section to bare claims for rateable distribution also, by the inclusive definition newly introduced by it. I read the words 'for the purpose of the section' as meaning for the purposes of avoiding a private alienation which is the obvious object of the section. Indeed, I cannot think of any other. Claims for rateable distribution whether or not they are in fact or in law claims really enforceable under an attachment are by force of the new definition notionally to be regarded as such for the purpose of avoiding a private transfer. This remarkable improvement in the status of these claims has been effected by including such claims by statutory definition within the expression 'claims enforceable under an attachment.' The claim for rateable distribution simpliciter without the support pi an anterior attachment are now as powerful and potent as claims enforceable under an attachment. The qualifications considered essential by all other Courts except Bombay, namely, a prior attachment was dropped as I think deliberately, in view of what had been said in Durga Churn Rai Chowdhury v. Manmohini Dasi (1935) 33 A.L.J. 4 (1888)15 Cal. 771. That a change was intended is perfectly plain to my mind, from a further circumstance. The word 'include' used in the explanation, has the legal significance attached to it by Lord Esher, M.R., in Rodger v. Harrison (1893) 1 Q.B.D. 161 :

The word 'interpreted' (in the present case claims enforceable under an attachment) 'has its ordinary meaning. That meaning it still has in the Act. But then there are other meanings that the Legislature wishes it to have in the Act. So the definition is used to enlarge the meaning of the term beyond its ordinary meaning and make it include matters which the ordinary meaning would not include. But this enlargement of meaning is confined to the matters expressly mentioned in such definition.'

72. In the light of this explanation of the word 'include' there is sufficient warrant for holding that the scope of Section 64 has been enlarged. In what other direction, I respectfully ask, is effect to be given to this, to me plain, enlargement unless it be in regard to the rights of claimants for rateable distribution? And how else is that to be, except by removing the handicap, the necessity for a prior attachment? To my mind, it is clear that the substratum of a prior attachment is no longer to be considered necessary to turn a bare claim for rateable distribution into a weapon of attack. The pendency of an earlier attachment is still a requisite but it is enough if it had been

placed by some other creditor and was still subsisting when the claim was made. That necessary integral connection which was, under the old Code such a supreme and essential pre-requisite is no longer required under the new Code. As I read the explanation, its effect seems to be that claims truly enforceable under the attachment equally with claims for rateable distribution devoid of that characteristic, are placed on an equal footing and both have under the new Code the power of overriding a subsequent private alienation, provided of course the claimant for rateable distribution has made his application in time and while the attachment is yet pending.

73. I have given my best consideration to the decision of the Privy Council in Mina Kumari Bibi v. Bijoy Singh Dudhuria (1916) 32 M.L.J. 425 : L.R. 44 I.A. 72 : I.L.R. 44 Cal. 662 (P.C.), but regret to find myself unable to agree that it is or was intended to be an authoritative ruling on the construction of Section 64 with the Explanation newly added to it, more especially in view of what their Lordships have thought fit to observe in Nur Mohammed Peerbhoy v. Dinshaw Hormasji Motiwalla (1922) 45 M.L.J. 770 (P.C.). I am also quite alive, I may add, to the volume and weight of judicial opinion which has accumulated in this country ever since the Full Bench decision of the court in Annamalai Chettiar v. Palamalai Pillai : AIR1918Mad127 . But sitting now as a member of a Fuller Bench, I have felt myself at liberty to examine the foundations on which that opinion rests. It is enough to say that I have most care fully considered that case and every other case, cited at the bar, or referred to in the judgment just now delivered, but I still remain unconvinced.

74. My answer to the question referred is accordingly in the affirmative. I agree that the costs of this reference should be costs in the cause.

75. This second appeal coming on for final hearing after the expression of the opinion of the Full Bench,