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IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 23.11.2021

PRONOUNCING ORDERS ON : 29.11.2021

Coram:

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

Application Nos.3605, 3606, 3923 of 2021
in C.S.Nos.401, 403 & 303 of 2017
and E.P.No.69 of 2018 in C.S.No.950 of 2017

M/s.Millennium Steel India Pvt.Ltd.,
Rep.by its Managing Director
Mr.D.Hari Prasad Reddy
No.98, Halls Road, 3rd Floor,
Kilpauk, Chennai 600 010.

..Applicant/Plaintiff
in A.N.3605 of 2021
in C.No.401 of 2017
(Comm.Suits)

M/s.Black Burn Fuels Pvt. Limited
Formerly Known as M/s.Maheswari Brothers
Coal Limited,
Rep.by its Director/Authorised Signator
Mr.D.Hari Prasad Reddy
No.7, Temple Street, New Avadi Road,
Kilpauk, Chennai 600 010.

..Applicant/Plaintiff
in A.N.3606 of 2021
in C.No.403 of 2017
(Comm.Suits)



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M/s.Trimex Industries Pvt. Limited

Rep.by its Vice President-legal

Mr.S.Sudhakaram

Trimex Towers, No.1

Subaraya Avenue

C.P.Ramaswamy Road

Alwarpet,Chennai 600 018.

..Applicant/Plaintiff

in A.N.3923 of 2021

in C.No.303 of 2017

(Comm.Suits)

. Vs.

M/s Ind Barath Thermal Power Limited

New No.20 (Old No.129) Chamiers Road

Nandanam, Chennai 600 035. .. Respondent/Defendant

in A.Nos.3605,3606, 3923 of 2021

in C.S.Nos.401, 403 and 303 of 2017

(Comm.Suits)

E.P.No.6 of 2018 in C.S.No.950/2017

IL & FS Financial Services Ltd

No.498 Karumuttu Centre

3rd Floor South Wing Anna Salai

Nandanam Chennai 600 035.

..Petitioner/Decree Holder

.Vs.

1. M/s Ind Barath Thermal Power Limited

New No.20 (Old No.129) Chamiers Road

Nandanam, Chennai 600 035.

..Respondent No.1/

Judgment Debtor

2.M/S Trimex Industries Pvt Ltd



Trimex Towers,
No.1, Subbaraya Avenue,
C.P.Ramaswamy Road, Alwarpet,
Chennai-600018.

..Respondent No.2/
Garnishee

3. M/S MILLENNIUM STEEL INDIA Pvt.LTD,
No.98 Halls Road 3rd Floor
Kilpauk, Chennai -10.

..Respondent No.3/
Garnishee

4. M/S Black Burn Fuels Pvt Ltd
No.7 Temple Street, New Avadi Road
Kilpauk, Chennai -10.

..Respondent No.2/
/Garnishee

Prayer in A.No.3605 of 2021: Judge's Summons filed under Order XIV Rule 8 of Original Side Rules read with under Section 151 of C.P.C.

(a) Why this application should not be treated as urgent;

(b) Why this Hon'ble Court shall not be pleased to allow the Applicant to withdraw a sum of Rs.42,82,40,044/- [Rupees Forty Two Crores Eighty Two Lakhs Fourty Thousand and Fourty Four Only] out of the amount deposited by the Garnishee and lying to the credit of the C.S.No.401 of 2017.

(c) Why this Hon'ble Court shall not be pleased to pass such further order or orders as it may deem fit and proper in the circumstances of the case.



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Prayer in A.No.3606 of 2021: Judge's Summons filed under Order XIV Rule 8 of Original Side Rules read with under Section 151 of C.P.C.

(a) Why this application should not be treated as urgent;

(b) Why this Hon'ble Court shall not be pleased to allow the Applicant to withdraw a sum of Rs.18,24,43,516/- [Rupees Eighteen Crores Twenty Four Lakhs Forty Three Thousand Five Hundred Sixteen Only] out of the amount deposited by the Garnishee and lying to the credit of the C.S.No.403 of 2017.

(c) Why this Hon'ble Court shall not be pleased to pass such further order or orders as it may deem fit and proper in the circumstances of the case.

Prayer in A.No.3923 of 2021: Judge's Summons filed under Order XIV Rule 8 of Original Side Rules read with under Section 151 of C.P.C.

(a) Why this application should not be treated as urgent;

(b) Why this Hon'ble Court shall not be pleased to allow the Applicant to withdraw a sum of Rs.28,73,33,059/- out of the



amount deposited by the Garnishee and lying to the credit of the C.S.No.303 of 2017.

(c) Why this Hon'ble Court shall not be pleased to pass such further order or orders as it may deem fit and proper in the circumstances of the case.

Prayer in E.P.No.69 of 2018: Execution Petition has been filed to execute the Decree passed by this Hon'ble Court on 05.01.2018 under Order XXI, Rules 51 and 52 of the Code of Civil Procedure, 1908 and consequently, attach the total amount of Rs.89,62,95,187/- (Rupees Eighty Nine Crores Sixty Two Lakhs, Ninety Five Thousand One Hundred and Eighty Seven Only) deposited in this Hon'ble Court to the credit of a) C.S.No.303 of 2017 a sum of Rs.28,46,18,581, b) C.S.No.401 of 2017 a sum of Rs.34,94,04,036/- and c) C.S.No.403 of 2017 a sum of Rs.26,22,72,570, respectively, and to pay the same to the Execution petitioner to the satisfaction of the decree.

A.No.3605 of 2021

in C.S.No.401/2017

For Applicant : Mr.T.R.Rajagopalan



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Senior Counsel
for Mrs.Revathi Manivannan

A.No.3606 of 2021

in C.S.No.403/2017

For Applicant : Mr.R.Yashod Vardhan
Senior Counsel
for Mrs.Revathi Manivannan

A.No.3923 of 2021

in C.S.No.303/2017

For Applicant : Mr.T.V.Ramanujam
Senior Counsel
for M/s.V.Anantha Natarajan

E.P.No.69 of 2018

in C.S.No.950/2017

For Petitioner : Mr.PVS.Giridhar

A. Nos.3605, 3606, 3923/2021

in C.S.Nos.401,403 & 303/2017

and E.P.No.69 of 2018 in

C.S.No.950 of 2017

For Respondents : M/s.Anirudh Krishnan
Mr.S.Adarsh
for R 1

COMMON ORDER

The applicants in Application Nos. 3605, 3606 and 3923 of



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2021 and the petitioner in E.P. No.69 of 2018 espouse a common cause. They have obtained a decree against a common defendant/judgment debtor, M/s. Ind Barath Thermal Power Ltd. (hereinafter referred to as “M/s. Ind Barath”). They now seek to realize their decretal dues by proceeding against the monies deposited into this Court by the garnishee. The facts and circumstances giving rise to the applications and the execution petition are as under:

Application No. 3923 of 2021 in CS No. 303 of 2017

2. The applicant M/s. Trimex Industries Private Limited filed C.S.No.303 of 2017 for recovery of money against M/s. Ind Barath. The plaint was presented on 18.04.2017. The claim was made based on the supply of goods and non-payment of the sale consideration. During the pendency of this suit, Application No.2417 of 2017 was taken out seeking a prohibitory order against the Tamil Nadu Generation and Distribution Corporation (hereinafter referred to as “TANGEDCO”), the garnishee, prohibiting them from paying a sum of Rs.28,46,18,581/- to M/s. Ind Barath and for a direction to the garnishee to deposit the said



amount to the credit of the suit. By an order dated 20.04.2017, this Court passed a prohibitory order against the garnishee restraining them from paying the aforesaid amount to M/s. Ind Barath.

3.Ultimately, on the stand taken by the garnishee, Application No. 2417 of 2017 was disposed of on 28.06.2017 directing the garnishee to deposit the sum of Rs.28,46,18,581/- to the credit of this suit within a period of 3 weeks. In compliance thereof, the garnishee paid the aforesaid sums into the Court by way of a fixed deposit in favour of the Registrar General, High Court, Madras.

4.The suit was eventually decreed on 06.08.2021, and the petitioner was found entitled to a money decree for a sum of Rs.22,17,05,264/- with interest at the rate of 10.50% per annum from 08.11.2018 till the date of realization. It is the case of the applicant that the principal and the interest due to it as on the date of filing of this application stands at Rs.28,72,33,059/-. This application has been taken out invoking the inherent powers of this Court under Section 151 of the Code of Civil Procedure, 1908



(hereinafter referred to as “CPC” or “the Code”) seeking payment out of the aforesaid sum.

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Application No.3605 of 2021 in C.S. No.401 of 2017

5. The applicant M/s. Millennium Steel India Private Limited filed a suit for the recovery of money against M/s. Ind Barath. The plaint was presented before this Court on 31.05.2017. The claim was made based on the supply of goods and non-payment of the sale consideration. During the pendency of this suit, Application No.2919 of 2017 was taken out for a prohibitory order against TANGEDCO, the garnishee, prohibiting them from paying a sum of Rs.34,94,04,036/- to M/s. Ind Barath and to direct the garnishee to deposit the said amount to the credit of the suit. This Court, by an order dated 05.06.2017, prohibited the garnishee from paying the aforesaid amounts to M/s. Ind Barath.

6.Ultimately, based on the stand taken by the garnishee, Application No.2919 of 2017 was disposed of on 05.10.2017, directing the garnishee to deposit the sum of Rs. 34,94,04,036/- to the credit of this suit. In compliance thereof, the amounts were



paid into the Court by the garnishee, and consequently, the same was directed to be kept in an interest-bearing fixed deposit in the name of the Registrar General, High Court, Madras.

7. The suit was eventually decreed on 06.08.2021 and the applicant was found entitled to a money decree for a sum of Rs.33,05,02,000/- with interest at the rate of 10.50% per annum from 9.11.2018 till the date of realization. It is the case of the applicant that the principal and the interest due to it as on the date of filing of this application stands at Rs.42,82,40,044/-. This application has been taken out invoking the inherent powers of this Court under Section 151, CPC, seeking payment out of the aforesaid sum.

Application No.3606 of 2017 in C.S. No.403 of 2017

8. The applicant M/s. Black Burn Fuels Private Limited filed C.S.No.403 of 2017 for recovery of money against M/s. Ind Barath. The plaint was presented on 31.05.2017. The claim was made based on the supply of goods and non-payment of the sale consideration. During the pendency of this suit, Application



No.2921 of 2017 was taken out for a prohibitory order against TANGEDCO, the garnishee, prohibiting them from paying a sum of Rs.26,22,72,567/- to M/s. Ind Barath and to direct the garnishee to deposit the said amount to the credit of the suit. This Court, by an order dated 05.06.2017, prohibited the garnishee from paying the aforesaid amounts to M/s. Ind Barath.

9. Ultimately, based on the stand taken by the garnishee, Application No.2921 of 2017 was disposed of on 05.10.2017, directing the garnishee to deposit the sum of Rs.26,22,72,567/- to the credit of the suit. In compliance thereof, the amounts were paid into the Court by the garnishee, and consequently, the same was directed to be kept in an interest-bearing fixed deposit in the name of the Registrar General, High Court, Madras.

10. The suit was eventually decreed on 17.08.2021, and the applicant was found entitled to a money decree for a sum of Rs.12,42,27,000/-with interest at the rate of 11% per annum from the date of filing of the suit till the date of realization. It is the case of the applicant that the principal and the interest due to it as on



the date of filing of this application stands at Rs.18,24,43,516/-.

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This application has been taken out invoking the inherent powers of this Court under Section 151, CPC, seeking payment out of the aforesaid sum.

E.P. No.69 of 2018 in C.S. No. 950 of 2017

11. The petitioner, M/s. IL & FS Financial Services filed C.S.No.950 of 2017 for recovery of money against M/s. Ind Barath. The plaint was presented on 10.11.2017. The claim was made on the basis of a term loan extended by the petitioner in favour of M/s. Ind Barath and the subsequent default in repayment of the dues. The petitioner claimed a sum of Rs.102,00,98,362/- and interest on the principal amount from the date of filing of the suit till the date of recovery. It is seen from the plaint that M/s.Ind Barath had hypothecated nine items of receivables specifically set out in Schedule A of the plaint. That apart, certain shares were also pledged in favour of the petitioner, and the same has been shown in Schedules B to D of the plaint. Surprisingly, the suit was not based on the charge created on the movables, and the prayer was only for the recovery of money simpliciter. In other words, the



plaintiff in C.S.No. 950 of 2017 had also sought a money decree.

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12. In the garnishee applications taken out by the plaintiffs in C.S.Nos. 303, 401 and 403 of 2017, the petitioner M/s.IL & FS Financial Services had intervened by filing intervening applications in all the three suits vide Application Nos.3680 to 3682 of 2021. This is evident from the order passed by this Court in all the said applications on 05.10.2017.

13. The suit filed by the petitioner was decreed as prayed for by a judgment and decree dated 05.01.2018, and E.P.No.69 of 2018 was taken out to execute this decree. The Execution Petition (hereinafter referred to as “EP”) was filed under Order XXI Rule 51 and 52, CPC on 26.02.2018. The prayer in the EP is for an order of attachment of the entire sums lying to the credit of C.S.Nos.303, 401 & 403 of 2017 and for payment of the sums lying therein towards satisfaction of the decree passed in the suit.

Submissions:

14. The submissions made on either side may now be



noticed. Since the matter essentially involves cross-claims, the submissions made by the learned counsel in E.P.No.69 of 2018 will serve as a reply to the case in Application Nos.3605, 3606 and 3923 of 2021. Similarly, the submissions made by the learned Senior Counsel appearing in the respective applications can be taken to be a reply for the submissions made in the EP as well.

15. The learned counsel for the petitioner in E.P.No. 69 of 2018 contended as under:

- The petitioner's debt is a charged debt. Hence the petitioner is entitled to the entire amount lying to the credit of the three suits in satisfaction of the decree passed in C.S.No. 950 of 2017.
- The prohibitory orders passed by this Court and the amount deposited by the garnishee does not create any charge in favour of the other three petitioners, and the money deposited continues to be the property of the judgment debtor until orders are passed by the executing court disbursing the amount.
- The money lying in the custody of the court is now



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claimed by four decree holders. Therefore, the question of title or priority has to be determined by this court under Order XXI Rule 52, CPC.

- In the alternative, this Court can exercise its jurisdiction under Section 73, CPC, and there can be the rateable distribution of the monies lying to the credit of the three suits.
- The money has been deposited pursuant to the directions given by the Court, and this cannot have the effect of an attachment. The same is clear from the orders passed by this Court. Even if it is taken to be an attachment, the same only prohibits the transfer or delivery of the property attached when the order is in force, and no other right or priority enures in favour of the other three applicants.
- Even if the petitioner is said not to have enforced its charge, and the decree passed in C.S.No. 950 of 2017 is taken to be a simple money decree; the petitioner will stand on the same footing as that of the other three decree holders. The money deposited by the



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garnishee should no longer be relatable to the invoices under which the amount was paid by the garnishee, and this amount, fair and simple, will continue to be the property of the judgment debtor till it is disbursed by order of the Court.

- The other three decree holders cannot withdraw the amount by filing an application under Section 151, CPC, after the disposal of the suit. They ought to have filed execution petitions in the manner provided under Order XXI, CPC and in the absence of the same, the petition filed to execute the decree in C.S.No. 950 of 2017 alone should be taken into consideration by this Court. This is more so due to the fact that the other three decree holders have not impleaded the petitioner in their applications despite being aware that the petitioner has a claim. On the other hand, the petitioner has impleaded all the three decree holders in this EP.
- The learned counsel, in order to substantiate his submissions, relied upon the following judgments:



HotiLal v. Chatura Prasad, AIR 1941 All 110; *Lakshman Swarup Om Prakash v. Union of India*, (1997) 7 SCC 245; *Income-tax Officer, Ward C Sangli and Anr. v. ChandanbaiBalaram Doshi &Ors.*, AIR 1957 Bom91; *NVENachiappaChettiar v. N.A.K.Subbier*, 1922 SCC OnLineMad 344; *Lanka Suryaprakash Rao and Ors. v. GdigatlaVenkatramanna Chowdary and Ors.*, AIR 1994 AP 53; *KanakamSrinivasa Rao v. Ganga Venkateswara Rao and Anr.*, AIR 2003 AP 38; *Shaji v. Dinesan&Ors.*, 1998 (2) KLJ 647; *Maddu Venkata Subbiah v. Alane Adi Narayana and Ors.*, AIR 1954 AP 44; *KattuvaRowthan's son Moidin alias SaivyRowthan v. Dakshayani Amma &Anr.*, AIR 1941 Mad 125; *Dena Bank v. BhikhabaiPrabhudas Parekh & Co.*, (2000) 5 SCC 694; *BhavanVaja v. Solanki HanujiKhodajiMansang*, (1973) 2 SCC 40; *Parayya Allaya Hittalamani v Sri ParayyaGurukungayaPoijari*, (2007) 14 SCC 318; and *Shiv Kumar Chadha andOrs. v. MunicipalCorporation of Delhi*, (1993) 3 SCC 161.

16. On the side of the applicants in Application Nos.3605, 3606 and 3923 of 2021, the learned Senior Counsel contended as



follows:

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- The petitioner in the EP is attempting to knock off the entire amount lying to the credit of the three suits by instituting a suit and getting a decree on admission much after the amount was deposited by the garnishee in the three suits filed by the petitioners.
- In other words, the petitioner in the EP is attempting to deprive the fruits of the decree by taking away the amount which was deposited by the garnishee, pursuant to the efforts taken by the petitioners. C.S.No. 950 of 2017 was filed only on 10.11.2017, and the money decree was passed in their favour in terms of the admission made by M/s. Ind Barathon 05.01.2018. E.P.No. 69 of 2018 was immediately filed in February 2018, and hence, there is obvious collusion between the petitioner in the EP and M/s. Ind Barath.
- The monies deposited by the garnishee to the credit of the suits are not covered by the invoices shown in Schedule A to the suit in O.S.No.950 of 2017, and the same is evident from the statement of accounts filed by



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TANGEDCO, and therefore, the petitioner in the EP does not have any right or charge over the monies deposited in the three suits.

- The petitioner in E.P.No. 69 of 2018 filed a simple suit for the recovery of money, and it was not based on the so-called charge created over the movables. They have, therefore, given up their charge over the receivables. In view of the same, they do not have any right to claim a charge over the money deposited by the garnishee to the credit of the suit. To substantiate the submission, the judgment in *Ramiah Aiyar & Anr v. Gopalier and Ors.*, (1918) ILR 41 Mad 1053 was relied upon.
- The monies deposited to the credit of the three suits will only enure to the benefit of the applicants in Application Nos. 3605, 3606 and 3923 of 2021 and will not pass on to the general creditors or any person claiming under them.
- Section 73, CPC will not apply to the facts of this case since the monies were deposited by the garnishee even



before the decree was passed, during the pendency of the suit. Section 73, CPC contemplates receipt of assets by the court in execution of a decree.

- The orders passed by this Court on 5.10.2017 and 25.7.2018 were interim orders passed during the pendency of these suits, and ultimately the suits were decreed. Therefore, the petitioner in E.P.No. 69 of 2018 cannot rely upon this order, and it will not clothe any rights in the petitioner to claim the monies deposited in the three suits.
- The prohibitory orders passed by this Court and consequent deposit of the money by the garnishee is by virtue of Order XXXVIII Rule 5, CPC read with Section 94(b), CPC. The provisions governing EPs are not applicable to the monies which are lying in court deposit since there is no question of reattachment of these monies by virtue of Order XXXVIII Rule 11, CPC. Therefore, the petition for payment out under Section 151, CPC, is maintainable.
- The petitioners need not be relegated to work out the



remedy by filing an independent EP, and this Court can deal with their rights in the payment out petition exercising its inherent powers under Section 151, CPC.

- The learned Senior Counsel, in order to substantiate the aforesaid submissions, also relied upon the following decisions: *Rikhabchand Mohanlal Surana v. The Sholapur Spinning and Weaving Company Ltd.*, 1973 SCC OnLineBom 126 and *E.M Vishvanadhan Chetty v. Arunachalam Chetti*, ILR XLIV 100.

17. This Court has carefully considered the submissions made on either side and the materials available on record.

The jurisdiction of the Commercial Division in execution matters

18. Before examining the rival contentions, it is necessary to set out the jurisdiction of the Commercial Division in matters concerning the execution of decrees passed by it. In the scheme of execution of decrees and orders provided under the Code, a decree may be executed either by i) a Court which passed the decree; or ii) by the Court to which it is sent for execution, i.e., through



transfer/transmission vide Sections 37 & 38 and Order XXI Rule

10, CPC.

19. Order XXI Rule 10, CPC requires that the decree-holder apply to the court which passed the decree or to the officer, if any, appointed on this behalf for execution. The expression “*Court*” is defined under Order I Rule 4(2) of the Original Side Rules, 1994 (hereinafter referred to as “OS Rules”) to include “*a judge, or Master or First Assistant Registrar*”.

20. On the Original Side of this Court, Order XXXIX, OS Rules sets out the procedure for execution of decrees and orders. In the usual scheme of things, Order XXXIX Rule 1, OS Rules requires that all applications for execution of decrees or orders of the High Court shall be made to the Registrar of the concerned High Court. Interestingly, Order XXXIX Rule 1, OS Rules explicitly states that all transmission of decrees and the issue of all necessary warrants and notices by the Registrar are not ministerial but shall be “*deemed*” to be quasi-judicial acts.



21. Order XXXIX Rule 13, OS Rules requires that all applications, post-service, shall be posted before the Master for final disposal if there is a contest. Order XIV Rule 10(xxix), OS Rules require that applications for or relating to an order for transmission or for the execution of a decree etc. shall be made to the Master who, in turn, is required to adjudicate the same under the relevant Rules, except matters which are to be dealt with by the Registrar under the powers delegated to him by the Hon'ble Chief Justice. There are various other provisions specifically empowering the Master to hear applications in execution (Order XXI Rule 50, Rule 95 & 96 etc. of the Code) on the Original Side.

22. The question that arises is whether an application for execution of a decree passed by a Commercial Division of this Court must be heard and disposed of by the Master or by the Commercial Division itself? This, in turn, requires an examination of the exact meaning of the expression "Commercial Division".

23. Section 4 of the Commercial Courts Act, 2015 (hereinafter referred to as "the Act") empowers the Chief Justice of



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the High Court, having ordinary original civil jurisdiction, to constitute a Commercial Division, having one or more Benches consisting of a single judge for the purposes of exercising jurisdiction and powers conferred on it under this Act. Then comes the jurisdiction of the Commercial Division, which is set out in Section 7 of the Act and reads thus:

“All suits and applications relating to commercial disputes of a Specified Value filed in a High Court having ordinary original civil jurisdiction shall be heard and disposed of by the Commercial Division of that High Court:

Provided that all suits and applications relating to commercial disputes, stipulated by an Act to lie in a court not inferior to a District Court, and filed or pending on the original side of the High Court, shall be heard and disposed of by the Commercial Division of the High Court:

Provided further that all suits and applications transferred to the High Court by virtue of sub-section (4) of section 22 of the Designs Act, 2000 (16 of 2000) or section 104 of the Patents Act, 1970 (39 of 1970) shall be heard and disposed of by the Commercial Division of the High Court in all the areas over which the High Court exercises ordinary original civil jurisdiction.”

24. Section 7 of the Act is, therefore, clear to the effect that a “suit” or “application” relating to a commercial dispute of a



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specified value filed before the Original Side of this Court shall be heard and disposed of by the Commercial Division. Does the expression “application” occurring in Section 7 of the Act take within its fold applications for execution of decrees or orders passed by the Commercial Division? Order XXXIX Rule 1, OS Rules, which deals with the execution of decrees and orders on the Original Side, begins thus:

“All applications for execution of decrees or orders...”

Therefore, in a generic sense, there can be little doubt that an application for execution of a decree or order passed by the Commercial Division is capable of falling within the net of the expression “application” in Section 7 of the Act.

25. It is seen that Sections 37 & 38 and Order 21 Rule 10, CPC require the decree-holder to petition the Court, which passed the decree to levy execution against the judgment debtor. Thus, where the decree is passed by the Commercial Division, an application for execution would lie to the Commercial Division alone.

26. Section 4 of the Act states that the Commercial Division, constituted by the Chief Justice, shall consist of a “single judge” of



the High Court. Therefore, what is evident is that, unlike the Original Side Rules, there is no diffusion of the jurisdiction on the Original Side between the single Judge, Master and the Registrar. The jurisdiction and powers of the Commercial Division are conferred on the single Judge of the High Court and to no one else. It would, therefore, be impermissible to equate the Commercial Division constituted under Section 4 of the Act to be in *pari materia* with the definition of “Court” occurring in Order 1 Rule 4(2), OS Rules, which comprises of the Judge, the Master and the First Assistant Registrar. It is also to be borne in mind that Section 16(3) of the Act specifically overrides the OS Rules of the High Court, to the extent the latter is inconsistent with the former. Thus, to the extent, the OS Rules require execution applications arising out of decrees passed by the Commercial Division to be dealt with by functionaries other than the single Judge of the High Court, the provisions of the OS Rules will have to yield to the clear and unambiguous mandate of Sections 4 and 7 of the Act.

27. The sequitur is that an application for execution of a decree passed by the Commercial Division would lie only before the Commercial Division constituted by the Chief Justice, which,



by virtue of Section 4 of the Act, comprises of the single Judge.

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This interpretation also accords with the Scheme and Objects of the Act, which is to provide a speedy resolution of commercial disputes. It stands to reason that the resolution of a commercial dispute does not stop with the passing of a decree but must extend to enable the decree-holder to enjoy the fruits of the litigation. This Court finds that the same view has been taken by a learned single Judge of the High Court of Delhi in ***Bayer Intellectual Property GMBH v Symed Laboratories Limited, (2019 SCC Online Del 7410)***, where, in the context of execution applications before Commercial Courts. The learned single Judge has observed thus:

“If the decree is of a Commercial Court, its execution will lie in a Commercial Court only and would not lie in an Ordinary Civil Court which has jurisdiction to entertain suits of a noncommercial nature. Vide Section 6 of the Commercial Courts Act, the Commercial Courts have jurisdiction to try “all suits and applications relating to commercial dispute”. Thus, an application for execution of a decree in a commercial suit would be in a Commercial Court only. To hold otherwise would be contrary to the underlying objective of the Commercial Courts Act, i.e. expediency and speed. A decree till executed, is a piece of paper and to hold that expediency and speed is made available till drawing up of a piece of paper and not till benefit thereunder is reaped,



would defeat the objective of the statute.”

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The nature of the Orders passed by the Commercial Division and the character of the money held in security.

28. Having thus cleared the ground on the jurisdiction, the next step is to examine the nature of the orders passed by this Court in the garnishee applications preferred by the decree holders in C.S.Nos.303 of 2017, 401 of 2017, and 403 of 2017. As was noticed *supra*, the prayer in these applications was to attach the monies belonging to the judgment debtor, lying with TANGEDCO, the garnishee. It is a common ground that pursuant to the orders of this Court, the garnishees appeared and have also made over the sums due to the defendant, M/s. Ind Barath, to the credit of the aforesaid suits. The monies were then ordered to be kept in interest-bearing fixed deposits in the name of the Registrar General of this Court. To ascertain the exact nature of the monies lying to the credit of these suits, it is necessary to examine the character of the garnishee orders that were passed by this Court.

29. The procedure for attachment and realization of monies of the judgment debtor lying in the hands of a third-party garnishee is provided under Order XXI Rules 46, 46-A to I, CPC. Where,



however, a garnishee order of a like nature is sought in a pending suit, the provisions of Order XXXVIII Rules 7 and 11-A(1), CPC come into play. For ease of reference, these rules are extracted herein under:

“7. Mode of making attachment.- Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

11A. Provisions applicable to attachment.-

(1) The provisions of this Code applicable to an attachment made in execution of a decree shall, so far as may be, apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of rule 11.”

The aforesaid provision makes the provisions of Order XXI Rule 46, 46-A to I, CPC applicable to the garnishee order pending the suit.

30. In ***Lakshminarayanan v. A. Veeraraghavalu, (1990) 1 LW 135***, a learned single Judge of this Court, after referring to Order XXXVIII Rule 11-A held as under:

“In the present case, in view of O. 38 R. 11-A, C.P.C. S. 60 C P.C., will certainly be applicable to attachment before judgment, i.e., even though the suit has not yet resulted in a ‘decree’ as such.

The learned counsel for the appellant then submitted that what was sought for was only an injunction under O. 39 C.P.C and not an attachment under O. 38 R. 5 C.P.C. But the injunction or the direction sought for amounts only to



attachment of a debt due to the defendant employee from his employer, the garnishee, by issue of a prohibitory order, to the garnishee, as in the case under O. 21, R. 46(1) C.P.C. which provides the mode of 'attachment' of debts and other properties not in possession of judgment debtor, the said mode being issue of such prohibitory orders."

31. The same view was taken by P.V. Reddy, J in **K.**

Chandrasekharam v. Vijay Bhargavi Chit Fund Pvt. Ltd., (2000)

2 ALT 32, wherein it was observed as extracted herein under:

"Order XXI Rule 46, which occurs in the chapter "Execution of decrees and orders" bears the heading "Attachment of debt share and other property not in possession of judgment debtor". The said rule provides for attachment by a written Order prohibiting the debtor from making payment until further orders of the Court. So also, in the case of other movable properties, the person in possession of the same can be prohibited from giving it over to the judgment-debtor. The procedure for issuing notice to garnishee etc., is provided for in the Rule 46-A and the following rules. Thus, the procedure and modalities of attachment for recovery of decretal amount applies mutatis mutandis to attachment before judgment as well. Otherwise the Rules contained in Order XXXVIII do not lay down any particular method of attachment before judgment. It only specifies the circumstances and the contingencies in which attachment before judgment could be ordered by the Court, the adjudication of claims to property and the removal of attachment. If the Rules of attachment for execution of decree are not brought within the gamut of



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Order XXXVIII Rules 5 and 6, there will be vacuum and the provision itself becomes unworkable. That is the reason why Rule 7 of Order XXXVIII has been advisedly introduced into the chapter “attachment before judgment”.

7. There is plethora of decisions in which attachment provisions contained in Order XXI have been applied while ordering attachment before judgment under Order XXXVIII. Suffice it to cite the Full Bench judgment of Patna High Court in Tapeshwar v. Santokh (AIR 1969 Patna 299). In that decision, it was observed inter-alia that Rule 7 in terms provides that the manner of attachment must be the same as in regard to the attachment of properties in course of execution of a decree and therefore it will attract Rule 54 in case of immovable properties. As long back as in 1932. Curgenven, J. in Alwar Aiyangar v. Subramania (AIR 1932 Madras 169) observed:

“The question which arises in this case is whether a Court attaching a debt either before judgment or in execution can inquire into the truth or the existence of the debt. The attachment in the present instance was made before judgment on an application filed on the same day as the plaint. But I cannot find that it makes any difference whether such an attachment was made before judgment or in execution of the decree, and it appears to me that Rules 7 and 8, Order 38, Civil Procedure Code show that the Court has the same powers in the one case as in the other”

32. In view of the aforesaid decisions, it is clear that the



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garnishee orders passed in favour of the decree holders in C.S. Nos. 303, 401 and 403 of 2017 have been passed in exercise of powers referable to Order XXXVIII Rules 5 and 11-A read with Order XXI Rule 46 and 46-A to F, CPC.

33. Once this position is clear, it now remains to be seen as to what is the effect of an attachment before judgment as contemplated under Order XXXVIII Rule 5 of the Code. In *V.S. Thiru Venkita Reddiar v. S. Noordeen*, AIR 1978 Kerala 11, the Kerala High Court held that in view of Order XXI Rule 54, CPC read with Appendix E, Form No. 24 of the Code, the only effect of attachment before judgment is to prevent alienation and not to confer title by way of charge or otherwise on the person seeking attachment before judgment.

34. The effect of an order of attachment before judgment and payment into court of the monies due by the garnishee is that the court becomes *custodia legis* of the properties belonging to the judgment debtor. In *Purna Chandra Basak v. Daulat Ali Mollah*, AIR 1973 Cal 432, the Calcutta High Court held that an attachment



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does not create any interest in or charge upon the property. It merely keeps it in *custodia legis* and prevents its alienation in certain cases. An attaching creditor can only attach the right, title and interest of his debtor at the date of the attachment, and on principle, this attachment cannot confer upon him any higher right than the judgment-debtor had at the date of the attachment. This decision was cited with approval by the Supreme Court in ***V.K Sreedharan v Chandramaath Balakrishnan***, (1990) 3 SCC 291.

35. The position was put beyond controversy by Wallace, J in his concurring opinion in the Full Bench decision in ***NachiappaChettiar v N.A.K Subbier***, AIR 1923 Mad 505. In that case, one Subbier had obtained an order of attachment before judgment of certain goods belonging to the defendant. These goods were later sold and the monies credited to Subbier's suit. In the meantime, one NachiappaChettiar brought a suit for money in the same court against the same defendant and had the monies in Subbier's suit attached before judgment. Examining the nature and character of an attachment before judgment, the learned Judge observed as under:



*“It is well-recognized law that an attachment confers no sort of lien or charge on the attached property and is not effective to create any sort of legal right in the attaching creditor to have the property earmarked for the satisfaction of any decree he has obtained or may obtain and it is in no sense to be regarded as the inception of execution on behalf of the attacher. Much less does it enure to create any such right for the benefit of other creditors seeking for decrees or for execution of decrees or for rateable distribution under section 73. And it then can be used for one purpose only, viz., to defeat and render void any private alienation made during its continuance. See *Annamalai Chettiar v. Palamalai Pillai* [(1918) I.L.R., 41 Mad., 265 (F.B.)] and *Mina Kumari Bibi v. Bijoy Singh Dudhuria* [(1917) I.L.R., 44 Calc., 662 (P.C.)] . There is in the present case no such private alienation in question, and hence, for the purposes of this case, the attachment before judgment by Subbier created or maintained for him no legal right to the fund in the custody of the Court.”*

36. In ***Ramiah Aiyar v. Gopalier and Ors.***, (1918) ILR 41 Mad 1053, the trial Court passed an order of arrest under Order XXXVIII Rule 1 and 2, CPC to furnish security, and in default thereof to have the defendant arrested and committed to prison. An order of arrest was passed, and the defendant applied to the court to make payment to the value of the claim. As to the question of whether Order XXXVIII Rule 5 conferred any lien on the money



the Division Bench speaking through Coutts Trotter, J observed

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*“It is clear that attachment before judgment of property under Order XXXVIII, Rule 5, does not pass any title to the person at whose instance it is attached but merely its effect is to prevent alienation on the part of the person whose property is attached. It restricts the hands of the owner of the property, but does not make him cease to be the owner nor does it confer any specific lien on the person who seeks the attachment. This was laid down in numerous cases both in England and in this country, and Lord Hobhouse observed in Motilal v. Karrabuldin (1898) I.L.R., 25 Calc., 170. (P.C), that even attachment in furtherance of execution gives no title. This has been re-affirmed by this Court on a specific reference to Order XXXVIII, Rule 5, which relates to attachment of property before judgment in order to prevent the disposal of the property by the defendant in **Errikulappa Chetty v. The Official Assignee, Madras**, (1916) I.L.R., 39 Mad., 903, a decision of Wallis, C.J., and SeshagiriAyyar, J.*

Similar principles have been applied to money deposited into Court under a Garnishee order in Jitmand v. Ramohan (1905) I.L.R., 29 Bom., 405. That is one class of case;”

Coutts Trotter, J added

“.....but you get a totally different class of case where money is not deposited in Court in order to secure something being done by the person who deposited it, such as abstaining from going away or removing his property from the jurisdiction of the Court but where money is paid to the credit of the suit or ear-marked for the suit, the Courts have always held that, when that is done, the money belongs to the plaintiff in the event of his success and that it cannot pass to the general



creditors of the person who pays it in or to any person who claims under him”

This latter observation was relied on by the learned Senior Counsel for the applicants in Application Nos. 3605, 3606 and 3923 of 2021 to contend that the monies paid into the Court by the garnishee were earmarked especially for the debt due to the applicants. This Court is unable to agree.

37. In the first place, the decision turned on the character of the monies paid into Court by the judgment debtor and not by the garnishee. In fact, Coutts Trotter, J specifically alludes to the class of cases where monies are deposited by the garnishee and holds that they are covered by the general principle that no specific lien attaches on the money so deposited. Secondly, even if Coutts Trotter, J is taken to have laid down a broad proposition that a lien attaches to the monies paid into Court under Order XXXVIII such observations would then be inconsistent with the subsequent decision of the Full Bench in ***Nachiappa Chettiar v N.A.K Subbier***, AIR 1923 Mad 505. Having considered the decision, this Court is not persuaded to hold that Coutts Trotter, J had intended to lay down any such broad principle.

38. The learned Senior Counsel for the applicants in



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Application Nos. 3605, 3606 and 3923 of 2021 also alluded to the decision of the Bombay High Court in ***Rikhabchand Mohanlal Surana v. The Sholapur Spinning and Weaving Company Ltd.***, 1973 SCC OnLineBom 126. This decision did not deal with Order XXXVIII, CPC at all and is a case that examines the effect of attachment post the passing of a decree. This case is, therefore, clearly distinguishable.

39. The position that an attachment before judgment does not confer any lien on the creditor becomes clear if one examines Order XXXVIII Rule 10, CPC, which reads thus:

“10. Attachment before judgment not to affect rights of strangers, nor bar decree-holder from applying for sale.-
Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.”

The aforesaid rule is a clear pointer that the monies of the defendant attached and deposited into the credit of the suit Court do not cease to become his property. In fact, it continues to remain so till the monies are paid over to the decree holders. If it were to be held that the monies paid into Court by virtue



of the attachment would cease to be the property of the defendant, the provisions of Order XXXVIII Rule 10, CPC would be rendered unworkable.

40. This conclusion is fortified by the decision of the Hon'ble Supreme Court in **Kotak & Co. v. the State of U.P.**, (1987) 1 SCC 455, wherein it was observed as under:

“Even so, while discussing the law on the subject in the context of the scheme of the CPC, the High Court of Bombay in ITO v. Chandanbai Balaram Doshi [AIR 1957 Bom 91: 58 Bom LR 564: ILR 1956 Bom 743] has articulated the principle thus:

“The scheme clearly indicates that until the court has directed appropriation of the amount to the claim made by the decree-holder or of creditors entitled to rateable distribution, the amount received in court continues to remain as of the judgment-debtor.”

By necessary implication it means that as soon as an order for rateable distribution is made, the amount ordered to be distributed will cease to be the property of the judgment-debtor. We are of the same opinion as that of the High Courts of Madras, Calcutta and Bombay.”

41. Consequently, the legal position is that the monies attached and deposited into the credit of the three suits pursuant to various orders of the Court continue to remain the property of the judgment debtor, held *custodia legis*, subject to the orders of the court. These funds, which remain the property of the judgment debtor, can therefore, be proceeded against and attached by third party creditors like the decree holder in E.P.No. 69 of 2018 under



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Section 60, CPC. In so far as the attaching creditors in Application Nos.3605, 3606 and 3923 of 2021 are concerned, since an order of attachment before judgment already operated in their suits, there is no requirement of re-attaching the same in view of the provisions of Order XXXVIII Rule 11 of the Code.

Does the concept of rateable distribution apply to the present case qua Order XXI Rule 52, CPC?

42. The next question is whether these monies must be paid out wholly to the decree holders/applicants in Application Nos.3605, 3606 and 3923 of 2021 or wholly to the decree holder in E.P.No.69 of 2018 or must it be rateably distributed to between all of them? In other words, should there be a distribution premised on the priority of attachment, or must the distribution be done rateably as between all decree holders? Before examining this issue, it is necessary to notice the nature of the applications made by the various judgment debtors.

43. Application Nos. 3605, 3606 and 3923 of 2021, though styled as one under Section 151, CPC for payment out is, in effect,



one under Order XXXIX Rule 28, OS Rules, which reads thus:

“The judgment-creditor may apply entitled in the suit or matter to the credit of which the money or property is held, for payment out of Court, or for sale of the property and payment of the proceeds, to the judgment creditor, unless otherwise ordered, notice of the application shall not be given to the judgment-debtor, but notice shall be given to all other persons interested therein.”

As has been pointed out above, the attachment before judgment made in favour of the decree holders in C.S.Nos.303 of 2017, 401 of 2017, and 403 of 2017 would enure to their benefit on the passing of the decrees in these suits. By virtue of Order XXXVIII Rule 11, CPC, there is no question of passing another order of attachment in their favour, as the earlier attachment would continue till the decree is satisfied. (See ***S. Janakaradas v C.M Raj Mohan***, 1993 2 MLJ 371).

44. On the other hand, the decree holder in E.P.No. 69 of 2018 has invoked Order XXI Rule 51 and 52 of the CPC seeking to attach the monies lying to the credit of C.S.Nos.303 of 2017, 401 of 2017, and 403 of 2017 filed by the applicants in Application Nos. 3605, 3606 and 3923 of 2021. Order XXI Rule



51, CPC relates to the attachment of negotiable instruments and has no application to the case at hand. Order XXI Rule 52, CPC reads as follows:

“52. Attachment of property in custody of court or public officer.-

Where the property to be attached is in the custody of any court or public

officer, the attachment shall be made by a notice to such court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the court from which the notice is issued:

Provided that, where such property is in the custody of a court, any question of title or priority arising between the decree holder and any other person, not being the judgment debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such court.”

Order XXI Rule 52, CPC underwent an amendment in 1935, and the following proviso and explanation was inserted:

“(ii) Provided further that when the Court whose attachment is determined to be prior receives or realizes such property the receipt or realization shall be deemed to be on behalf of all the Courts in which there have been attachment of such property in execution of money decree prior to the receipt of such asset.

Explanation - Priority of attachment in the case of attachment of property in the custody of Court shall be



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determined on the same principle as in the case of attachment of property not in the custody of Court.”

45. A close reading of Order XXI Rule 52, CPC shows that it speaks of a Court that holds the property of the judgment debtor and a Court which directs attachment of the property lying in the custody Court. The former is alluded to as the “custody court” and the latter as the “executing-attaching Court”. This is a case where the Commercial Division assumes a dual character as both the custody Court as well as the executing-attaching Court.

46. Order XXI Rule 52, CPC requires the attaching Court to issue a notice of attachment to the custody Court directing that the fund be held by it subject to further orders of the attaching Court. Under the first proviso to Order XXI Rule 52, the jurisdiction of the custody Court is confined to an examination of any question of “title” or “priority” between the decree holder and any other person, not being a judgment debtor. There is no dispute about the title in the present case. The question, therefore, is whether the decree holders in C.S.Nos.303 of 2017, 401 of 2017, and 403 of 2017 are entitled to any priority claim by virtue of the attachments



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before judgment and payments made into the credit of their suits by the garnishee. This Court finds that the issue is no longer *res integra* and is settled by a decision of this Court in ***Ramanathan Chettiar v Chidambaram Chettiar***, (1933) 65 MLJ 347, wherein this precise issue as to priority of an attachment under Order XXI Rule 52, CPC was raised and rejected. The Court held thus:

“Admittedly, the attachment per se does not create any charge or interest on the property so as to give the first attaching creditor any preferential claim.”

47. In ***Sewdut Roy v. Sree Canto Maity***, 1906 SCC OnLine

Cal 14, Woodroffe, J observed as under:

“The law recognizes and rewards the diligence of the creditor who has realized assets for payment of his debt. But unless there has been actual realization in execution, the principle to be applied is that so far as possible creditors should be treated paripassu and that nothing short of actual realization of the debt due should give rights of priority.

The object of an attachment before judgment is simply to safeguard the property so as to enable the Plaintiff to realize the amount of his decree if he should get one. He has, however, no lien or charge on the property which remains that of the Defendant. He has a security. But this does not import present property or even beneficial interest. Further the benefit of the attachment may enure to the benefit of others than the creditor who has procured it. Though he may



have secured the goods, another decree-holder may under sec. 489 apply for the sale of them. In short a Plaintiff attaching before judgment has not by reason merely of such attachment or process incidental thereto any right to be treated preferentially to others.”

Even prior to this decision, a Division Bench of this Court had taken the same view in ***Krishnaswamy Mudaliar v. The Official Assignee***, (1903) 13 MLJ 278, wherein it was observed as under:

“4. The amendments of the law of procedure in this country, as well as of the law of bankruptcy in England, have been based upon the principle that so far as possible the creditors should be treated paripassu and that nothing short of actual realization of the debt due should give rights of priority.”

In view of the aforesaid decisions, the decree holders in C.S.Nos.303 of 2017, 401 of 2017, and 403 of 2017 cannot lay a preferential claim to the monies belonging to the judgment debtor lying to the credit of these suits.

Scope of Section 73 of the Code.

48. The next complex question is as to how the competing claims of the decree holders in C.S.Nos.303 of 2017, 401 of 2017, and 403 of 2017 and the decree holder in C.S.No.950 of 2017 are to be determined. The learned counsel for the decree holder in



E.P.No. 69 of 2018 contended that Section 73, CPC can be invoked to effect a rateable distribution of the monies lying to the credit in the three suits. In order to examine this contention, it is necessary to first set out Section 73, CPC, which stipulates the manner in which the proceeds of execution sale must be rateably distributed amongst various decree holders. Section 73, CPC reads as follows:

“(1) 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 realization, shall be rateably distributed among all such persons:

Provided as follows :

(a) where any property is sold subject to a mortgage or charge, the mortgage or incumbrancer shall not be entitled to share in any surplus arising from such sale;

(b) where any property liable to be sold in execution of a decree is subject to a mortgage or charges the Court may, with the consent of the mortgagee or incumbrancer, Order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold;



- (c) where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied-*
- first, in defraying the expenses of the sale;*
- secondly, in discharging the amount due under the decree;*
- thirdly, in discharging the interest and principal moneys due on subsequent incumbrances (if any); and*
- fourthly, rateably among the holders of decrees for the payment of money against the judgment debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.*
- (2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.*
- (3) Nothing in this section affects any right of the Government."*

49. The functions under Section 73 of the Code are to be carried on by the executing-attaching Court and not the custody Court. The custody court has nothing to do with the distribution of assets under the Code. This is clear from the concurring judgment of Krishnan, J in the Full Bench decision of ***E.M. Visvanadhan v. ArunachelamChetti***, AIR 1921 Mad 218, wherein it was held as follows:

"The custody Court has, in my view, nothing to do with the



distribution of assets under the Code, as it has to hold the property subject to the farther orders of the attaching Court; and section 73 of the Civil Procedure Code has no application to the custody Court.”

It would thus appear that the Commercial Division, as the custody Court holding the funds in the three suits, has no jurisdiction to go into the issue of rateable distribution. That is a matter solely for the consideration of the Commercial Division functioning as the executing-attaching Court in E.P.No. 69 of 2018.

50. The five conditions requisite for the application of Section 73, CPC have been succinctly set out by Kailasam, J in ***V.T VeerappaChettiar v P.S PalaniappaChettiar***, AIR 1973 Mad 313, as under:

“The following conditions have to be satisfied before S. 73 C.P.C. can be applied; (1) The decree-holder claiming rateable distribution should have applied for execution of his decree to the appropriate court; (2) such application should have been made prior to the receipt of the assets by the Court. (3) The assets of which rateable distribution is claimed must be assets held by the court (4) The decree-holder should be holder of a decree for the payment of money. (5) such a decree should have been obtained against the same judgment debtor.”

51. It now remains to be seen whether the decree holder in



E.P.No. 69 of 2018 has satisfied the aforesaid conditions.

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Admittedly, the plaintiff in C.S.No.950 of 2017 has levied execution vide E.P.No. 69 of 2018, and is the holder of a decree for payment of money against the same judgment debtor. On the facts, there is no difficulty in concluding that the first, fourth and fifth conditions have been met.

52. The next step is to ascertain whether the application for execution has been made prior to the receipt of assets by the Court. As noticed above, this is a case where the custody court and the executing-attaching court are one and the same. The moot question then is when is the exact point in time that the executing-attaching court receives the assets from the custody Court?

53. The expression “receipt of assets by the Court” in Section 73, CPC fell for interpretation by a Full Bench of this Court in *E.M Visvanathan Chetty v Arunachalam Chetti*, AIR 1921 Mad 218. The issue was whether monies deposited in Court to the credit of a judgment debtor, before being paid out to a decree holder in execution, must be dealt with on a system of



priority when several decree holders apply to have it attached or should it be paid out rateably amongst them. On a reference being made by Spencer and SadasivaAyyar, JJ, the matter was placed before a Full Bench of five Judges of this Court. In an instructive passage, Krishnan, J, in his concurring opinion, observed as follows:

“If the property attached has to be sold to convert it into money, the attaching Court will take the necessary steps under the rules for sale in the Code as in the case of any other property attached. But if it is money in the hands of the custody Court the attaching Court may direct the money to be paid over to itself. It is only when the attaching Court gets the money into its hands, so as to be available for distribution, that section 73, Civil Procedure Code, comes into play; rateable distribution will then have to be given to all decree-holders who have brought themselves under the terms of the section by having applied for execution prior to the receipt of such assets. When the attaching Court and the custody Court are the same, it seems to me that an order should be made by the Court as attaching Court for transferring the money from the suit in which it came into Court to the suit in which the attachment took place. It is only when this is done, the Court, as attaching Court, can properly be said to have received the assets and to hold it within the meaning of section 73; and decree holders when have attached prior to that are entitled to rateable distribution.”



54. In *Imperial Bank v Balasubramania Pandia*, AIR 1945

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Mad 412, a Division Bench of this Court reiterated the view that the receipt of funds within the meaning of Section 73 occurs when the custody Court passes some order transferring the amounts to the credit of the executing Court. That was also a case where the custody court and the executing-attaching court were one and the same.

55. Applying the aforesaid test to the facts of this case, as the funds lying in the custody Court (i.e., to the credit of the three suits in C.S.Nos. 303 of 2017, 401 of 2017, and 403 of 2017) have not been transferred to the file of the execution-attaching Court in E.P.No.69 of 2018, it cannot be said that the execution-attaching Court in E.P.No. 69 of 2018 has received the assets to hold it within the meaning of Section 73, CPC. Thus viewed, the second condition also stands satisfied as the EP has been lodged prior to the receipt of funds in E.P.No. 69 of 2018. The third condition would also stand satisfied the moment the funds are transferred to the file of the EP by the custody Court, as was held by Wallis CJ in *E.M Visvanathan Chetty v Arunachalam Chetti*, AIR 1921 Mad



CPC, the remaining issue is to examine how the rival claims of the decree holders in C.S.Nos. 303 of 2017, 401 of 2017, and 403 of 2017 are to be dealt with. Admittedly, these decree holders obtained attachment before judgment which continues post the passing of the decree in view of Order XXXVIII Rule 11 of the Code. Their applications for payment out, though captioned under Section 151, CPC, is in substance, one under Order XXXIX Rule 28 of the OS Rules for payment out. Should the decree holders in C.S.Nos.303 of 2017, 401 of 2017, and 403 of 2017 be driven to institute multiple execution petitions to realize their share of the monies?

58. If Section 73, CPC applies, then it must follow that the decree holders in C.S.Nos.303 of 2017, 401 of 2017, and 403 of 2017 will be entitled to a rateable distribution of the monies lying to the credit of those suits along with the decree holder in C.S.No. 450 of 2017 in E.P.No.69 of 2018. This Court is of the considered view that driving these decree holders to institute separate execution petitions would completely obfuscate the very purpose of Section 73, CPC, which is to avoid multiplicity of execution



petitions by several persons against the very same judgment

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debtor. As was pointed out by this Court in ***PalaniappaChettiar v***

Muthu VeerappaChettiar, AIR 1966 Mad 406:

“Section 73 of the Civil Procedure Code is intended to provide expeditious, summary, and cheap remedy for the execution of money decrees held against the same judgment debtor by several persons, the claims of rival decree-holders getting adjusted without the necessity for separate proceedings.”

In ***Mohd. Jan v. Haji Abdul Sattar***, AIR 1971 Del 132, a learned single judge of the Delhi High Court alluded to the object behind Section 73, CPC and held thus:

“The intention appears to be to secure an equitable distribution of the property by placing the decree-holders, if more than one, on the same level and making the property rateably divisible among them.”

59. In ***Kusum Kumari Devi v GayanathPramanik***, AIR 1936 Cal 390, the Calcutta High Court ordered pro rata distribution by applying the principle of rateable distribution of monies amongst decree holders who had not applied for execution at all. Mitter, J held that even if the case did not fall within the four corners of Section 73, CPC as none of them had made any specific application for execution, the appropriate course was to pass an



order, presumably in exercise of powers under Section 151, CPC,

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to order pro-rata distribution. The Court held as under:

“The attachments had been made at the instance of three sets of creditors. These attachments did not create any lien in favour of any of them and therefore their rights cannot be detained by priority of attachment. Having regard to this fact according to the principle laid down in the case of Thakurdas Motilal v. Joseph Iskender 1917 Cal 13, I hold that each of these three sets of creditors namely petitioner and opposite parties Nos. 3 and 4, must get the surplus sale proceeds divided amongst them pro rata, that is in proportion to their decrees.”

The Allahabad High Court has taken the same view in ***Bisheshar Das v Ambika Prasad***, (1915) ILR 37 All 575 wherein it was observed thus:

“It may be that when several decree-holders have caused the same property to be attached, but to their case Section 73 of the Code of Civil Procedure does not strictly apply, they would be entitled to a rateable distribution on general principles of justice, equity and good conscience.”

The principles of justice, equity and good conscience are the fundamental cornerstones of the administration of justice. It must also be borne in mind that Clause 19 of the Letters Patent of the Madras High Court specifically enjoins the High Court to apply equitable principles in cases before it in its ordinary original civil



jurisdiction. This clause specifically preserves the preexisting law and equity which would have been applied by the High Court if the Letters Patent had not been issued.

60. In light of the aforesaid principles, it must follow that there is no necessity to drive the decree holders in C.S.Nos.303 of 2017, 401 of 2017, and 403 of 2017 to institute separate EPs to realize their dues rateably or on pro rata i.e., in proportion to their decrees. As has been pointed out, there is no requirement of these decree holders seeking re-attachment in view of the provisions of Order XXXVIII Rule 11, CPC. All that remains to be done is to pay out the monies to these decree holders. This Court is of the considered opinion that the applications styled under Section 151, CPC can be treated as one under Order XXXIX Rule 28, OS Rules for payment out. It is too fundamental that misquoting a wrong provision cannot deprive the suitor to a relief that he is otherwise entitled to.

61. In the result, the decree holders in C.S.Nos. 303 of 2017, 401 of 2017, and 403 of 2017 will, therefore, be entitled to



rateable distribution of the monies along with the decree holder in

WEB COPY E.P.No. 69 of 2018 in C.S.No.950 of 2017.

Final Directions:

62. To facilitate the process of rateable distribution of the assets lying to the credit of the three suits in C.S.Nos. 303 of 2017, 401 of 2017, and 403 of 2017, amongst the various parties in these matters, the following directions are issued:

a) Exercising power under Order XXI Rule 52 of the Code, this Court directs that the sums lying to the credit of the Registrar General, High Court, Madras C.S Nos.303 of 2017, 401 of 2017, and 403 of 2017 shall stand attached.

b) Consequently, there shall be a direction to the Registrar General, High Court, Madras, to transfer the sums so attached to the credit of E.P 69 of 2018 pending on the file of the Commercial Division of this Court.

c) Upon receipt of funds to the credit of E.P 69 of 2018, the monies shall be rateably distributed to the decree holders in all four suits viz., C.S.Nos.303 of 2017, 401 of 2017, and 403 of 2017 and C.S.No. 950 of 2017 in the following manner:

Party	Amount in %	Amount to be paid out (in Rupees)
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M/s. Trimex	14.99%	16,84,31,151/-
M/s. MilleniumSteel	22.32%	25,09,60,166/-
M/s. Blackburn	9.51%	10,69,27,920/-
M/s. IL&FS	53.18%	59,79,41,831/-

d) In view of the order directing the rateable distribution of the monies lying to the credit of the suits in C.S.Nos. 303 of 2017, 401 of 2017, and 403 of 2017, the amounts shall cease, forthwith, to be the property of the judgment debtor in view of the decision of the Supreme Court *in Kotak & Co. v. State of U.P.*, (1987) 1 SCC 455, and shall vest with the decree holders in the proportion set out in paragraph 62(c), *supra*.

e) Upon the filing of appropriate applications for payment out, the aforesaid sums shall be paid out to the decree holders in the four suits, i.e., C.S.Nos. 303 of 2017, 401 of 2017, and 403 of 2017, and C.S.No. 950 of 2017 under due authorization and acknowledgement. For this purpose, the Master Original Side, is directed to entertain the payment out applications and order release of the sums indicated in paragraph 62(c), *supra*, to the respective decree holders.

f) Considering that all the parties have substantially succeeded in their respective applications, there shall be no order as to costs.



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N. ANAND VENKATESH.,J.

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PRE DELIVERY COMMON ORDER IN
Application Nos.3605, 3606, 3923 of 2021
in C.S.Nos.401, 403 & 303 of 2017
and E.P.No.69 of 2018 in C.S.No.950 of 2017

29.11.2021

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