(1870) 04 CAL CK 0001

Calcutta High Court

Case No: None

Abbott		APPELLANT
	Vs	
Abbott and Crump		RESPONDENT

Date of Decision: April 5, 1870

Judgement

Markby, J.
In this case a decree-holder, Abbott, applies for execution against the property of his judgment-debtor, Crump. The proceeding arises out of a suit in the Divorce Court, but I assume that the practice as to execution is that laid down by Act VIII of 1859. The application as amended by leave of the Court now stands thus:--

Attachment of the co-respondent"s two-thirds share in the assets of the business lately carried on by him in co-partnership with the petitioner, at No. 36, Dhurrumtollah Street, in the town of Calcutta, under the firm and style of Crump, Abbott, and Co., as chemists and druggists, which business is now in the hands of the Receiver of this Court, under a decree made in suit No. 609 of 1869, in this Honorable Court, on and bearing date the third day of February 1870." And the petition which accompanies the application now prays "for an order restraining the Receiver of this Honorable Court from paying or making over, and the co-respondent, William Henry Crump, from receiving, the two-thirds share of the said William Henry Crump, in the assets of the said partnership business now in the hands or control of the said Receiver, or any sum or sums of money, property, or effects to which the said William Henry Crump is entitled in respect thereof." Now, as appears from the application itself, the creditor who is seeking to take these proceedings is a partner in the business with respect to which it is sought that attachment should issue; but I treat this case precisely as if the applicant were an entire stranger. Even so treating him, he is not entitled to have the application granted. The question turns entirely on the construction of section 205, Act VIII of 1859, which has already received consideration in somewhat analogous cases. That section, to some extent, defines what property is liable to attachment; namely, lands, houses, goods, money, banknotes, cheques, bills of exchange, promissory notes, Government securities, bonds, or other

securities for money, debts, shares in the capital or joint stock of any railway, banking, or other public company or corporation, and all other property whatsoever, moveable or immoveable, belonging to the defendant, and whether the same be held in his own name or by another person in trust for him or on his behalf.

The question will be whether this not being property specifically mentioned in the section, comes under the general description of property belonging to the defendant. The word by which the property is sought to be attached, viz. "assets," is not of very definite meaning; it is clear, however, what is sought to be attached in this case. The applicant does not seek to take in execution the stock-in-trade of the partnership. He does not seek by the ordinary prohibitory order to prevent debtors of the partnership from paying their debts,--he seeks to attach what is due to the defendant after the Receiver has paid and satisfied the debts and liabilities of the partnership. The applicant seeks to attach two-thirds of those sums of money. I have to say, therefore, whether or no that is property belonging to the defendant u/s 205. One thing is clear that, whether or no by any use of the word "property" either in its widest legal or popular sense that which the execution-creditor seeks to attach in this case can be called "property," that the decisions of this Court have put some limitation on those words. I myself should doubt whether, however widely the word may be used, this can be called property "belonging to the defendant;" but this Court has already put a construction upon these words, which shows they are not to be taken in their most extended sense. In the case of Bhoobunmohun Bannerjee v. Thacoordoss Biswas 2 Ind. Jur., N.S., 277, an application was made to attach the reversionary rights of the defendant in certain property. These so-called reversionary rights are not such as are understood by those words in English law, but rights of the next taker after the death of the daughters of a Hindu widow. It was decided that the attachment could not be made. It may be argued that this case is not identical with that, as not only was it uncertain there what the successor would take, but who would be the successor. Here it is certain who will take, but uncertain what he will take; or whether there will be anything after the accounts are taken. But the case, at any rate, shows that it is not every possible right which a person may have that can be taken in execution, and therefore there must be a limitation on the word "property." Another case, in which the Court has refused to issue execution, In re Pestanji Cursetji Shroff 3 Bom. H.C. Rep., 42, is where the property sought to be taken was books of account, and it was refused on the ground that the property was not in its nature saleable. Mr. Marindin has referred to a case before the Full Bench, Cowar Rajkumar Roy v. S.M. Kadambini Debi 4 B.L.R., F.B., 175, in which it was held by all the Judges, that not only property could be attached, but any undivided share an execution-debtor might have in property might be attached; and it was truly inferred from that that the word "property" must be held as extending beyond things existing and tangible. I should be bound by that judgment, in which I entirely concur. The tangibility of the property, or its existence in specie, has nothing to do with the matter. A debt is as incorporeal as a share in a house. The section suggests one limitation, and the decision of Westropp, J., suggests another. Even if you could call these assets property, it is impossible to call them property belonging to the

defendant. What now belongs to the defendant is a share in the stock-in-trade and in the outstandings. The sum which may ultimately be found due can hardly be said to belong to the defendant before it is known what it is, or whether there will be anything. The words of the Bombay decision are, I think, that books are not property which is in its nature saleable, by which Westropp, J., does not mean that it is physically impossible to sell it, for the books could be sold, but that they are not sold, according to the ordinary dealings of persons, I do not think it would be in accordance with the ordinary dealings of persons to sell possible sums of money which might be found due to a person after accounts have been taken. I do not mean that the Court has not a discretion after attachment to consider whether it will order a sale; but sale is the end of every attachment, and the Court ought not to issue attachment against any property which, from its very nature, ought not to be sold; and I think that anything so indefinite as the rights of this judgment-debtor ought not to be sold. I look upon this as quite distinct from a share in a railway company. The rights of shareholders are the creation of the Statute incorporating the Company, and by the words of that Statute and by common usage, they are made the subject of sale. The case coming nearest to this is that of an equity of redemption. In Brajanath Kundu Chowdhry v. S.M. Gobindmani Dasi 4 B.L.R., O.C., 83, Phear, J., says: "I had been disposed always to take the view that the attachment sections of Act VIII do not apply to such property as an equity of redemption; and I have been told that Mr. Justice Norman, on one occasion, formally pronounced an opinion to that effect. But I abstain from judicially deciding that point now." I must say I should fully concur in that doubt, and have only surrendered the doubt to the words of section 271, Act VIII of 1859, "provided that when property is sold subject to a mortgage, the mortgagee shall not be entitled to share in any surplus arising from such sale." But for those words I should have been inclined to hold an equity of redemption not liable to attachment. On the whole, I consider that what the judgment-creditor desires to attach is not "property" within the meaning of the words section 205. It has been brought to my notice that, in another case, in respect to this very property, Macpherson, J., granted a similar attachment; but I cannot say whether this point was brought to his notice or considered by him; and as I do not know whether Mr. Justice Macpherson differed from my view, I must leave the party to appeal rather than refer the question to a Full Bench.