

(1924) 02 CAL CK 0054

Calcutta High Court

Case No: None

Dwarkadas Marwari

APPELLANT

Vs

Jadab Chandra Ganguly

RESPONDENT

Date of Decision: Feb. 26, 1924

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 47

Citation: (1924) ILR (Cal) 761

Hon'ble Judges: Walmsley, J; Mukerji, J

Bench: Division Bench

Judgement

Walmsley, J.

I have had the advantage of reading the judgment which my learned brother is about to deliver, and I agree in the substance of the order that he proposes to make. If there is a right of appeal to this Court, that is, if the learned Judge was right in thinking that an appeal lay to him, I agree that his decision on the merits was wrong and should be reversed.

2. Personally, however, I do not think that an appeal lay and consequently I hold that we should interfere under the provisions of Section 115, Civil Procedure Code. My reasons for thinking that no appeal lay are as follows: The view that the matter comes within the scope of Section 47, Civil Procedure Code, rests on the footing that the question has arisen between the parties to the suit brought by Sitaram. It must be that suit, because Jadab was not a party to the other. The parties to that suit are Sitaram on the one side and Jadab and Anil on the other side, and the order for rateable distribution can be treated as an order falling within the scope of Section 47 of the Code only, if it raised a question between the parties to that suit relating to the execution, discharge or satisfaction of the decree. We have to see whether there was such a question. On behalf of Jadab it is argued that there was such a question, on the ground that, but for the order of rateable distribution, Rs. 2,932-15 would have been credited towards the satisfaction of Sitaram's decree, instead of Rs.

2,631-15. It is urged that in respect of the sum of Rs. 301 there is a question between Jadab and Sitaram relating to the discharge of Sitaram's decree. I agree that there is a question relating to the discharge of the decree, but I cannot regard it as one between Jadab and Sitaram. The question is not whether Sitaram should relax his hold on any portion of the sale-proceeds, but whether Dwarka should be allowed by order of the Court to lay hands on that portion. If, however, it be conceded that the question has arisen between Sitaram and Jadab, it is obvious that it cannot be decided in the absence of Dwarka and Ram Kumar. That means that an outsider to the suit must be brought in to the proceedings, and this addition destroys the element of identity which appears to be a necessary ingredient in proceedings u/s 47 of the Civil Procedure Code.

3. As, however, I think that the Judge's order should be reversed, I see no reason to differ from the order proposed by my learned brother, and the appeal will be disposed of in accordance with his judgment.

Mukerji, J.

4. Jadab Chandra Ganguly and Pasupati Hazra were two partners in a certain business. Dwarkadas Marwari and Ram Kumar Marwari instituted a suit in the Small Cause Court at Asansol against Pasupati Hazra and one Umananda Hazra, and Pasupati Hazra having died during the pendency thereof, obtained a decree against Umananda Hazra and the heir of Pasupati Hazra, a minor named Anil Kumar Hazra. The decree was for money due from Pasupati Hazra and Umananda Hazra, in their personal capacities and had nothing to do with the partnership. The decree was put into execution against Anil Kumar Hazra in Execution Case No. 327 of 1920 of the Small Cause Court and certain moveable properties belonging to the partnership were attached, upon which Jadab Chandra Ganguly preferred a claim alleging that he had a half share therein and prayed for a release of the said half share from attachment in Claim Case No. 23 of 1920. To this Anil Kumar Hazra agreed on the understanding that his half share should be allowed to be sold in execution of the decree in the aforesaid Execution Case No. 327 of 1920. Orders to the said effect were passed on the 24th December, 1920, and the sale was fixed for the 7th January, 1921.

5. On the 7th January, 1921, Jadab Chandra Ganguly preferred another claim in Claim Case No. 1 of 1921, objecting to the sale on the ground that the half share of Anil Kumar Hazra in the moveables, that is to say the share that had been attached and was about to be sold, was not saleable. The sale was accordingly put off. Jadab was called upon to submit accounts of the partnership business which he never did, and eventually the claim was dismissed.

6. In the meantime on the 3rd January, 1921, one Sitaram Marwari obtained a decree against Jadab Chandra Ganguly and Anil Kumar Hazra in respect of monies due from the partnership, and on the 14th January, 1921, in Execution Case No. 18

of 1921 of the Subordinate Judge's Court at Asansol, attached all the moveables, a half share of which had already been attached in Execution Case No. 327 of 1920 and the said moveables were sold on the 9th March, 1921 for Rs. 3,025.

7. By petitions filed on the 1st March, 1921 and 3rd March, 1921, Dwarkadas Marwari and Ram Kumar Marwari tried to put off the sale, impugning the bona fides of the decree obtained by Sitaram Marwari and also the conduct of Jadab Chandra Ganguly in at first consenting to the half share of Anil Kumar Hazra being attached and then getting the sale of that share put off by filing a farther claim as aforesaid, and they prayed that that claim should be disposed of and the sale in execution of their decree might take place first. Eventually on the 5th March, 1921, they prayed for rateable distribution of the sale-proceeds of the share of Anil Kumar Hazra as between themselves and Sitaram Marwari. On the 19th March, 1921, Sitaram Marwari put in a petition objecting to the rateable distribution, on the ground that his decree was against the partnership and therefore the sale-proceeds must go to satisfy his decree, but thereafter on the 9th April, 1921, he put in a further petition agreeing to the rateable distribution.

8. On the 30th July, 1921, and again on the 7th December, 1921, Jadab Chandra Ganguly put in petitions objecting to the rateable distribution, mainly on the grounds that the sale-proceeds should go to satisfy the decree of Sitaram, as that decree was for money due from the partnership that the judgment-debtors in the two execution cases were, different and therefore the prayer for rateable distribution was not maintainable.

9. The learned Subordinate Judge, by orders passed on the 22nd December, 1921, held that the objection of Jadab Chandra Ganguly should be overruled on the ground of waiver and estoppel and he ordered rateable distribution in the following way: that is to say, Sitaram Marwari was to get the costs Rs. 51-9 and poundage fee Rs. 40-8 and out of the balance, that is to say, Rs. 3,025 less Rs. 92-1 a. a half, viz., Rs. 1,466-7-6 representing the share of Jadab Chandra Ganguly, and that the other half share, viz., Rs. 1,466-7-6 representing the share of Anil Kumar Hazra was to be divided rateably between the two sets of decree-holders: that is to say Sitaram Marwari was to get Rs. 1,165-7-6 and Dwarkadas Marwari and Ram Kumar Marwari were to get Rs. 301.

10. Against this order Jadab Chandra Ganguly appealed to the District Judge of Burdwan and the learned District Judge overruling an objection as to the competency of the appeal before him, allowed the appeal and ordered the whole of the sale-proceeds to be paid to Sitaram Marwari.

11. The present appeal and application in revision have been preferred by Dwarkadas Marwari and Ram Kumar Marwari against the aforesaid order of the learned District Judge.

12. Of the contentions put forward on behalf of the appellant, it is necessary to notice only two, viz., that no appeal lay against the order of the learned Subordinate Judge and that Jadab Chandra, having expressly consented to the attachment of the half share of Anil Kumar Hazra, must be taken to have waived all objections to the rateable distribution of the sale-proceeds on the footing that they represented the proceeds of partnership property and must be availed of first to satisfy the debts of the partnership.

13. On behalf of the respondent, it has been urged that the question decided by the learned Subordinate Judge was one between the parties to the suit and related to the execution, discharge or satisfaction of the decree passed therein and therefore came within the purview of Section 47, CPC and was appealable; that the whole of the sale-proceeds must, in view of Section 262 of the Contract Act, go towards the payment of the partnership debts and further that the application for rateable distribution was not maintainable inasmuch as the judgment-debtors of the two decrees are not precisely the same. The respondent also supports the view which found favour with the learned District Judge that he was not precluded from objecting to the rateable distribution by reason of his petition of consent releasing the half share of Anil Kumar Hazra in the moveables.

14. The first point for consideration, therefore, is whether an appeal lay to the District Judge against the order of the Subordinate Judge. Now, an order u/s 73, Civil Procedure Code, is not appealable unless it also comes u/s 47, Civil Procedure Code, and satisfies all the requirements thereof: *Balmer Lawrie & Co. v. Jadunath Banerjee* I.L.R (1914) Cal 1. In order to be appealable, the order must, therefore, decide a question arising between the decree-holder Sitaram Marwari on the one hand and the judgment-debtors Jadab Chandra Ganguly and Anil Kumar Hazra on the other. In determining whether the order passed by the learned Subordinate Judge fulfilled these tests, the cases cited at the bar do not afford us any real assistance. In *Jagadish Chandra Shaha v. Kripa Nath Shaha* I.L.R (1908) Cal 130, the petitioner had a decree against certain judgment-debtors, the opposite party had a decree against certain judgment-debtors who were not exactly identical with the former set of judgment-debtors, the opposite party applied for rateable distribution, the application was refused by the Court of first instance; the opposite party appealed and an order for rateable distribution was passed by the Appellate Court. The petitioners then appealed to this Court and it was held that the order of the Court of first instance refusing rateable distribution did not come u/s 244 of the old CPC and therefore no appeal lay from it. This presumably was on the ground that there was no determination on any question relating to the execution, satisfaction or discharge of the decree which was under execution as between the parties to the suit in which it had been passed and the order only purported to decide a contest between two rival decree-holders. In *Balmer Lawrie & Co. v. Jadunath Banerjee* ILR (1914) Cal 1, the petitioners had obtained a decree against a firm, while the opposite party had obtained a degree against one of the partners of the firm. Daring the

pendency of a proceeding for rateable distribution as between the opposite party and certain other execution creditors of the said partner, the petitioner had made an application for rateable distribution which was refused. That order was held as being one between two rival decree-holders which did not affect the interest of the judgment-debtor and so did not come u/s 47, Civil Procedure Code, so as to confer a right of appeal. In cases where, as between the parties to the suit, a question relating to the execution, satisfaction or discharge of the decree passed therein has been decided by the order for rateable distribution, it has always been held that an appeal lies: Venkata Perumal v. Venkata Reddi I.L.R (1915) Mad. 570, Sorabji Coovarji v. Kala Baghunath ILR (1911) 36 Bom. 156. In the case of Rashi Ram v. Mani Ram ILR (1892) All. 210, the Court held that the order, which was passed in that case and by which rateable distribution was refused, did not decide a question which arose between the parties to the suit in which, the decree was passed or their representatives within the meaning of Section 244 of the old Code of Civil Procedure. In the case before us, the order passed by the learned Subordinate Judge determined, on the application of Dwarkadas Marwari and Ram Kumar Marwari, a question as between Sitaram Marwari on the one hand and the judgment-debtors Jadab Chandra Ganguly and Anil Kumar Hazra on the other, as to what extent the decree under execution was to be satisfied and therefore in my judgment the order came under the purview of Section 47, CPC and the learned District Judge was, in my judgment, right in his view of the competency of the appeal before him.

15. Coming now to the merits, the whole basis of the order of the learned District Judge is that the decree being for recovery of monies due from the partnership, no rateable distribution Could be made and the whole of the sale-proceeds should be available for its satisfaction. In my judgment the petition of the respondent preferring a claim to a half share and consenting to a release of his half share only and agreeing to the sale of the half share of Anil Kumar Hazra in execution of the decree for the personal debts of the latter's father amounted to a declaration that the partnership had ceased and had the effect of divesting the said half share of the moveables of its character as partnership property and to such property the provisions of Section 262 of the Indian Contract Act, relating to partnership property would no longer apply. The Subordinate Judge was perhaps not right in the view that this conduct of Jadab Chandra Ganguly amounted to waiver or estoppel, and it may be that the principle that where a party has elected to adopt a certain course of action he will be confined to that course which he has deliberately adopted may not apply in the present case. It is clear, however, that neither Sitaram Marwari nor Jadab Chandra Ganguly, until he applied on the ground that the said half share was not saleable in execution of the decree of Dwarkadas Marwari and Ram Kumar Marwari, treated this half share as still clothed with the incidents of partnership assets. In my opinion the learned District Judge was wrong in the view that he took of the matter and the principle underlying the decision of the learned Subordinate

Judge is the correct one to apply to the case.

16. As for the maintainability of the application for rateable distribution, the contention of the respondent is based upon the amendment of the law due to the insertion of the word "passed" in Section 295 of the CPC (Act X of 1877). As observed by Strachey C.J., in *Bithal Das v. Nand Kishore* ILR (1900) 23 All. 106:

The object of the section is two-fold. The first object is to prevent unnecessary multiplicity of execution proceedings, to obviate, in a case where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling the property. The other object is to secure an equitable administration of the property by placing all the decree-holders in the position I have described upon the same footing, and making the property rateably divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property." These objects would not be furthered, but rather defeated, by putting upon the rule the interpretation which the respondent asks us to adopt. In *Balmer Lawrie & Co. v. Jadunath Banerjee* ILR (1914) Cal 1, this Court declined to express any opinion on the question as to whether the principle enunciated in the Full Bench decision in the case of *Gonesh Das Bagria v. Shiva Lakhshman Bhakat* ILR (1903) Cal 583 was affected by the alteration of the law. In my opinion, if the Legislature intended to effect any such alteration, it would have expressed it in terms more clear and specific. This contention put forward on behalf of the respondent must fail.

17. I therefore agree with my learned brother in reversing the order of the learned District Judge and restoring that of the learned Subordinate Judge with costs in all Courts--the hearing fee in this Court being assessed at three gold mohurs. The Rule is discharged.