

(1936) 08 CAL CK 0026

Calcutta High Court

Case No: None

Sailendra Krishna Choudhury

APPELLANT

Vs

Harendra Kumar Roy and Others

RESPONDENT

Date of Decision: Aug. 4, 1936

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 42, Order 21 Rule 53

Citation: 167 Ind. Cas. 430

Hon'ble Judges: S.K. Ghose, J; D.N. Mitter, J

Bench: Division Bench

Judgement

D.N. Mitter, J.

1.This is an appeal by the assignee of the decree-holder against an order of the Subordinate Judge, Dacca, dismissing his application for execution of decree which is said to be partly preliminary and partly final. It is unfortunate that the respondent has not appeared in this case, but although Mr. Das for the appellant has fairly placed the case before us, the absence of the respondent is a sensible disadvantage. It becomes necessary to examine the facts of the case and the legal arguments a little more carefully than it would have been necessary if the respondents had been represented before us.

2. It appears that Harendra Kumar Roy, the respondent, brought a suit for partition of certain immovable properties and dissolution and winding up of certain Ijmalikarbars belonging to the parties in; the suit against Pulin Krishna Roy and others. That suit was numbered as Suit So.302 of 1918 and in that suit a final Decree for partition and preliminary decree for accounts were made as a result of a settlement reached by the parties. By the portion of the decree which was final the parties were given separate allotment of immovable properties, and to equalise the partition defendants Nos. 11(ka) to 11(ga) became entitled to get Rs. 6,289-5-3 from the plaintiff as compensation money. The said defendants Nos. 11(ka) to 11(ga) were

afterwards adjudged insolvents in the insolvency jurisdiction of the High Court and their estate including their rights to get the amount of compensation under the decree aforesaid vested in the Official Assignee, who sold by public auction on August 8, 1925, the right, title and interest of the insolvents in the out standings together with interests, profits and the properties and subject-matters of pending suits, decrees obtained. prior, and after the insolvency, all fully described in the schedules annexed to Ex. 2, and the appellant Sailendra Krishna Choudhury was declared the purchaser thereof for a sum of Rs. 325 and the Official Assignee executed a formal conveyance on August 21, 1925, in favour of Sailendra. The schedule referred to in the said deed of assignment mentioned the due of Rs. 6,289-5-3 from Harendra Kumar Roy on the decree in suit No. 302 of 1918 of the Subordinate Judge's Court, Dacca: see pp. 1-3, part 2, of the paper-book. Prior to this assignment, however, the Official Assignee tiled an application for the execution of the said decree before the Dacca Court, and Sailendra, the appellant before us, afterwards got himself substituted in place of the Official Assignee and was allowed to execute the decree. Sailendra got the execution case, transferred to the First Subordinate Judge's Court at Faridpur with a view to the attachment and sale of the immovable properties of Harendra, the respondent before us, situate in that District, and got some of the properties of the respondent sold by public auction and the sale was confirmed on December 15, 1930. The sale fetched the sum of Rs. 2,100 Sailendra filed an execution case before the Subordinate Judge at Dacca for realizing the balance by attachment and sale of the right, title and interest of Harendra in the preliminary decree for dissolution and accounts of the partnership. The Commissioner is making an inquiry into the said accounts. The respondent, Harendra put in an objection to the application for execution for the balance contending that Sailendra is not entitled to maintain the application for execution on two grounds: (1) that the application is barred by limitation, and (2) that a preliminary decree for accounts is not liable to attachment and sale under Order XXI, Rule 53 of the Code, seeing that the preliminary decree for accounts is not a decree for a sum certain. A further contention was raised that Sailendra is not entitled to maintain this application as the assignment was not valid and was tainted by fraud and collusion. The question of limitation was not pressed before the trial Court and has not been raised before us. With regard to the maintainability of the application for execution, it appears that although notice of assignment was given to Harendra he never appeared to contest the assignment and is now precluded from raising the contention, but notwithstanding Ibis finding, the Subordinate Judge has recorded the finding that the kobala Ex. 2 obtained by Sailendra for the nominal sum of Rs. 325 seems to be a collusive affair. The Subordinate Judge was of opinion that the only question emerged for determination in the case was whether a preliminary decree for accounts can be attached and sold in execution of another decree, and he held that a preliminary decree for dissolution of partnership and accounts is not an executable decree and therefore not attachable, and that the application for execution is premature and. cannot proceed. He has accordingly

dismissed the application for execution. Hence the present appeal by Sailendra, the assignee of the decree-holder.

3. Against this decision, the present appeal has been brought, and it has been contended before us that a decree for dissolution of partnership and accounts is an executable decree and is liable to attachment and sale. It has been further contended that the Court below has erred in going into the legality or validity of the conveyance by the Official Assignee to the appellant, and it ought to have held that the Raid question could not be raised by the judgment debtor and that at any rate the finding that the conveyance by the Official Assignee to the appellant is a collusive affair is erroneous. So far as the last two contentions are concerned, we are of opinion that it was not open to the judgment-debtor to question the validity of the conveyance (Ex.2) on the principle that at a preliminary stage of the same execution proceedings the assignment was proved and substitution of the assignee was made with notice to respondent judgment-debtor and that the finding that the conveyance by the Official Assignee to the appellant is a collusive affair must be set aside as it was not competent to the Execution: Court to question the validity of the assignment having regard to the principles laid down in *Mungal Pershad Dichit v. Girija Kant Lahiri* 8 C 51 : 8 I.A. 123 : 4 Sar. 249 : 11 C.L.R. 113 : 4 Sar. 248 The first contention that the decree for dissolution of partnership and accounts is a decree for money within the meaning of Order XXI, Rule 53, of the Code is a question which is not free from doubt or difficulty. In the execution petition printed at pp. 8 and 9, part 1, order XXI, Rule 53, is not mentioned but in the 10th column of the said petition the prayer of the decree-holder is that the whole of the decretal amount together with the costs of the execution may be realised by attachment and the sale of the entire rights, interests and proofs of the judgment-debtor in Title Suit No. 302 of 1918 of the Court of the Subordinate Judge, Dacca. The question is whether a preliminary decree for accounts in a suit for dissolution, of partnership can be regarded as a decree for the payment of money within the meaning of order XXI, Rule 53 of the Code.

4. On the face of it, it is not a decree for the payment of money as there is no such direction in the decree except perhaps in the matter of costs. The amount due to the judgment-debtor is not an ascertained sum of money; for aught one knows the inquiry into the accounts of this partnership may result in a final decree for the payment of the money against the plaintiff who is a judgment-debtor in the present case. It is true that the preliminary decree for taking accounts is no doubt final as regards the questions settled by that decree including the liability of the defendants to render an account to the plaintiff: see *Rahimbhoy v. Turner* 15 B. 155 : I.A. 6 5Sar. 639 : 15 Ind. Jur. 30 Under the present Code the final decree in a suit for accounts of the partnership may be either for the payment of money by the plaintiff to the defendant; and vice versa. If a balance is found against the defendant as a result of the enquiry into accounts the defendant is bound to pay the same to this plaintiff. If on the contrary the balance is found against the plaintiff he will be bound to pay the

same to the defendant (see Form No. 22 of Appendix D). It is difficult to say in these circumstances that such a decree is a decree for the payment of money either in favour of the plaintiff or in favour of defendant until accounts are taken and examined by the Court and finally determined by it. A reference has been made in the course of argument to a decision of the Bombay High Court in *Sidlingappa Iraappa v. Shankarappa Karibasappa* 27 B. 556 : 5 Bom. L.R. 529. which lays down that a decree for dissolution will be so far regarded as a money decree and that, therefore, it can be attached but cannot lie sold. This decision, however, proceeds on an admission made in the course of argument and cannot be regarded as an authority for the decision of the point in controversy. On that other hand the view we take receives support from a decision of Thiruvengkatachariar, J., in [Immidiseti Dhanaraju and Others Vs. Motilal Daga and Others,](#) . We are not unmindful of the provisions of Order XXI, Rule 42, which enacts that:

Where a decree directs an enquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him is ascertained, be attached as in the case of an ordinary decree for the payment of money.

5. The words any other matter cannot, in our opinion, include a preliminary decree directing the taking of accounts in a partnership suit. This rule deals expressly with the decrees for mesne profits and rents. In these cases the defendant can only be the judgment-debtor, but the plaintiff can never be the judgment debtor. No decree can possibly be passed in those cases rendering the plaintiff liable to the defendant. That is the essential difference between those decrees and a decree in the partnership suit directing accounts to be taken, as in the latter case the question as to who will be the judgment debtor will depend on the result of the accounts. The Subordinate Judge is right in holding that this application for execution is premature. The result is that the appeal must be dismissed subject to the variation that the finding that the kobala. Ex 2 obtained by the appellant for a nominal sum of Rs. 323 is a collusive a lair and must be set aside.

S.K. Ghose. J.

6. I Agree