
(1922) 03 MAD CK 0003
In the Madras High Court

Abdul Wahab Sahib

APPELLANT

Vs

M. Rokia Bibi Sahiba and Others

RESPONDENT

Date of Decision : 16-03-1922

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 97

Citation : 73 Ind. Cas. 903

Hon'ble Judges : Kumaraswami Sastri, J

Bench : Single Bench

Judgement

Kumaraswami Sastri, J.—This matter arises out of a report submitted by the Official Referee in pursuance of an order dated the 8th of April

1921. The suit was filed by the plaintiff for a dissolution of partnership and for the taking of the partnership accounts, the case for the plaintiff being

that he and his father, the deceased Hajee Abdul Ghani Sahib, were trading in partnership from the 1st of September 1015 on the terms mentioned

in the plaint. The defendants are sued as the legal representatives of the deceased Hajee Abdul Ghani Sahib. Defendants Nos. 1 and 3 filed written

statements denying that the partnership was carried on on the terms mentioned in the plaint and alleged that the plaintiff worked in the business only

up to the end of October 1917 and that he had overdrawn his share of the profits. The 2nd defendant filed a written statement putting the plaintiff

to the proof of his claim. The 4th defendant is the plaintiff himself and is on record as ore of the legal representatives of his father.

2. The following issues were settled:

(1) What were the terms of the partnership between the plaintiff and the deceased Hajee Abdul Ghani Sahib?

(2) What was the duration of the said partnership?

(3) Are the sums referred to in paragraphs 9 and 10 of the plaint assets of the partnership?

(4) What are the shares of the parties as heirs in the estate of the deceased Hajee Abdul Ghani Sahib?

(5) To what, relief are the parties entitled?

3. When the suit came for trial, Coutts-Trotter, J., without determining any of the matters in controversy in the suit passed the following order on

the 8th of April 1921: ""The whole case is referred to the Official Referee to determine what share the plaintiff had in the business carried on by the

deceased Hajee Abdul Ghani Sahib and having determined that, to take a full account as in an ordinary partnership action and report to this

Court."" The 1st defendant states that this order was passed by consent of all parties, but this is not admitted by the plaintiff nor does tire order

purport to have been passed by consent. In pursuance of this order what is called an interim decree was drawn up by the office.

4. Objections have been filed to the Official Referee's report by the plaintiff. The Official Referee in the report submitted has not taken an account

but has confined his report to the determination of Issues Nos. 1, 2 and 4, viz., as to the terms of the partnership, its duration and the shares of the

parties. The objection taken by the plaintiff is that the Official Referee had no jurisdiction to go into these questions; that the order referring the

whole suit to him by Coutts-Trotter, J., was without juridical and is ultra tins, and that, even if tie Official Referee had power to go into these

questions, his decision is wrong on the merits. It is contended for the defendants (1) that the Official Referee has power to go into the matter; (2)

that, even if he has no power, the order of Coutts-Trotter, J., referring the whole suit to him cannot be questioned in this suit so long as it remains in

force and has not been set aside either by review or by way of appeal, and (3) that Section 97 of the CPC prevents the correctness of a

preliminary decree not appealed against from being disputed in appeal from any final decree that may be passed and so a appeal bars any

objection to proceedings in tie suit necessary for the obtaining of tie final decree.

5. As regards the objection founded on Section 97 of the Civil Procedure Code, the order is not an interim decree or even a judgment within the

meaning of the Letters Patent. Rule 13 of Order XX of the CPC provides that where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved and directing such accounts to be taken, and other acts to be done, as it thinks fit. Section 2, sub Clause (2), of the Civil Procedure Code, defines decree as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final and the explanation states that a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final. In order, therefore, for an order to be a preliminary and partly final. In order therefore, for an order to be a preliminary decree the Court should dispose of finally some at least of the matters in controversy. In the present case there is nothing disposed of. All that the learned Judge states is, that the whole work is to be done by the Official Referee, no rights of the parties having been adjudicated upon. Nor is the order of the 8th of April a judgment within the meaning of Clause 15 of the Letters Patent, as there is no adjudication on any matter. I need only refer to *Tuljaram Row v. Alagappa Cheitiar* 8 Ind. Cas. 340 : 35 M. 1 21 M.L.J. 1, where the definition of judgment is fully discussed by a Full Bench of this Court. Sir Arnold White, C.J., observes as follows: "The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent.

6. As regards the powers of the Official Referee to go into the questions. I am of opinion that he has no power to decide questions as to the terms of partnership, its duration or the shares of the partners. So far as the Official Referee is concerned, there are no provisions in the CPC or in the Original Side Rules analogous to Order XXXVI of the Rules of the Supreme Court which deals with Referees and Order LV, which deals with the powers and duties of Masters, and, therefore, it is not necessary to consider the procedure in English Courts or the English decision based on those Rules in arriving at a conclusion as to the powers of the Official Referee of this Court. There is no Statute constituting the office of the Official Referee, and his powers have, therefore, to be determined with reference to the provisions of the CPC and the Original Side Rules. So far as the Code is concerned, Section 75 enacts that, subject to such conditions and limitations as may be prescribed, the Court may issue a Commission to examine any person to make a local investigation; to examine or adjust accounts; or to make a partition. Order XXVI refers to Commissions issued in pursuance of the powers conferred by Section 75, and Rules 11 and 12 refer to Commissions to examine or to adjust accounts. Rule 11 enacts that in any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment, and Rule 12 enacts that the Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings, which he may hold on the enquiry, or also to report his own opinion on the point referred for his examination. Clause (2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further enquiry as it shall think fit. Rules 15 to 18 contain general provisions as, to the expenses of the Commission, the powers of the Commissioner to examine parties, witnesses and documents and the appearance of the parties before the Commissioner. Prior to the appointment of the Official Referee in the year 1914 the practice of the Court was to appoint Commissioners ad hoc, whenever accounts had to be gone into in partnership, partition and administration actions. The practice was usually for a Vakil to be appointed who submitted his report, and

the matter was disposed of by the Judge in Chambers in the Reference Court. This procedure having been found to be dilatory and inconvenient, it was thought desirable that there should be an officer of Court to do what was usually done by the Commissioner appointed and an Official Referee was appointed; but the Rules do not confer on the Official Referee any higher powers than those conferred on the Commissioners. Order XXIII of the Original Side Rules refers to the procedure in cases of reference to a Judge in Chambers and the provisions of that Order relate to cases where the Judge takes the accounts himself. Order XXIV relates to reference to Commissioner or arbitrator. Order XXIV-A refers to proceedings to fore the Official Referee and Rule 1 provides that, subject to the Rules hereinafter contained, Order XXIV of the Original Side relating to accounts and enquires referred to a Commissioner shall, as far as practicable, apply to all proceedings before the Official Referee. Order XXIV-A while it prescribes the procedure to be followed by the Official Referee does not give him the powers which are conferred by the English Supreme Courts Rules on the Official Referee or Master. Rule 4 of Order XXIV-A has been rephrased to but it does not enter on the Referee all the powers of a Judge or constitute him a Judge of the Court. All that it states is that in matters within his competence he shall conduct the enquiry in the same manner as a Judge in Chambers hearing references. It seems to me that the Official Referee's powers, limited as they are, must be sought for in the Civil Procedure Code and the Original Side Rules and that, having regard to the provisions referred to by the above, the Official Referee is in partnership suits only a permanent Commissioner whose duty is to take accounts and make enquiries contemplated by the Code and the Rules. There has to be a sharp division between the function of a Judge disposing of a suit and a Commissioner who is to aid the Judge in taking accounts rendered necessary for the passing of a final decree. I think that the function of the Court in such cases is to determine the rights of the parties where the rights of the parties or the terms of the partnership are disputed and to decide in what manner and from what date accounts are to be taken. The function of the Official Referee is to take accounts having regard to the declarations of the rights of the parties made by the Judge in passing the preliminary decree and his powers to deal with the questions are not limited simply to matters of arithmetic but he has, for the purposes

of carrying into effect the directions given by the Judge in the preliminary decree and for the purpose of arriving at conclusions as to the state of

accounts between the parties, power to take evidence and deal with matters auxiliary thereto. He is not a Judge of the Court but only a

Commissioner and I think that the adjudication by him of these questions which; under the Court and the Rules, form part of the functions of a

Judge would be ultra vires. The Judge referring to the Official Referee questions which have to be tried by himself could not confer jurisdiction on

the Official Referee any more than he can confer jurisdiction on a stranger by asking him to decide points in dispute in the case. Questions as to the

substantive rights of the parties are solely within the province of a Judge and matters of detail, i.e. the working out of those rights either by taking out

accounts or effecting a partition or selling properties are, under the rules, functions which the Judge may delegate to the Official Referee. While it is

conceded by Mr. Etharaja Mudaliar for the defendants that there is nothing in the Code or in the Rules which gives the Official Referee powers to

dispose of questions in dispute as to the substantive rights of the parties his contention is that in the absence of any provisions in the Code or in the

Rules, the English Rules of Practice should apply, but no authority is cited for the proposition that the Rules of Procedure of the English Courts

form part of the substantive Rules on the Original Side. It will be a novel and, in my opinion, a dangerous proposition to hold that the Rules of

Practice in English Courts apply en bloc to the Original Side except in so far as our own Rules modify them.

7. The question, however, remains as to how far I have power in these proceedings to treat the order of Coutts-Trotter, J., and the report of the

Official Referee as mere nullities. It is contended by the Advocate-General for the plaintiff that, if Coutts-Trotter, J., had no jurisdiction to pass the

order referring the whole suit to the Official Referee, no consent of parties, even if it was given at the time of the passing of the order, would affect

the question, and that the proceedings before the Official Referee would be a nullity thereby leaving the whole matter in the same position as it was

when the order was passed and reference is made by him to *Ledgard v. Bull* 9 A. 191 : 13 I.A. 134 : 4 Sar. P.C.J. 741 ; *Minakshi Naidu v.*

Subramanya 11 M. 26 : 14 I.A. 160 : 5 Sar. P.C.J. 54 : 11 Ind. Jur. 393 : 4 Ind. Dec. 18 (P.C.); *Rajlakshmi Dasi v. Datayanee Dasee* 12 Ind.

Cas. 464 : 38 C. 639, Nusserwanjee Pestonjee v. After Mynooddeen Khan 6 M.I.A. 134 : 19 E.R. 30 and Raja Har Narain Singh v. Chaudhrain

Bhagwant Kuar 13 A. 300 : 18 I.A. 331. There can be little doubt that, so far as the authorities go, want of jurisdiction in a Judge to try a suit

renders the proceedings void and that no amount of consent could confer jurisdiction where no jurisdiction exists. The principle has thus been laid

down by their lordships of the Privy Council in *Ledgard v. Bull* 9 A. 191 13 I.A. 134 : 4 Sar. P.C.J.741 ""When the Judge has no inherent

jurisdiction over the subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may

constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities

which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits,

the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure which, if objected

to at the time, would have led to the dismissal of the suit."" The authorities cited, however, refer to objection being taken either in appeal from the

decision or in subsequent suits or proceedings. The cases cited by the Advocate-General do not touch the question as to how far in the same suit

and in the same proceedings, it is open to the parties to get behind an order passed, however incorrect that order may be. No authority has been

cited in favour of the contention of the Advocate-General that I ought to go behind the order of *Coutts-Trotter, J.*, and the authorities I shall refer

to are against the contention. In *George Henry Hook v. Administrator-General of Bengal* 60 Ind. Cas. 631 : 48 C. 499 : 19 A.L.J. 366 , their

Lordships of the Privy Council held, that the principle of *res judicata* is applicable to all orders passed in the same suit between the same parties

when the question arises in subsequent proceedings in the suit. The order of *Coutts-Trotter, J.*, standing as it does unreversed or unmodified either

by appeal or review, must, I think, be taken to bind the parties in subsequent proceedings in the suit, and that the only remedy of the plaintiff is to

carry the order in appeal. I have already pointed out that in the present case no appeal lies at present, but under the Code an order passed which

is not subject to appeal can be objected to after the passing of the final decree which under the Code can be appealed against. I think also, that a

distinction has to be drawn between cases where the Court has no jurisdiction to try the suit and cases where the Court having jurisdiction passes

an order which it is incompetent to pass. It cannot be disputed that in the present case Coutts-Trotter, J., had jurisdiction to try the suit though, in

the view I take, he had no jurisdiction to refer the whole suit to the Official Referee for disposal. In *Mungul Pershad Dichit v. Grija Kant Lahiri* 8

C. 51 : 11 C.L.R. 113 : 8 I.A. 123 : 4 Sar. P.C.J. 249 : it was held by their Lordships of the Privy Council that where a Court having jurisdiction

to try an issue has given an erroneous decision, such decision must, if unreversed, be treated as valid. I may also refer to *Sukhnath Rai v. Nehal*

Chand 18 A.L.J. 644 : 2 U.P.L.R. (A.) 240 . It has been held that where a decree is passed by a Court not having jurisdiction and the decree is

not appealed against objection cannot be taken in execution proceedings which forms a continuation of the suit. In *Gomatham Alamelu v.*

Komandur Krishnamacharlu 27 M. 118 a suit on a mortgage was instituted in a District Munsif's Court, which was competent to try a suit of its

nature and value, but the mortgaged lands were situate outside the jurisdiction of the District Munsif, who would, therefore, have had no

jurisdiction, objection was taken, to pass a mortgage-decree affecting the lands. Such a decree was passed and when the decree-holder applied

for an order absolute and for execution of the decree objection was taken that the Court had no jurisdiction to entertain the suit and that the decree

passed by it could neither be made absolute or be executed. It was held that the decree was not a nullity and that the judgment-debtor should not

be allowed to object to the validity of the decree in the course of its execution. In *Tuljaram Raw v. Gopala Aiyar* 40 Ind. Cas. 611 : (1917)

M.W.N. 234 it was held that erroneous orders should be vacated by proper proceedings and should not be made the subject of collateral attack

by the parties. In *Sashikanta Acharyya v. Raja Sarat Chandra Rai Chaudhuri* 70 Ind. Cas. 6 : 34 C.L.J. 415 it was held that the validity of an order

at one stage of a litigation, unless forthwith challenged by appropriate proceedings in a Superior Tribunal, must be regarded as conclusive between

the parties and cannot be questioned or collaterally attacked at a later stage, and reference was made to *Krishana Behari Roy v. Bunwari Lall Roy*

2 I.A. 283 : 25 W.R. 1 . *Mungul Pershad Diohit v. Grija Kant Lahiri* 11 C.L.R. 113 : 8 I.A. 123 : 4 Sar. P.C.J. 249 , *Ram Kirpal v. Rup Kuari* 6

A. 269 : 11 I.A. 37 : 4 Sar. P.C.J. 489 : 3 Ind. Dec. 718 (P.C), Beni Ram v. Nanhu Mal 7 A. 102 : 4 Sar. P.C.J. 564 : 4 Ind. Dec. 138 (P.C),

George Henry Hook v. Administrator-General of Bengal 23 Bom. L.R. 648 : 48 I.A. 147 : 25 C.W.N. 915 : 14 L.W. 221 (P.C). and Rajeswara

Srthupati Avergal [Raja of Ramnad] v. Velusami Tevar 39 Ind. Cas. 880 : 23 C.W.N. 581 : 19 A.L.J. 168 :. I may also refer to Ex parte,

Manohar Bhivrav 2 B.H.C.R. 374 and Sadasiva Pillai v. Ramalinga Pillai 15 B.L.R. 383 : 24 W.R. 193.

8. It is argued by the Advocate-General that a distinction should be drawn between processual irregularities and fundamental defects of

jurisdiction, but it seems to me that the decisions, I have referred to above do not support the view that an order without jurisdiction passed in a

suit which the Court had jurisdiction to entertain and try can be treated as a nullity by the same Court in subsequent poceedings.

9. In the view I take of the case, I think that, so far as the proceedings on the Original Side are concerned, I must treat the order passed by

Coutts-Trotter, J., as valid. The reference will proceed on that footing. The objections to the Official. Referee's report will be considered on the merits.