
(1938) 01 MAD CK 0026
In the Madras High Court

Bademian Saheb (Adjudged Insolvent) and Another	APPELLANT
Vs	
P.M. Jankan Saheb	RESPONDENT

Date of Decision : 17-01-1938

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 17

Citation : AIR 1938 Mad 438 : (1938) ILR (Mad) 734 : (1938) 47 LW 448 : (1938) 1 MLJ 495

Hon'ble Judges : Alfred Henry Lionel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.—The petitioner filed a suit in the Court of the District Munsiff of Dharmapuri for the taking of accounts of a partnership. A preliminary decree was passed on the 9th of October, 1933 and the District Munsiff appointed a Commissioner to take the accounts. The plaint contained no-allegation of irregularity or fraud, but during the taking of the accounts the petitioner wished to urge that certain transactions had been suppressed by the respondent and consequently asked that these matters should be inquired into. On objection being raised to this course the petitioner applied to the Court for an order directing the Commissioner to inquire into the alleged irregularities. By an order dated the 10th of February, 1934, the District Munsiff held that it was beyond the province of the Commissioner or the Court to embark on an inquiry into these allegations. He considered that it was then too late. The petitioner had had an opportunity of inspecting the accounts and as no objection had been raised before the passing of the preliminary decree the petitioner must be deemed to have waived all objections. The petitioner thereupon applied to this Court for revision of the order. The matter came before Beasley,

C.J. and Venkataramana Rao, J., on the 8th February, 1937.

Feeling some doubt as to the correctness of the decision of the Full Bench of this Court in *In re The District Munsiff of Tiruvallu* (1911) 24 M.L.J.

637 : ILR 37 Mad. 17 (F.B.) the following question was referred to a Full Bench of five Judges:

Are Civil Rules of Practice made under the Code of 1882 but not re-enacted and published in accordance with the procedure prescribed in Part X

of the Code of 1908 and inconsistent with any of the rules of the first schedule of the latter Code valid and have they any legal effect?

2. The Court as now constituted is called upon to give the answer.

3. The Civil Rules of Practice relating to suits for the dissolution of partnership and the taking of accounts are inconsistent with Order 20, Rule 17

of the CPC and it is this fact which has given rise to the question now under discussion. The Civil Rules of Practice require questions of irregularity

or fraud to be raised and determined before the case is remitted to the Commissioner for the taking of the accounts. Order 20, Rule 17 of the

Code of Civil Procedure, however, states that the Court may either by the decree directing an account to be taken or by any subsequent order

give special directions with regard to the mode in which the account is to be taken and in particular may direct that in taking the account the books

of account in which the accounts in question have been kept shall be taken as prima facie evidence of the truth of the matters therein contained with

liberty to the parties interested to take such objection thereto as they may be advised. Therefore the Code allows questions of irregularity and

fraud to be raised before the Commissioner if the Court considers that this should be done. It is to be observed that the Civil Rules of Practice

were framed under the Code of 1882, which did not contemplate a preliminary decree in a partnership suit.

4. In order to answer the question referred it is necessary to examine certain provisions of the Code of 1908. Section 2(1) makes it clear that the

Code includes the rules in the First Schedule. Therefore Order 20, Rule 17, is as much a part of the Code as the sections forming the body of the

Act. Section 121 states that the rules in the First Schedule shall have effect as if enacted in the body of the Code until annulled or altered in

accordance with the provisions of Part X, which comprises Sections 121 to 131. u/

s 122, High Courts established under the Indian High Court

Act, 1861, or the Government of India Act, 1915, may, from time to time, after previous publication, make rules regulating their own procedure,

and the procedure of Civil Courts subject to their superintendence, and may by such rules annul, alter, or add to all or any of the rules in the First

Schedule. Section 123 gives power to constitute a Rule Committee of the High Court and states how the Committee shall be composed. Section

124 requires the Committee to report to the High Court on any proposal to annul, alter or add to the rules in the First Schedule or to make new

rules and states that before making any rules u/s 122 the High Court shall take such report into consideration. Section 126 says that the rules made

under Part X shall be subject to the previous approval of the authority prescribed by the proviso to Section 107 of the Government of India Act,

1915. So far as this Court is concerned, the authority is the local Government. Section 127 provides that the rules so made and approved shall be

published in the Gazette of India or in the local Official Gazette, as the case may be, and shall from the date of publication or from such other date

as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had

been contained in the first Schedule.

5. Section 157 stipulates that the rules made under the Code of 1882 shall so far as they are consistent with the Code of 1908 have the same force

and effect as if they had been made under the new Code, but such rules must not be inconsistent with the new Code. If they are inconsistent the

old rules cease to have validity. When the Code of 1908 was enacted, the Civil Rules of Practice then in force were not re-enacted and published

in accordance with the provisions of Chapter X. No steps were taken under this Chapter and the validity of the present rules therefore depends

entirely on the provisions of Section 157. As that section limits the validity of the old rules to such rules as are consistent with the present Code, it

follows that rules which insist on questions of irregularity and fraud being decided before the preliminary decree is passed in a partnership suit are

invalid.

6. As I have indicated, this reference has been necessitated as the result of the decision in "The District Munsiff of Tiruvallur, In re (1911) 24

M.L.J. 637 : ILR 37 Mad. 17 (F.B.). That case was decided by Arnold Whites C.J., and Munro and Sankaran Nair, JJ. The question there was

whether the rules made by Government u/s 269 of the Code of 1882 remained in force until rules were framed by the High Court under the new

Code, though they might be inconsistent with Order 21, Rule 43 of the new Code. The Court held that they did remain in force; and the reasoning

given can be gathered from the following passage in the judgment of the learned Chief Justice at page 20 of the report:

There is nothing in the Code of 1908, as distinguished from the orders in the first schedule to the Code, which is inconsistent with the rules issued

u/s 269, though there is an inconsistency between the rules and Order 21, Rule 43. But the High Court has power to alter the rules in the first

schedule. This being so, I do not think it follows that, because the rules made under the old section are inconsistent with the rules in the schedule,

they are not consistent with this Code, within the meaning of Section 157.

The point is not free from doubt, but until rules are made by the High Court, I think the rules made by Government u/s 269 of the old Code are in

force.

Section 157 is an enabling, not a repealing, section. The rules have never been expressly repealed and I do not think we are bound to hold they are

implicitly repealed by virtue of the words "so far as they are consistent with this Code", which occur in Section 157.

7. The learned Judges obviously overlooked the fact that by virtue of Section 2(1) the rules in the First Schedule of the Code of 1908 are as much

a part of the Code as the sections themselves and it follows that if there is inconsistency between the old rules and the rules of the new Code, the

old rules must go.

8. It is not necessary to refer in detail to the other cases mentioned in the order of reference. They have been sufficiently dealt with there. It is quite

clear that In re The District Munsiff of Tiruvallur (1911) 24 M.L.J. 637 : ILR 37 Mad. 17 (F.B.) was wrongly decided and must be over-ruled.

We accordingly answer the question referred in this way: The Civil Rules of Practice made under the Code of 1882 but not re-enacted and

published in accordance with the procedure prescribed in Part X of the Code of 1908 are invalid if and in so far as they are inconsistent with any

of the rules of the First Schedule of the latter Code.

9. [This Civil Revision Petition coming on for final hearing this day after the expression of the aforesaid opinion of the Full Bench,]

JUDGMENT

10. The application for revision will be granted and the case remitted to the District Munsiff to be dealt with in the light of the judgment of the Full

Bench in this case. There will be no order as to costs.