
(1961) 03 CAL CK 0011
In the Calcutta High Court
Case No : Suit No. 1845-A of 1955

Hardayan Garodia and Others

APPELLANT

Vs

Gangadhar Periwal and Others

RESPONDENT

Date of Decision : 10-03-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 1
Evidence Act, 1872 — Section 101, 3, 58

Citation : AIR 1963 Cal 500

Hon'ble Judges : P.C. Mallick, J

Bench : Single Bench

Advocate : B.N. Sen, for the Appellant; Salil Hazra, Datta and Banerji, for the Respondent

Final Decision : Dismissed

Judgement

P.C. Mallick, J.—The plaintiffs seek to challenge in this suit the validity of an attachment and sale of a share in three tea gardens and the export quota rights therein.

2. The plaintiffs are five members of the Garodia family hereinafter for convenience referred to as Sarodias. They along with the defendant Gangadhar Perival and Nath-mull Pertwal constituted a partnership known as Messrs. Garodia Periwal Tea Co. [hereinafter for brevity referred to as the "Tea Company".] The defendant Gangadhar Periwal and Nathmull Periwal father of defendant Mahendra Kumar Periwal had another business of their own carried on in co-partnership under the name and style of Messrs. Gangadhar Nathmull. The firm of Gangadhar Nathmull became very involved and many of the creditors instituted suits and obtained decrees against the said firm of Messrs. Gangadhar Nathmull. Three such creditors are: 1. Hanuman Box Gothia, 2. Gouri Shankar Mal, and 3. Udaichand Hazarimal defendants Nos. 4, 5, and 6 in this suit.

3. It is pleaded in the plaint that the Tea Co., was the owner of three tea gardens and of export quota right therein for the year 1953/54. Ten annas share in three

tea gardens known as Nurbong Tea Estate, Mulootar Tea Estate and Sivitar Tea Estate was attached along with quota rights therein. The share in the quota right was sold in execution of decrees obtained by the three decree-holders named before. This attachment and sale is pleaded to be unlawful and the allegations are that this attachment and sale was brought about fraudulently by the decree-holder defendants in collusion and conspiracy with the defendant Gangadhar Periwal. The particulars of fraud, collusion and conspiracy are set out in paragraph 8 of the plaint. The fraud alleged consists in not impleading the Garodias in the proceedings in which the sale took place and in suppressing from the court the fact that Messrs. Gangadhar Nathmull is an absolutely independent concern having no connection with the said Tea Co. The Periwal under the deed of partnership of the Tea Co. were entitled to ten annas share, the remaining six annas share belonged to the Garodias. The ten annas share in the tea quota rights was sold for Rs. 60,000/- approximately. It is contended that this attachment and sale is wrongful. In any event it is claimed that the Garodias are six annas owner of the export quota rights sold and are entitled to get back if not the whole of the sale proceeds amounting to Rs. 60,000/- at least to six annas share therein amounting to Rs. 22,500/-. The reliefs claimed are inter alia as follows:

- (a) Declaration that the said orders for attachment of the said tea gardens are void, invalid, inoperative in law and not binding on the plaintiffs;
- (b) Removal of attachment of the said tea gardens;
- (c) Injunction restraining the defendants Nos. 4, 5 and 6 from proceeding in execution of the decrees obtained in suits Nos. 1162 of 1952, 1194 of 1952 and 1196 of 1952 against the said tea gardens;
- (d) Declaration that the said orders for attachment and sale of -/10/- annas share of the said tea quotas are void, invalid, inoperative in law and not binding on the plaintiffs;
- (e) Declaration that the attachment and sale of -/10/- annas share of the said tea quotas is not binding on the plaintiffs;

Alternatively, a declaration that the plaintiffs were and are the owners of 6/16th portion of -/10/- share of the said tea quotas and/or the sale proceeds thereof and that the attachment and sale of the said portion is wrongful and not binding on the plaintiffs;

(I) Payment to the said Tea Co. the said sum of Rs. 60,000/-; alternatively, a decree for Rs. 22,500/;

4. The suit is being contested by the three deeres-holder defendants being defendants Nos. 4, 5 and 6. They have filed a joint written statement disputing the plaintiffs' claim. All allegations of fraud and conspiracy alleged against them have been denied. It is contended that the attachment and sale had been effected pursuant to lawful orders of court openly obtained and the plaintiffs had

full knowledge of all the proceeding's. There are allegations of collusion and conspiracy between the plaintiffs on the one hand and the defendant Gangadhar Periwal on the other. It is pleaded that in order to defeat and delay the claims of the decree-holder defendants, collusive suits were caused to be instituted by Gangadhar Periwal in the name of the minor defendant Mohendra Kumar Periwal, but having failed in their object in the said suit to get an injunction and/or stay of the execution proceedings, the present suit has been instituted by Gangadhar Periwal through the Garodias.

5. In the written statement the allegations made in paragraphs 7 and 8 of the plaint have been denied except the allegation that the decree-holder defendants obtained decrees from this court and executed the decrees for the realisation of their claims. The written statement was filed by the decree-holder defendants through Mr. N. K. Ray, solicitor, who is now dead. After the death of Mr. N. K. Ray the defendants Nos. 4 and 5 engaged a separate attorney, while the defendant No. 6 is being represented by the successor firm of N. K. Ray and Co. Mr. S. Hazra represents the defendants Nos. 4 and 5 and Mrs. Banerjee represents the defendant No. 6. Mr. Dutt represents the guardian-adlitem of the minor defendant Mohendra Kumar Periwal. At the trial Mr. Hazra appearing for the plaintiffs raised a number of issues. The plaintiffs tendered the evidence of Kanaiyalal Garodia. On behalf of the defendant Gourishankar Mal, one of the decree-holders tendered evidence. Gum Narayan Chatterjee the Managing Clerk of Messrs. N. K. Ray and Co., was also called by the defendants to prove certain entries in the Day Book and Account Book of N. K. Ray and Co. Apart from these, a number of documents have been tendered. The documents disclosed by the respective parties and embodied in the Brief of Documents have been tendered and marked as an exhibit, the parties having dispensed with formal proof by consent. Over and above the documents disclosed originally, certain other court proceedings have been tendered and marked as exhibits. These are all the evidence on record.

6. The partnership deed of Garodia Periwal Tea Co., tendered in evidence shows that the partnership was started long prior to the deed and that the new partnership deed became necessary because of the retirement of one of the old partners, namely, Arjunlal Garodia. The shares of the partners have been set out in paragraph 5, namely, each of the two Periwal's five annas and each of the four Garodias one anna six pies. Clauses 2 and 10 of the partnership deed are set out hereunder and read as follows:

"2. The business of the partnership will ordinarily be that of dealing in tea but the partners will have the option to embark upon any new line of business and open and close branches and agencies as they agree upon from time to time and all the terms and conditions of the said partnership shall equally apply.

10. The stock-in-trade, capital and property of the partnership as well as of the other partners shall in no way be liable for any personal debt of any partner."

The decree obtained by Gourishankar Ma! in suit No. 1194 of 1952 shows that the judgment debtor is the partnership firm "Gangadhar Nathmull carrying on business at No. 20/5, Armenian Street." The claim of the decree-holder is on khata-peta account. By the decree, the attachment before judgment issued on April 10, 1952 is directed to continue until further orders. The decree obtained by Udaichand Hazarimal in suit No. 1196 of 1952 is also against the firm of Gangadhar Nathmull. In execution of the decree obtained by Udaichand Hazarimul in suit No. 1196 of 1952 the Official Receiver was appointed Receiver of the export quota rights allotted for the year 1953/54 in respect of the defendants ten annas share in the tea gardens known as Nurbong Tea Estate, Sivitar Tea Estate and Muloctar Tea Estate in the District of Darjeeling. So also the decree obtained by Hanumanbux Chand Gotia in suit No. 1162 of 1952 was against the firm of Gangadhar Nathmull. Suit No. 3237 of 1953 is a suit instituted by the three minor Periwals against the other Periwals and the three decree-holder defendants in this suit, namely, Gourishankar Mal, Hanumanbux Chand Gotia and Udaichand Hazarimul. The Garodias were not im-pleaded as defendants. It is a partition suit of the Petiwals and the allegations made are that Gangadhar Periwai and Nathmal Periwai were carrying on joint family business as a co-partnership business and the share belonging to Gangadhar Periwai and Nathmal Periwai amounting to ten annas in the Tea Co. belonged to the joint family and not to Gangadhar and Nathmal personally. The debts contracted by Gangadhar and Nathmal and the decree obtained by the decree-holder defendants are claimed to be not binding on the plaintiffs. The tea gardens and the ten annas share of the export quota rights are alleged to belong to the joint family and were not liable to be sold in execution of the decree obtained against the partnership firm of Gangadhar Nathmal. The properties sought to be partitioned are set out in the Schedule to the plaint. The three tea gardens are included in the Schedule Part III, The suit was instituted on September 8, 1953, the plaintiffs' attorney being Sri D. K. Mitra, immediately on the following day i.e. on September 9, 1953 Rohini LaI Mitra the father of Sri D. K. Mitra writes to the attaching creditors. The letter was written on behalf of the Garodias. This letter, according to the defence case, is evidence of the fact that the Garodias had full knowledge of the execution proceedings. It is stated in the letters that the Garodias had six annas share in the tea gardens and that the attachments were wrongful. Immediate withdrawal of the attachment is demanded and substantial damages claimed. On September 15, 1953 Mr. N. K. Ray in reply wrote to Rohini Kumar Mitra denying that the attachments were obtained by wrongful concealment and misrepresentation. It is stated that the Garodias might have six annas share in the tea gardens but they cannot prevent attachment of the ten annas share of Gangadhar Nathmal in the said tea gardens.

7. In the partition suit of the Periwals, the plaintiffs made an application for injunction to restrain the decree-holder defendants from proceeding in execution of their respective decrees. This application was dismissed by Sarkar, J. on December 7, 1953. Against this order of dismissal an appeal was taken which

was numbered Appeal No. 163 of 1953. In the said appeal, on the application of the appellants the Appeal Court appointed the Official Receiver as Receiver of the quota rights. This order appears to have been made by consent. The partition suit No. 3237 of 1953 of the Periwals was ultimately dismissed in June 1954 for non-compliance with the peremptory order of filing affidavit of documents. On July 24, 1954, the same plaintiffs instituted a second suit for partition on substantially the same allegations as made in suit No. 3237 of 1953. This second suit is numbered 2257 of 1954. In this second suit however all the Garodias were impleaded as defendants. In paragraph 15 of the plaint it is pleaded "the Garodias defendants, namely, the defendants Nos. 10 to 15 have been added since they are entitled to six annas share in the properties described in Part 111 of the Schedule hereunder; so that the declaration of the plaintiffs' rights may be made in their presence. The properties included in Part III of the Schedule is ten annas share in the partnership firm of Garodias Periwai Tea Company, including the share in the said leasehold interests in all lands in the tea gardens. In the second partition suit an application for injunction similar to the one made in the first suit was made. On July 24, 1954 the Court refused to pass the order for injunction but directed the Official Receiver to proceed with the sale on notice to the parties. Shortly before this order was passed, on July 1, 1954 the present suit was filed by the Garodias in which another application for injunction was made by the plaintiff Garodias to restrain the decree-holders from executing the decrees. This third application also was dismissed with costs. Mr. Hazra appearing for two of the decree-holders submitted that it is clear from the above facts that all the above proceedings have been taken as a result of the collusion between the Periwals and the Garodias to harass the decree-holders. Even if the evidence is not sufficient to establish collusion and conspiracy, there is bound to be a strong suspicion that the Periwals and Garodias were acting together to put the decree-holders in trouble. On the other hand, the fact that the Garodias were not impleaded as defendants in the first partition suit No. 3237 of 1953 instituted by the Periwals, may indicate that they were taking steps in the matter on their own behind the back of the Garodias. It is only in the second partition suit No. 2257 of 1954, that the Garodias were impleaded as defendants. It may be that the Periwals only impleaded the Garodias as defendants to enable them to contend that it was a different suit to avoid difficulties that might be raised. The fact that the Garodias instituted this suit and made an application for injunction to restrain the decree-holders from executing the decree may well be to protect their own interest. In my judgment, however suspicious the circumstances might at first sight appear, the evidence is inadequate to record a finding of fraud and collusion against the Garodias. I should note that though in the pleadings and in their respective openings, either parties were alleging fraud and collusion with Gangadhar Periwai against the other -- in argument of the learned counsel, the case was conducted on a different basis and not on the basis of fraud and collusion. Mr. Sen expressly gave up and abandoned the case of fraud made in the plaint and confined the case to points of law to be noted later. The case of fraud made by the respective parties against each others receded to the

background if it did not altogether vanish.

8. Mr. Sen's case is that the tea gardens and the export quota rights attached belong to the partnership firm of Messrs. Garodia Periwai Tea Company, of which Gangadhar Periwai and Nathmal Periwai were only partners having five annas share each. As such partners their interest in the partnership property in execution of a decree obtained against them personally cannot be attached and sold in the manner it has been done in the instant case. Order 21, Rule 49 is a clear bar. Again, the decrees sought to be executed were decrees passed against the partnership firm of Gangadhar Nathmal of which Gangadhar and Nathmal were partners. Such a decree can only be executed against the assets of the firm of Gangadhar Nathmal. It can also be executed against the Periwai partners personally, if the partners appeared in their own name under Rules 6 and 7 of Or. 30 of the Code or if they had admitted to be partners in the pleadings or had been so adjudged or if leave had been given to execute the decree against them personally. This is the express provision of Or. 21, Rule 50. In the instant case the decree-holder defendants obtained their decrees against the firm of Gangadhar Nathmal. The tea gardens and quota rights attached admittedly do not belong to the firm of Gangadhar Nathmal. The decrees therefore are not liable to be executed against Gangadhar and Nathmal personally by attachment and sale of other properties not belonging to the partnership firm of Gangadhar Nathmal but to the partners personally. Order 21, Rule 50 is a bar. In support of this contention Mr. Sen has cited an unreported decision of P. B. Mukharji, J. passed on 25-4-1956 in the case of Babulal Pachisia v. Ganpadhar Nathmull, wherein the learned Judge pointed out that the law of execution makes a difference in procedure between a decree against a firm and a decree against a partner and that a decree against a firm is not necessarily executable against a partner unless certain conditions are satisfied. The conditions have been indicated in Order 21, Rule 50 of the Code. The case that the decrees against the firm of Gangadhar Nathmal was not liable to be executed against the partners personally has not been made in the plaint. There is no averment that the conditions laid down in Order 21, Rule 50 have not been complied with and by reason of such non-compliance the decrees were incapable of being executed against Gangadhar and Nathmal the partners. No evidence on the point has been led by either party. In my judgment, this contention of Mr. Sen cannot be upheld, firstly, because no such case has been made in the pleadings and, secondly, because there is no evidence that the conditions laid down in Order 21, Rule 50 have not been satisfied. It may well be, and I must hold that to be so unless the contrary is proved, that this Court allowed execution to proceed after being satisfied that the conditions had been fulfilled. There is evidence that in an affidavit affirmed on March 29, 1952 in suit No. 1194 of 1952, in opposition to the plaintiffs' application for attachment before judgment Gangadhar and Nathmal admitted themselves to be partners of the firm of Gangadhar Nathmal. Mr. Sen therefore has to fall back on the other point noted above, namely, that the attachment and sale were contrary to the provisions of Order 21, Rule 49 of

the Code of Civil Procedure.

9. In order to establish that the attachment and sale of the tea garden and the quota right is hit by the provisions of Order 21 Rule 49, the first and the most important fact to be established is that the properties attached were partnership assets of Garodia Periwai Tea Co. If it is not a partnership asset of the Tea Co., then Order 21 Rule 49 would not apply and the attachment and sale cannot be challenged. The attachment can only be levied in the manner it has been done on the basis that the two Periwais were co-owners having 10 annas share in the tea garden and the quota right. It is true that there is a distinction in law between co-ownership and co-partnership. Co-ownership is not always the product of an agreement between the co-owners, whereas co-partnership can only come into existence by mutual agreement. Co-owners, however, may choose to carry on business with properties of which they are co-owners after entering into an agreement on that behalf. In such event, the distinction becomes very obscure. It is indeed a tricky question what would be the proper mode to proceed in execution of a decree obtained against co-owners who entered into a partnership agreement to carry on business with properties of which prior to the partnership they were co-owners *simpliciter*. Qua co-owner his share in the property is liable to attachment and sale in execution of the decree obtained against him personally. Qua partner, on the other hand, his share in the partnership can only be proceeded against by way of a charging order and no share in any of the partnership properties can be attached and sold, as clearly indicated in Order 21 Rule 49 of the Code.

10. It is necessary now first to consider the case made in the pleadings. In paragraph 7 of the plaint decree-holder defendants Nos. 4, 5 and 6 have been charged with fraud, collusion and conspiracy with the defendant Gangadhar. Fraud consists of causing wrongful attachment of 10 annas share in "the tea garden including factory which belonged and still belongs to the said Tea Co." The tea company means Messrs. Garodia Periwai Tea Co. In paragraph 8 of the plaint it is pleaded that 10/16th portion of the quota rights belonging to the company was caused to be sold by the Official Receiver in execution of the decree obtained by the three decree-holder defendants Nos. 4, 5 and 6. In the particulars of fraud, collusion and conspiracy pleaded in the said paragraph, one of the frauds alleged is the suppression of this fact. In paragraph 9 of the plaint it is pleaded that in the premises the attachment and sale of quota rights is void. In paragraph 4 of the written statement allegations in paragraphs 7 and 8 of the plaint have been dealt with. It is pleaded that "save and except that the defendants caused the decrees to be passed in their favour which decrees were lawfully executed for the realisation of the decretal dues, these defendants deny each and every allegation contained in paragraphs 7 and 8 of the plaint." The allegations of fraud, collusion and conspiracy have been specifically denied. There is no specific denial of the allegation that the tea company was the owner of the tea garden or the export quota right. In paragraph 15 the allegations made in paragraph 9 of the plaint are denied. On these pleadings, Mr. Hazra raised

various issues, of which one was as to the ownership of the tea gardens.

11. The wrongful act giving rise to the cause of action in this suit is the interim prohibitory order passed in the suit of Gourisankar Mull, being suit No. 1194 of 1952 passed by Sarkar, J. On March 28, 1952 in respect to "10 annas share in the tea gardens known as Norbong Tea Estate, Sibitar Tea Estate and Mullutar Tea Estate in Darjeeling in the said petition mentioned." In paragraph 5 of the petition it is alleged that the defendant, namely, Gangadhar Nathmull also owns 10 annas share in the said tea gardens named belonging to the firm of Garodia Periwai Tea Co. of which the defendant is a partner. This fact, however, is not correct. The partnership firm of Gangadhar Nathmull was never a partner of the firm of Garodia Periwai Tea Co. Gangadhar and Nathmull were partners in their individual capacity. The final order for attachment before judgment was passed on April 10, 1952. The order is:

"That a writ of attachment do issuefor the attachment of the defendants" 10 annas Share in the tea gardens known as Narbong Tea Estate, Sibitar Tea Estate and Muilutar Tea Estate in Darjeeling....."

This attachment before judgment was directed to continue by the decree in the suit passed on January 16, 1955. In execution of the decree obtained by Udaichand Hazari-mull against Gangadhar Nathmull in suit No. 1196 of 1952, the Official Receiver was appointed Receiver of the export quota right in respect of the defendants" 10 annas share In the tea gardens known as Narbong Tea Estate, Sibitar Tea Estate and Mullutar Tea Estate in the district of Darjeeling. The order does not indicate that the tea estates belong to Garodia Periwai Tea Co, The decree passed on January 16, 1955 directs that the attachment do continue. The decree obtained by Hanumanbux Chandgotia against Gangadhar Nath-mull on January 16, 1953 in suit No. 1162 of 1952 is only a money decree and no proceeding in execution of this decree has been tendered in evidence.

12. In the partition suit by the Periwals claim was made that 10 annas share of Gangadhar Nathmull in Garodia Periwai Tea Co., belonged to the joint family, of which Gangadhar and Nathmull were ostensible owners. In these proceedings the only question sought to be canvassed was whether the properties of which the firm of Gangadhar Nathmull and/or Gangadhar and Nathmull were ostensible ownen belonged to the joint family of Periwals. The records tendered in evidence show that the only point canvassed was whether the firm of Gangadhar Nathmull belonged to the joint family of the Periwals or it was the personal property of the two partners Gangadhar and Nathmull. In the present case, defendant No. 5 Gourishankarmull tendered evidence. He was examined-in-chief by his counsel Mr. Hazra. In his examination-in-chief, in answer to Mr. Hazra, Gourishankar Mull stated that he knew that the tea company namely Garodia Periwai Tea Co. owned the three gardens, namely, Narbong Tea Estate, Sibitar Tea Estate and Mulootar Tea Estate. This is all the evidence on record on the point under consideration.

13. It is to be noticed that the best evidence to prove the ownership of the tea

gardens and export quota rights has not been tendered in these proceedings. The tea gardens are leasehold properties and held under the Government. The leases or their assignments, if any, have not been tendered. Nor have the documents evidencing the ownership of the export quota rights been tendered in evidence by either party. The failure of either party to tender the best evidence may suggest that the parties did not appreciate the importance of this evidence. Mr. Hazra, learned counsel for the decreeholder, frankly confessed that he did not properly appreciate the importance of this fact and the evidence tendered by his client, the decree-holder, in court is attributable to his mistake in putting QQ.10, 11 and 12 in such a form as led his client to give the answer noted before. The answer is not only improper from his client's point of view but, on the face of it, untrue. The decreeholder cannot have personal knowledge as to whether the Tea Company were the owners of the tea gardens or the Periwals and the Garodia as held the same in defined shares.

14. It was argued by Mr. Hazra that it is an essential fact in proof of the plaintiff's case that the tea gardens and the quota rights belong to the partnership firm of Garodia Perival Tea Co., and that failure to prove this essential fact will non-suit the plaintiff. There is an averment in paragraph 7 of the plaint that the tea gardens and the export quota rights belonged to the partnership. This is denied in the written statement. An issue has been joined. It is the clear duty of the plaintiffs to prove this fact by tendering the best evidence. The other documents tendered in evidence are of no value and are liable to be excluded from any consideration by the rule of "best evidence". Mr. Hazra asked me not to attach any importance to the evidence of Gourishankarmull to the effect that he knew that the tea gardens belong to the Tea company. Though Gourishankarmull could never have personal knowledge, the answer he gave to QQ. 10 to 12 in-chief is due to Mr. Hazra's own mistake. This mistake on his part does not condone the plaintiffs from tendering satisfactory evidence of a fact which is the foundation of the plaintiffs' case.

15. Mr. B. N. Sen appearing for the plaintiffs, however, strenuously contended that the plaintiffs were under no obligation to prove an admitted fact. The allegation in paragraph 7 of the plaint has not been specifically denied. In fact, the decree-holder defendant tendered the evidence of Gourishankarmull, one of the decree-holders, who has himself admitted that the Tea company owned the tea gardens. The records and proceedings in the various suits prove that the decree-holders admit that the tea gardens belong to Garodia Perival Tea Co. Having regard to these facts, I must hold that it is proved that the tea gardens and the export quota rights belonged to the partnership firm of Garodia Perival Tea Co., even though the best evidence to prove this fact has not been tendered. That there is some justification for Mr. Sen in not tendering the best evidence to prove ownership in the tea gardens and the export quota rights might be conceded. As indicated before, the decree-holder defendants in the various suits and proceedings previously referred to were themselves confused and had no clear understanding on the question of ownership of the three tea gardens. In

the face of all these, if there is no specific denial of the allegation of the fact in the written statement, the plaintiffs might well have been misled into thinking that the ownership of the partnership in the tea gardens was not seriously disputed and that they were under no obligation to tender the best evidence to prove that the tea gardens and the quota rights belonged to Garodia Periwai Tea Co. As stated by Mr. Hazra, he was himself confused and did not realise the importance of this evidence. Indeed the importance of this point was brought out in the discussions during argument-stage, long after evidence was closed.

16. As stated before, the plaintiffs may well plead some cause for being misled in the matter. But are the plaintiffs entitled to contend that they are not required to prove an essential fact constituting their cause of action, unless the fact is admitted in the pleadings? The fact pleaded in paragraph 7 as to the ownership of the tea company in the three tea gardens may not have been specifically denied in the written statement, but has been denied all the same, though generally. The manner in which the fact has been pleaded in paragraph 7 of the plaint might well have led the learned pleader who drafted the written statement to deny the averment in general terms. Paragraphs 7 and 8 of the plaint make out a case of fraud, collusion and conspiracy and the learned draftsman of the written statement denied in paragraph 4 of the written statement this case of fraud, collusion and conspiracy specifically. The other allegations of fact in the said paragraphs 7 and 8 of the plaint were denied only generally. This denial, though in general terms, is enough to impose on the plaintiffs the obligation to prove the essential fact. A fact not admitted in the pleadings must be proved and it is not permissible for the plaintiffs to contend that they were misled in not tendering proper evidence in proof of that essential fact. Again, in the instant case, the plaintiffs are misled because of their own pleading. They came to Court to make out a case of fraud, collusion and conspiracy and the pleading in paragraphs 7 and 8 of plaint are on that basis. The allegation we are considering now is there no doubt but not on the basis that it by itself gave rise to the cause of action in the suit. At the argument stage the case of fraud has been given a go-by and the case has proceeded on entirely a different footing that the attachment and sale are contrary to Order 21 Rule 49 and Order 21 Rule 50 of the Code. The essential fact in support of this case urged in argument is no doubt to be found in paragraphs 7 and 8 of the plaint. But this fact has not been pleaded as by itself giving rise to the cause of action. Hence the denial in the written statement is not as specific as Mr. Sen now contends it should have been. This failure to be more specific in his denial, if it is a defect at all, is attributable to the way in which this essential fact is pleaded. In my judgment, the plaintiffs are bound to prove this essential fact to substantiate their case, this essential fact not having been admitted in the pleadings.

17. In the instant case, the best evidence to prove the ownership in the tea gardens and quota rights has not been tendered by either side. The other evidence tendered is certainly inferior. Mr. Hazra contended that such an inferior kind of evidence should be excluded from consideration under the rule of best

evidence. I do not think that Mr. Hazra is right in submitting that all evidence other than the best evidence should be ruled out of consideration in deciding a point at issue. Not all inferior evidence is inadmissible under the Evidence Act. Evidence other than the best evidence is admissible under the Evidence Act and evidence admissible in law is bound to be considered by the Court in recording its finding on a point in which the parties are at issue. It is necessary, therefore, to decide whether the evidence tendered, when not excluded from consideration, amount to proof of this essential fact.

(His Lordship then considered the evidence and continued as under:--) I was expressly asked to decide the suit on the evidence already on the record. For reasons stated above I am unable to hold on the materials on record that the three tea estates and the export quota rights relating thereto have been proved to belong to the partnership firm of Garodia Periwal Tea Co.

18. The alternative case is that the plaintiffs Garodias are entitled to six annas share in the sale-proceeds of the quota rights. This is, apparently, on the basis that the Garodias are co-owners having six annas share in the quota rights. Six annas share in the quota rights has not been touched by the attachment and sale in execution of the decrees obtained by the decree-holder defendants. The plaintiffs, therefore, have no cause of action on that basis.

19. A decree is claimed in the suit for the entire sale-proceeds of the quota rights amounting to Rs. 60,000/- or six annas share therein amounting to Rs. 22,500/-. The Court is asked to pass a decree not in favour of the plaintiffs but in favour of Garodia Periwal Tea Co. Apart from the plaintiffs, the Garodias, Gangadhar and Nathmull were other partners of the Garodia Periwal Tea Co. Gangadhar has been impleaded as a defendant, Nattimal is dead and the defendants Nos. 2 and 3 are the legal representatives of the defendant Nathmal. The plaintiffs Garodias have not instituted this suit for and on behalf of the partnership firm of Garodia Periwal Tea Co. Further, on the death of Nathmal the partnership firm stood dissolved. The authority of the partners to carry on the partnership business no doubt continues for the purpose of winding up. One of such purpose is to realise the partnership assets. This authority may include the right to institute suit for the purpose of recovering the partnership assets. But what would be the form of the suit? What is the nature of the relief to be claimed? If there is already a suit for dissolution as is alleged being suit No. 2339 of 1953 in which a Receiver has been appointed, is the form of the present suit correct? These questions might have arisen and would have required an answer. These questions, however, were not seriously debated and having regard to my main decision in this suit, they need not be considered further.

20. For the reasons given above the suit fails and is dismissed. In the circumstances of this case I direct the parties other than the guardian of the minor defendant to bear and pay their own costs. The costs of the guardian will be paid by the plaintiff assessed at Rs. 730/-.