
(1953) 04 MAD CK 0025

In the Madras High Court

Case No : Civil Revision Petition No. 325 of 1950 and A.A.A.O. No. 34 of 1950

Muttangi Jaggayya

APPELLANT

Vs

Ramanujam Venkata Narsimharao and Others

RESPONDENT

Date of Decision : 28-04-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 53, Order 21 Rule 53(1), Order 22 Rule 10, Order 22 Rule 10(1)

Citation : AIR 1954 Mad 471

Hon'ble Judges : Ramaswami, J

Bench : Single Bench

Advocate : M.S. Ramachandra Rao and M. Krishna Rao, for the Appellant; T. Venkatadri Ramachandra Rao and R. Rajeswara Rao, for the Respondent

Judgement

Ramaswami, J.—This civil revision petition and the appeal are against the judgment of the learned District Judge of Rajahmundry in C. M.

A. No. 71 of 1947 confirming the order of the learned Subordinate Judge of Rajahmundry in I. A. NO. 1103 of 1947 in O. S. No. 43 of 1936.

2. The facts are: Pandari Brothers obtained a decree in O. S. No. 5 of 1927 against Ramanujam Brothers, who are the contesting respondents in

both the lower courts. This decree in O. S. No. 5 of 1927 obtained on 4th March 1935 was confirmed by the High Court in A. S. Nos. 299 of

1936 and 329 of 1937. There was a transfer of the decree in O. S. No. 5 of 1927 in favour of the present petitioner Sri Muttangi Jaggayya. This

was on 11-11-1940. In the meanwhile, O. S. No 43 of 1936 on the file of the Sub Court, Rajahmundry, a suit for accounts, had been filed by

Ramanujam Brothers against the defendants herein. On 30-9-1940, a preliminary decree for accounts in O. S. No. 43 of 1936 was passed against

the 2nd defendant alone. In E. A. No. 337 of 1941, the decree in O. S. No. 5 of 1927 was transferred to the District Court of Rajahmundry for

execution. On 27-3-1945, the decree in A. S. No. 160 of 1942 preferred against the decree in O. S. No. 43 of 1938 was passed in which the

preliminary decree for accounts was given against defendants 5 and 6 also in the said suit.

On 6-4-1945, E. P. No. 47 of 1945 in O. Section No. 5 of 1927 was filed in the District Court of Rajahmundry for attachment of the decrees

passed in O. Section No. 43 of 1936, Sub Court, Rajahmundry, and in A. Section No. 160 of 1942, District Court, Rajah-mundry. On 5-7-

1945, attachment was effected of the appellate decree in A. Section No. 160 of 1942. On 11-7-1945, attachment was effected of the decree in

O. Section No. 43 of 1936, Sub Court, Rajahmundry. On 25-8-1945, the attachment was made absolute after notice to all parties. The defeated

party in A. Section No. 160 of 1946 had filed a second appeal, 8. A. No. 857 of 1945 in the High Court and it was dismissed on 2-9-1946. Then

on 60-9-1947. the present I. A. No. 1103 of 1947 in O. Section No. 43 of 1936 had been filed to add this Jaggayya as a party plaintiff and

permit him to carry on further proceedings.

3. The points for determination, which arose in both the lower courts, were three-fold, viz., whether the preliminary decree for taking accounts

could be attached; secondly, whether this attachment entitled Jaggayya to come on record as supplemental plaintiff to carry on further proceedings;

and thirdly, whether notice to the judgment debtors (decree-holders) by the court which passed the decree was necessary. Both the lower courts

found against the petitioner on all these three points and hence this civil revision petition and the appeal.

4. "Point 1": There has been a conflict of decisions as to whether a preliminary decree for accounts could be attached under Order XXI, Rule 53,

C. P. C. It was held by the Bombay High Court in -- "Sidlingappa v. Shankarappa", 27 Bom 556 (A), that where certain creditors of a

partnership obtained a money decree against the firm and in execution of their decree they sought to attach and sell a decree for the dissolution of

the firm and for taking of the accounts of the partners and for the incidental reliefs requisite in such decree, including the appointment of a receiver

and a direction to pay the debts of the firm the decree for dissolution could so far be regarded as a money decree and could therefore be attached

but not sold and that the proper remedy in such cases was by proceedings u/s 273 of the old Civil procedure Code. The learned Judges relied

upon the previous decision in -- "Copal Nanashet v. Joharimal", 16 Bom 622 (B). It will be noticed that the Bombay High Court held that the

preliminary decree could be attached but not sold.

I may point out here that it is common ground before me that so far as the Madras High Court is concerned, there can be no question of the sale of

such a decree in view of rule 178 of the Madras Civil Rules of practice: -- "Venkata-swamy v. Venkataramana Rao", AIR 1034 Mad 692 (C). I

am mentioning this to show that what the petitioner is seeking for in this case is not the sale of the attached decree but merely to carry on further,

proceedings in that attached decree, viz., obtain a final decree and work out that final decree in the usual manner in execution. But the Calcutta

High Court in -- Mono Mohan Vs. Kali Kinkar Chakravarty, , has held that a preliminary decree for accounts is a saleable property over which

the decree-holder has a disposing power which he may exercise for his benefit and that such a decree is liable to be attached u/s 60, C. P. C.

"Syud Tuffuazal Hussain Khan v. Rughoonath Pershad", 14 Moo Ind App 40 (PC) (E), distinguished; -- "Prasanna Kumar V. Asutosh Roy", AIR

1914 Cal 60 (F), applied and -- Khettra Mohan Das Vs. Biswanath Bera, . In -- Sailendra Krishna Choudhury Vs. Harendra Kumar Boy and

Others, , it was held as follows:

The preliminary decree for accounts in a suit for dissolution of partnership, on the fact of it is not a decree for payment of money. The amount due

to the judgment debtor is not an ascertained sum of money. 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 inquiry into accounts^ he is

bound to pay the same to the plaintiff. If on the contrary the balance is found against the plaintiff he will be bound to pay the same to the defendant

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. The words "any other matter" in Rule 42 do

not include preliminary decree directing the taking of accounts in a partnership suit. This rule deals expressly with the decree 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 these cases rendering the plaintiff liable to the defendant. That is the essential difference between these decrees and a preliminary 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 account. Hence such decree cannot be attached and sold under rule 53.

The question arose before the Madras High Court in -- *Immidiseti Dhanaraju and Others Vs. Motilal Daga and Others*, . This appeal was first

heard by a Bench of two Judges Phillips and Thiruvengkatachariar JJ. Phillips J. held that a preliminary decree directing the taking of partnership

accounts which involves the payment in money of the partner's share, is a decree for the payment of money within the meaning of Rule 53 of

Order XXI, C. P. C. and so cannot be sold in execution. "*Sharoda. Moyee Burmonee v. Wooma Moyee Burmonee*", 8 WR 9 (Cal) (J); --

"*Ramaswami Aiyar v. Rama Aiyar*", 2 Mad LJ 288 (K) and -- "*Rahimbhoy Habibhoy v. C. A. Turner*", 15 Bom 155 (PC) (L), relied on and --

"*Subbaraya Rowthu v. Kuppusami Aiyangar*", 34 Mad 442 (M) discussed. Thiruvengkatachariar J. held that a partner's interest in a partnership is

saleable property, within the meaning of Section 60 and may be attached and sold in execution of a decree obtained against the partner by his

creditor: -- "*Parvatheesam v. Bapanna*", 13 Mad 447 (N), -- "*Jagat Chunder v. Iswar Chunder*", 20 Cal 693 (O), followed; and -- "*Deendayal v.*

Jugdeep", 3 Cal 198 (PC) (P), relied on.

There was a reference to the Full Bench in regard to the question whether the provisions of Section 98, C. P. C. or the provisions of Clause 36 of

the Letters Patent should be applied. We are not concerned here with the decision of the Pull Bench constituted for deciding this question. In so far

as this difference of opinion is concerned, viz., the attachability of the preliminary decree for accounts, there was no resolving of it by a third Judge.

In -- *Khimji Poonja and Co. Vs. Ratanshi Hirji Bhojraj and Others*, , it was held that a preliminary decree for accounts passed in a suit for

dissolution of partnership and for partnership accounts is attachable but not saleable; -- Badri Das and Another Vs. Behari Lal Kamani and

Another, , distinguished; -- " 27 Bom 556 (A) relied on. Therefore, the preponderance of decisions is in favour of holding that a preliminary decree

for accounts can be attached but cannot be sold.

5. "Point 2:" It has been held in -- Khimji Poonja and Co. Vs. Ratanshi Hirji Bhojraj and Others, , that

as an attaching creditor under Order 22, Rule 10 (2) he is deemed to have obtained an interest entitling him to the benefit of rule 10, sub-rule (1),

that is to say, he can by leave of the court, continue the suit as a person on whom the interest of the plaintiff has devolved. Of course in the stage

between the passing of the preliminary and the final decrees in a suit for accounts, the suit is considered to be still a pending suit. Then he is entitled

to the benefit of Order 21, Rule 53(3) and (5), that is to say, he is to be deemed to be the representative of the holder of the attached decree

and to be entitled to execute such attached decree in the manner lawful for the holder thereof".

In -- AIR 1944 298 (Nagpur) , it has been held:

An attaching creditor of a preliminary decree for sale on a mortgage is entitled in law to file an application to make the decree final. The

attachment creates an interest in favour of the attaching creditor within the meaning Of Order 22, Rule 10 and he can file an application under

Order 34, Rule 5(3) read with Section 146 and the decree-holders can be transposed from the array of non-applicants and made applicants along

with the attaching creditor for making the decree final.

(Firm) Ram Kumar-Rameshwar Lal Vs. Prem Sukh Das and Others, dissented from; -- Ismail Vs. Firm Johri Mal-Sital Prasad , partly

disapproved; and -- AIR 1937 365 (Oudh) explained. Therefore, the petitioner in this case is entitled to be brought on record as a supplemental

plaintiff in the attached decree.

6. "Point 3": This point is concluded by authority, in -- Pirthi Raj Ganesh Das Vs. Balmakund Marwari, , it has been held:

No doubt where the Code confers certain powers on the court which specifically passes the decree, it does not necessarily follow that these same

powers are exercisable by the court to which the decree has been sent. These

are, generally speaking, cases in which the powers which are brought into play are not powers being exercised "in executing such decree" within the meaning of Section 42; but the steps contemplated by Order 21, Rule 53(4), are things to be done in executing the decree and therefore in this matter the powers of the court to which a decree has been sent are co-extensive with the powers of the court which passed the decree even without the addition, in the rule, of words specifically permitting the court to which a decree had been sent to do a particular thing. Therefore, notice to the judgment debtors (decree-holders) by the court which passed the decree is not necessary.

7. Before parting with this part of the case, I may point out that the negating of the petitioner's application in C. M. P. No. 1499 of 1946 before

Second appeal No. 857 of 1945 was disposed of, will not constitute "res judicata" in regard to this application filed after the dismissal of the said

second appeal and the preliminary decree has become final.

8. There can be no objection on merits to this petitioner being brought on record as a supplemental plaintiff in the attached decree and in fact the

6th respondent in the lower court, the judgment debtor in the attached decree, submitted that he would have no objection for the petitioner

becoming a party provided he became personally liable for all the costs incurred by him. In fact the only substantial objection of the respondents

before us was that this petitioner might collude with the 6th respondent & protract the proceedings. On the other hand, the petitioner wants to

come in as a supplemental plaintiff only on account of the apprehension felt by him that these respondents might collude with that Judgment debtor

and render nugatory the only asset available to him for satisfying his decree. These difficulties are not irreconcilable and our order can be so

moulded as to safeguard both.

9. The orders of the lower courts are set aside and the petition is allowed and this petitioner will be brought on record as a supplemental plaintiff in

the attached decree. The conduct of the final decree proceedings will be in the hands of the original plaintiffs in the attached decree and? the

petitioner will be allowed to intervene only if the respondents try to render nugatory the final decree proceedings by adjustments outside court or

by omission to prosecute the final decree proceedings fairly and legitimately. On

such default by the respondents, the petitioner is permitted to apply to the court in which the final decree proceedings are carried on and take its instructions & then intervene. The Subordinate Judge of Rajahmundry in whose court O. S. No. 43 of 1936 is pending is clothed with the necessary powers to give such instructions. In the circumstances of this case the parties are directed to bear their own costs in this court.