
(1939) 01 CAL CK 0004
In the Calcutta High Court

Satyapriya Banerjee

APPELLANT

Vs

Kundanmull Babu

RESPONDENT

Date of Decision : 27-01-1939

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 48, 17(2)

Citation : AIR 1939 Cal 428

Hon'ble Judges : Derbyshire, C.J; Nasim Ali, J

Bench : Full Bench

Judgement

Derbyshire, C.J.—This is an appeal from the decision of the Subordinate Judge of Rajshahi made on 25th September 1937 whereby he held that the appellant Satyapriya Banerjee, the judgment-debtor who is a member of the Legislative Assembly, Bengal, is a public officer and as such liable to have his pay attached under Order 21, Rule 48, Civil P.C. The learned Judge made an order that the Accountant-General of Bengal, should out of the monthly salary of Rs. 150 payable to the appellant remit a sum of Rs. 50 each month to the Court until the amount under the decree is satisfied. The appellant is a member of the Bengal Legislative Assembly. A decree was passed against him at the instance of the respondent on 24th May 1933 for the sum of Rs. 6398 on a hand-note. On 17th September 1937 the decree-holder stated that a sum of Rs. 4441-4-3 was still payable under the decree and asked for the attachment of half of the appellant's salary as a member of the Legislative Assembly. The learned Judge made the order stated above. The appellant has appealed against that order contending that he is not a public officer and is not liable to have his salary as an M. L. A. attached under Order 21, Rule 48, Civil P.C. Section 2, Sub-section 17, Civil P.C. defines the words "public officer." It has been contended by the respondent that the appellant comes within Sub-para (h), namely:

Every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty.

2. The Bengal Legislative Chambers (Members Emoluments) Act, 1937, provides

in para. 3 as follows:

There shall be paid to each member a salary at the rate of Rs. 150 per mensem with effect from the date on which he takes his oath.

3. Section 4 of the same Act provides for certain allowances to be paid to members. It is true that the appellant receives remuneration in respect of his membership in the Legislative Assembly. The question is whether he is an officer within the meaning of Section 2, Sub-section 17(h), Civil P.C. In *Hollonshead v. Hazleton* (1916) 1 A.C. 428 the question arose whether in bankruptcy proceedings in Ireland a member of Parliament could be ordered to pay a sum of ₹200 a year out of his salary of ₹400 a year as an M. P. to the Official Assignee in Bankruptcy. It was held by the House of Lords that a Member of Parliament could be ordered to make such a payment. During the discussion there was some consideration, not very extensive it is true, of the position of a member of Parliament. At p. 460 Lord Parker of Waddington said: "The payment is made to and received by every member *virtute officii*...." That sentence clearly suggests that a member of Parliament is the holder of an office. However on p. 439 Lord Atkinson used these words:

Palles C.B. in his judgment laid it down that this sum of ₹100 per annum is expressly given to each Member of Parliament *virtute officii*, and is payable out of State funds to enable them to support the office with the degree of dignity due to it, and for that reason is inalienable. It is certainly given to the members because they are members, but with infinite respect for that most distinguished Judge, I doubt very much whether membership of the House of Commons is, within the meaning of the principle of law and public policy to which he refers, an office of State at all.

4. We have here two passages from the speeches from distinguished Law Lords which appear to be in opposition. Having regard to the fact that Lord Atkinson was specifically considering the question whether membership of the House of Commons was an office and Lord Parker was but referring to the matter incidentally, I have come to the conclusion that I ought to be guided in this respect by the words of Lord Atkinson and to take the view that membership of the House of Commons and similar institutions is not an office. I find support for taking that view in this case in the provisions of the Government of India Act 1935 under which the Bengal Provincial Legislature is set up. Section 69, Sub-section 1 provides:

A person shall be disqualified for being chosen as, and for being a member of Provincial Legislative Assembly or Legislative Council - (a) if he holds any office of profit under the Crown in India, other than an office declared by Act of the Provincial Legislature not to disqualify its holder.

5. Section 72 provides:

Members of Provincial Legislative Assemblies and Legislative Councils shall be

entitled to receive such salaries and allowances as may from time to time be determined by Act of the Provincial Legislature....

6. If membership of the Legislative Assembly were an office under the Crown, it appears to me that each member of it receiving a salary contemplated by Section 72 would be disqualified from sitting in it by the provisions of Section 69(1)(a). Such cannot be the position. I am therefore of opinion that a member of the Legislative Assembly is not an officer in the service or pay of the Crown or remunerated by fees or commission for the performance of any public duty. Consequently he is not a public officer within the meaning of the Code of Civil Procedure. Therefore the order which has been made by the learned Judge for the attachment of a part of the appellant's salary under Order 21, Rule 48 of the Code which provides for the case of the attachment of the salary of a public officer cannot stand.

7. It must be borne in mind that as the suit herein was instituted before 1st June 1937, the law applicable in this case is that which existed before Section 60, Civil P.C. was altered by Act 9 of 1937. It has been suggested that the order appealed from might be supported under Order 21, Rule 46, Civil P.C. I do not think so. Order 21, Rule 46 provides for the attachment of a "debt." In this case the appellant's salary is ordinarily payable at the end of each month, and until the end of each month there is no "debt" in respect of it, only an expectancy of payment. At the time this order was made (25th September 1937) there was no "debt." This was the ratio decidendi in *Debi Prosad v. Lewis* (1909) 31 All. 304 where a decree-holder applied on 18th November 1907 for the attachment of the salary for November of the judgment-debtor who was a lawyer's clerk. The Court held that the unearned salary of a private servant in whole or in part was not liable to attachment in advance.

8. Again the Accountant-General of Bengal is located in Calcutta outside the jurisdiction of the Subordinate Judge at Rajshahi and as pointed out by Nasim Ali, J. during the argument, an order under Order 21, Rule 46 made by that Judge could not bind the Accountant-General: see *Begg Dunlop & Co. v. Jagannath Marwari* (1912) 39 Cal. 104. Order 21, Rule 48 was designed to overcome the obstacles just mentioned to attaching future salary payable outside the Court's jurisdiction. But it only applies to the salaries of public officers, railway servants and the servants of local authorities. The amendments to Section 60, Civil P.C. introduced by the Act of 1937 may alter the position somewhat in a case of this kind but as pointed out above they do not apply here, because the decree herein was made before 1st June 1937. It has been suggested that this Court might appoint a receiver of [the salary of the appellant. I do not feel disposed to accede to that suggestion. Members of Legislative Assemblies must satisfy their debts like other people but I can see grave objections to the appointment of a receiver of the salary of a member of the Legislative Assembly, although I do not say that it could not be done in a proper case if no other remedies were available. In this case the decree-holder has

other remedies open to him if he is prepared to make use of them. In my opinion this appeal should be allowed and the order appealed from set aside. The appeal is allowed with costs, hearing-fee being assessed at four gold mohurs.

Nasim Ali, J.

9. I agree with my Lord, the Chief Justice, that this appeal should be allowed. The order of the Subordinate Judge for attachment of the appellant's salary cannot be supported under Order 21, Rule 48, Civil P.C. The mere fact that an elected member of a Provincial Legislative "Assembly is entitled to receive such salary and allowance as may from time to time be determined by the Act of Provincial Legislature u/s 72, Government of India Act of 1935, does not make him an officer in the service or in the pay of the Crown. Membership of the Provincial Legislative Assembly cannot be held to be an office of profit under the Crown in India although they are entitled to salaries and allowances. If the two Sections, namely Sections 69 and 72, Government of India Act are read together there cannot be any doubt that the membership of Provincial Legislative Assembly or Legislative Council is not an office of profit under the Crown. I am inclined to think that these salaries and allowances are given to a member not to enable him to make a profit but to enable him to maintain his position and dignity as a member of the Provincial Legislative Assembly or Provincial Council. An elected member of the Provincial Legislative Assembly or Provincial Council cannot be said to have been appointed for a remuneration to discharge public duty. My conclusion therefore is that the appellant is not a public officer and consequently his salary cannot be attached under Order 21, Rule 48 of the Code. The order of the Subordinate Judge cannot also be supported under Order 21, Rule 46 of the Code. That Rule contemplates the attachment of a debt not secured by a negotiable instrument. There are two objections to the attachment of the appellant's salary under this Rule. In the first place, that Rule contemplates the attachment of a debt.

An existing debt, though payable on a future day, may be attached whilst a salary, wages, or money claimed accruing due, may not.... Syud Tuffuzool Hossein Khan v. Raghoonath Prasad (1870) 14 MIA 40.

10. Before the salary becomes payable it cannot be attached as a debt. In the case cited above their Lordships of the Judicial Committee also observed:

If the creditor desires to have the security on the receipt of salary as it accrues, that can be effected only by contract with the debtor and arrangement with him and not by attachment by an act of the Court.

11. An exception however has now been made in the CPC so far as the salaries of public officers are concerned. The amendments of the CPC however do not in any way affect the observations of the Judicial Committee in the above case so far as the question of the attachment of the salary of the person other than a public officer is concerned. Further, a debt payable to the judgment-debtor outside the jurisdiction of the Court by a person not resident within the

jurisdiction of the executing Court cannot be attached: *Begg Dunlop & Co. v. Jagannath Marwari* (1912) 39 Cal. 104. Here the money is payable to the appellant within the Original Jurisdiction of this Court. The officer who makes payment, namely the Accountant-General of Bengal, also resides within the jurisdiction of this Court. As a debt therefore his salary also cannot be attached under Order 21, Rule 46 of the Code. I however express no opinion on the question as to whether the respondent has got any other remedy open to him in order to enable him to have his decree satisfied from the salary of the appellant.