

APPELLATE CIVIL.

Before C. C. Ghose and Pearson J.J.

SUDARSAN PODDAR

v.

MANINDRACHANDRA PAL*.

1930

Nov. 27.

Execution of Decree—Attachment—Preliminary decree in partition suit, if money-decree—Such decree if saleable—Code of Civil Procedure (Act V of 1908), O. XXI, r. 53, sub-clauses (1), (2), (3).

Order XXI, rule 53 of the Code of Civil Procedure, provides two ways of executing decrees by attachment of other decrees passed in favour of the judgment-debtor by other courts or by the same court : (1) If the attached decree is a money decree passed by another court, then, by the combined operation of Order XXI, rule 53, sub-clauses (1) and (2), the attached decree is not sold as a saleable property, but it is executed under sub-clause (1) by realising the net proceeds in satisfaction of the execution creditor's decree : (2) If the attached decree is not one for money, then Order XXI, rule 53, sub-clause (4) applies, and the attached decree is to be sold in execution like any other saleable property.

A preliminary decree in the ordinary form in a partition suit, having merely declared the shares of the co-sharers in the property under partition is not a money decree as contemplated by Order XXI, rule 53, sub-clause (1) of the Code of Civil Procedure, and is liable to be attached and sold in execution as a saleable property under Order XXI, rule 53, sub-clause (4) of the said Code.

SECOND APPEAL by the defendant.

The facts have been fully set out in the Judgment.

N. N. Sircar, Advocate-General, Saratchandra Basak, Rajendrachandra Guha and Bhagirathchandra Das for the appellant.

Gunadacharan Sen, Jitendrakumar Sen Gupta and Satyacharan Pal for the respondents.

C. C. GHOSE AND PEARSON J.J. The facts giving rise to this appeal are of a somewhat complicated nature and it is, therefore, necessary to set them out briefly for the purpose of understanding what is said

*Appeal from Appellate Decree, No. 1038 of 1929, against the decree of R. K. Mitra, Additional District Judge of Dacca, dated Oct. 4, 1928, affirming the decree of Natabihari Ghosh, Subordinate Judge of Dacca, dated Aug. 16, 1926.

hereafter. It appears that there was a partition suit between certain co-sharers, one of whom was named Mathuranath Poddar. That was suit No. 6 of 1913. In that suit, the preliminary decree for partition was made on the 15th September, 1914. The preliminary decree is not before us, but the learned advocates on both sides are agreed that it was in the ordinary form, that is, it declared the shares of the parties and gave direction for partition by metes and bounds. The final decree in the partition suit was made on the 18th December, 1917. It appears that, under the terms of the final decree, the said co-sharer Mathuranath was held to be entitled to certain immovable properties and was further held to be entitled to a sum of money, namely, Rs. 10,573 odd annas. Although the final decree was made so far back as the 18th December, 1917, it appears that the final decree was not drawn up till the 9th December, 1918.

Meanwhile, one Sudarsan Poddar, who is defendant No. 1 in the suit, out of which this appeal has arisen, and who is the appellant before us, instituted a suit, being suit No. 70 of 1916 in the Court of the 4th Subordinate Judge of Dacca, against Mathuranath and others. But this suit was transferred to the 5th Subordinate Judge and was numbered 99 of 1917. It appears that Sudarsan Poddar attached the right, title and interest of Mathuranath in the said properties before judgment on the 10th May, 1916. He subsequently obtained a decree against Mathuranath and others.

The plaintiffs in the present suit, Shanandachandra Pal and others, instituted a suit, being Suit No. 459 of 1917 in the First Subordinate Judge's Court at Dacca, for recovery of certain moneys against Mathuranath and others. The suit was decreed on the 15th April, 1918.

It appears that Sudarsan Poddar, in execution of the decree in Suit No. 99 of 1917, proceeded to execute the decree that he had obtained by attachment

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of the right, title and interest of his judgment-debtors, namely Mathuranath and others, in the properties referred to in the preliminary decree in the said partition suit, while the present plaintiffs, Shanandachandra Pal and others, proceeded to execute their decree in Suit No. 459 of 1917 by attaching the money portion payable to their judgment-debtors namely, Mathuranath and others, under the final decree in the said partition suit. The question that calls for our determination is whether the sale of the right, title and interest of the judgment-debtors at the instance of Sudarsan Poddar, as declared by the preliminary decree, was a valid sale or not. We are not concerned in this appeal with the determination of the question as to whether the attachment of the money portion payable to the judgment-debtors under the final decree for partition at the instance of the present plaintiffs was good or whether the subsequent proceedings taken by the present plaintiffs were in order. This question must be determined in some other proceeding.

On behalf of the appellant, Sudarsan Poddar, it has been contended by the learned Advocate-General that, if one examines the provisions of Order XXI, rule 53, Civil Procedure Code, it becomes clear at once, having regard to the nature of the decree which was sought to be attached at the instance of his client, that it was not a money decree *simpliciter*, but it was a decree of the nature referred to in sub-section (4) of Order XXI, rule 53; in other words, the contention is that if the court is satisfied that it could not possibly come within Order XXI, rule 53(1), but can properly come within Order XXI, rule 52(4), then it follows, as a natural and logical corollary, that the subsequent proceedings, *namely*, the sale of the right, title and interest of the judgment-debtors of Sudarsan in the properties which were the subject matter of the preliminary decree in the partition suit must be held to be valid. Now, all that the preliminary decree laid down was that certain people, who were

interested in certain properties as co-sharers, were entitled to certain shares. These become ascertainable and become ascertained after the preliminary decree had been worked out and after the final decree had been pronounced. It is clear, therefore, that the decree sought to be attached, and which was attached at the instance of Sudarsan, was not a money decree. If that is so, then we have next to proceed to ascertain whether it can come within Order XXI, rule 53(4). Now there are two ways of executing decrees obtained by a decree-holder by attachment of other decrees passed by other courts or by the same court. Those two ways are indicated in Order XXI, rule 53. If it is a money decree, and if the decree is one which is passed by another court, then, by the combined operation of Order XXI, rules 53(1) and (2), the decree which is attached is not sold as a saleable property; the decree which is attached is executed in terms of sub-clause (2) by realising the net proceeds in satisfaction of the decree sought to be executed. If, however, the decree is not one for money, then sub-clause (4) is attracted and the procedure laid down in sub-clause (4) has got to be followed—in other words the attached decree is sold like any other saleable property. There cannot be much doubt, on the facts found, that the decree which was attached, at the instance of Sudarsan, was not a decree for money and that, therefore, the procedure adopted by him, namely, that he sold the decree in execution proceedings like any other saleable property was the correct procedure under the law. That being so, it would appear that the sale cannot be set aside on the ground that the correct procedure had not been followed.

In our opinion, the learned Additional District Judge was clearly in error in saying that sub-clause (1) of rule 53 was applicable to the decree sought to be attached at the instance of Sudarsan. At the time when the right, title and interest of Sudarsan's judgment-debtors under the preliminary decree was

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sold, the said right, title and interest had become ascertained by virtue of the final decree having been passed then. The decree-holder, Sudarsan, was, therefore, entitled to sell what had by then become ascertained. On all these grounds, we are of opinion that the sale of Sudarsan's judgment-debtors' property under the preliminary decree in the partition suit in execution of the decree obtained by Sudarsan in Suit No. 99 of 1917 was a valid sale held in strict compliance with the provisions of the law and cannot be attacked in the manner sought to be employed by the present plaintiffs. But it may be noticed that the present plaintiffs' case was that the decree itself, namely, the decree in Suit No. 99 of 1917 was a collusive and fraudulent decree. On that point, the lower appellate court has come to a distinct finding of fact that the decree was not a collusive decree, nor a fraudulent one. Therefore, the basis of the prayer of the present plaintiffs in the present suit that such a decree was null and void and inoperative as against them is clearly gone. It follows, therefore, that the appellant is clearly entitled to succeed in this appeal and the appeal must be allowed.

Mr. Sen, who appears for the present plaintiffs, wishes to safeguard the position of his clients in manner following. He states that his clients in execution of their decree in Suit No. 459 of 1917, had attached the money portion payable to his judgment-debtors, Mathuranath and others, under the final decree in the partition suit and that nothing that we might say in disposing of this appeal might be construed to infringe in any way the rights acquired by his clients under the decree in Suit No. 459 of 1917 or in the execution proceedings following thereafter. We need hardly observe that nothing that has been said by us heretofore can possibly have that meaning.

The defendants respondents Nos. 4 to 8 appear through a separate advocate and they inform us that they had purchased at a private sale the interest of

Sudarsan's judgment-debtors in the decree in the said partition suit. Whatever rights might have been acquired by these defendants Nos. 4 to 8 at the said sale, if such sale did take place, is not a matter of any concern to the appellant in the present appeal and we, therefore, refrain from dwelling thereon. Further, it must be distinctly understood that we are not dealing with any question of priorities as between rival decree-holders.

In the result the appeal is allowed and the plaintiffs' suit is dismissed with costs in all courts.

Appeal allowed.

A. K. D.

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