

APPELLATE CIVIL.

Before Derbyshire C. J. and Nasim Ali J.

SATYA PRIYA BANERJI

1939

Jan. 23, 24, 27.

v.

KUNDAN MULL.*

Execution—Attachment of salary—Member of the Bengal Legislative Assembly—Public Officer—Code of Civil Procedure (Act V of 1908), s. 2 (17) (h); O. XXI, r. 48.

A member of the Bengal Legislative Assembly is not a public officer within the meaning of s. 2 (17) of the Code of Civil Procedure, 1908, and his salary cannot be attached in execution under O. XXI, r. 48 of the Code.

Hollinshead v. Hazleton (1) considered.

APPEAL FROM ORIGINAL ORDER by judgment-debtor.

The facts of the case as well as the arguments in the appeal appear sufficiently from the judgment of Derbyshire C. J.

Jatindra Mohan Choudhuri, Sajani Kanta Nag and Himadri Nath Bisi for the appellant Satya Priya Banerji.

Phanindra Kumar Sanyal for the respondent.

DERBYSHIRE C. J. This is an appeal from the decision of the Subordinate Judge of Rajshahi made on September 25, 1937, whereby he held that the appellant Satya Priya Banerji, 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 O. XXI, r. 48 of the Code of Civil Procedure, 1908. The learned Judge made an order that the Accountant-General of Bengal should, out of

*Appeal from Original Order, No. 24 of 1938, against the Order of Mohammed Abul Ahsan, Subordinate Judge of Rajshahi, dated September 25, 1937.

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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 May 24, 1933, for the sum of Rs. 6,398 on a hand-note. On September 17, 1937, the decree-holder stated that a sum of Rs. 4,441-4-3 was still payable under the decree and asked for the attachment of one 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 a Member of Legislative Assembly attached under O. XXI, r. 48 of the Code of Civil Procedure.

Section 2, sub-s. (17) of the Code of Civil Procedure defines the expression "public officer". It has been contended by the respondent that the appellant comes within cl. (h) of the sub-s. (17), namely:—

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

The Bengal Legislative Chambers (Members' Emoluments) Act, 1937, provides in s. 3 as follows:—

There shall be paid to each Member a salary at the rate of one hundred and fifty rupees *per mensem* with effect from the date on which he takes his oath.

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 of the Legislative Assembly. The question is whether he is a public officer within the meaning of s. 2, sub-s. (17)(h) of the Code of Civil Procedure.

In the case of *Hollinshead v. Hazleton* (1) 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, at p. 439, Lord Atkinson used these words:—

Palles C. B. in his judgment laid it down that this sum of £400 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.

We have here passages from the speeches of two 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 that 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.

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(1) [1916] 1 A. C. 428.

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Section 69(1) of the Government of India Act, 1935, provides :—

A person shall be disqualified for being chosen as, and for being, a member of a 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 :

Section 72 of the Act 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.....

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 s. 72 would be disqualified from sitting in it by the provisions of s. 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 O. XXI, r. 48 of the Code which provides for an attachment of the salary of a public officer, cannot stand.

It must be borne in mind that as the suit herein was instituted before June 1, 1937, the law applicable in this case is that which existed before s. 60 of the Code of Civil Procedure was altered by Act IX of 1937.

It has been suggested that the order appealed from might be supported under O. XXI, r. 46 of the Code of Civil Procedure. I do not think so. Order XXI, r. 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. On the date, *viz.*,

September 25, 1937, when this order was made there was no "debt". This was the ratio *decidendi* of *Devi Prasad v. Lewis* (1) where a decree-holder applied on November 18, 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.

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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 O. XXI, r. 46 made by that Judge could not bind the Accountant-General: *Begg, Dunlop & Co. v. Jagannath Marwari* (2).

Order XXI, r. 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 s. 60 of the Code of Civil Procedure introduced by Act IX 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 June 1, 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 the 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.

(1) (1909) I. L. R. 31 All. 304.

(2) (1911) I. L. R. 39 Cal. 104, 112-113.

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The appeal is allowed with costs, the Order appealed from set aside. Hearing fee is assessed at four gold *mohurs*.

NASIM ALI J. 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 O. XXI, r. 48 of the Code of Civil Procedure. 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 Act of the Provincial Legislature under s. 72 of the Government of India Act, 1935, does not make him an officer in the service or 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, ss. 69 and 72 of the Government of India Act, 1935, 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 Legislative Council.

An elected member of the Provincial Legislative Assembly or Legislative Council cannot be said to have been appointed at a remuneration to discharge a public duty. My conclusion, therefore, is that the appellant is not a public officer and, consequently, his salary cannot be attached under O. XXI, r. 48 of the Code.

The order of the Subordinate Judge cannot also be supported under O. XXI, r. 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 claim accruing due, may not :

Syud Tuffuzzool Hossein Khan v. Rughoonath Pershad (1). 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 a creditor desires to have a security on the receipts of a salary as they accrue, that can be effected only by contract with the debtor and arrangement with him, and not by an attachment by the act of the Court.

An exception, however, has now been made in the Civil Procedure Code so far as the salaries of public officers are concerned. The amendments of the Civil Procedure Code, 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 a person other than a public officer is concerned.

In the second place, 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* (2). 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 such jurisdiction. As a debt, therefore, his salary also cannot be attached under O. XXI, r. 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.

Appeal allowed.

P. K. D.

(1) (1871) 14 M. I. A. 40, 50.

(2) (1911) I. L. R. 39 Cal. 104.

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