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amount is not satisfied by the sale of the mortgaged properties including the land of khata no. 325 it will be open to the plaintiffs to take such proceedings as they are entitled to take under the law to realise the balance of the dues from the other properties, if any, belonging to defendants nos. 1 to 5. Each party will bear his own costs in this Court and in the Court below but the order of the first Court as to costs will stand.

AGARWALA, J.—I agree.

VARMA, J.—I agree.

Appeal allowed in part.

S. A. K.

REVISIONAL CIVIL.

Before Fazl Ali and Chatterji, JJ.

1939.
May, 9, 11.

RATANSI HIRJI BHOJRAJ

v.

TRICUMJI JIWANDAS.*

Code of Civil Procedure, 1908 (Act V of 1908), section 60 and Order XXI, rule 53 (4)—preliminary decree in a suit for dissolution of partnership and accounts, whether is attachable.

A preliminary decree in a suit for dissolution of partnership and accounts is attachable under section 60 of the Code of Civil Procedure, 1908, and may be attached in the manner prescribed by Order XXI, rule 53 (4).

* Civil Revision nos. 379, 467 and 468 of 1938, from an order of Babu Jugal Kishore Narayan, Subordinate Judge, Dhambad, dated the 25th May, 1938.

Sailendra Krishna Choudhury v. Harendra Kumar Roy(1), dissented from.

F. P. Dhanaraju v. Moti Lal Daga(2), *Syud Tuffuzzool Hoscim Khan v. Raghoonath Pershad*(3) and *Khettra Mohan Das v. Biswanath Bera*(4), distinguished.

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Application in revision by the decree-holders.

The facts of the case material to this report are set out in the judgment of Chatterji, J.

R. S. Chatterji, for the petitioners.

Sir M. N. Mukherji and *N. N. Roy*, for the opposite party.

CHATTERJI, J.—These three applications are directed against an order by which three connected claim cases under Order XXI, rule 58, of the Code of Civil Procedure, arising out of execution case no. 12 of 1937 in the Court of the Subordinate Judge of Dhanbad were allowed. The decree under execution was obtained by the petitioners against the opposite party no. 1 (a firm named Tricamjee Jivandas) and another individual. The subject of the attachment which gave rise to the claims was a preliminary decree for dissolution of partnership and for accounts obtained by the opposite party no. 1 and three others, namely, opposite party nos. 2 to 4, against certain individuals. This preliminary decree provided, among other terms, that—

“After such accounting is completed a decree for the amount that may be found due for the plaintiffs' 1½ annas share in the profits of the partnership properties and business will be drawn up against defendants nos. 1 to 3 realisable from the assets of Goa Petha in their hands.”

The decree further provided that the plaintiffs were to get full costs which were to be assessed after the accounting was over. In execution case no. 12 of 1937 in the Subordinate Judge's Court at Dhanbad

(1) (1936) 40 Cal. W. N. 1993.

(2) (1929) A. I. R. (Mad.) 641.

(3) (1871) 14 Moo. I. A. 40.

(4) (1924) A. I. R. (Cal.) 1047.

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when the petitioners attached the interest of the opposite party no. 1 in this preliminary decree, the opposite party nos. 2 to 4 who were the remaining decree-holders under that decree objected that the preliminary decree was not liable to attachment. This objection has been allowed.

The learned Subordinate Judges, relying upon the decisions in *Sailendra Krishna Choudhury v. Harendra Kumar Roy*⁽¹⁾ and *Dhanarju v. Moti Lal Daga*⁽²⁾, has held that the preliminary decree in question is not a decree which is capable of being attached under the provisions of Order XXI, rule 53, of the Code of Civil Procedure. The question whether the decree is attachable or not must be determined with reference to the terms of section 60 of the Code of Civil Procedure. That section lays down that with the exception of certain classes of properties specified therein all other property over which the judgment-debtor has a disposing power is attachable. Order XXI, rule 53, merely prescribes the manner in which the attachment of decrees is to be effected. The real question, therefore, is whether the preliminary decree can be said to be property over which the judgment-debtor has a disposing power. It has not been suggested that it comes under any of the exceptions in section 60. It has, however, been contended by Sir M. N. Mukherji appearing for the opposite party that the right conferred by the preliminary decree is nothing more than a mere right to sue which under the provisions of section 6 of the Transfer of Property Act is not assignable. A decree conclusively determines the rights of a party with regard to all or any of the matters in controversy in the suit, and it may be preliminary or final, as the very definition of decree in section 2 of the Code of Civil Procedure shows. When a right to sue merges in a decree, it

(1) (1936) 40 Cal. W. N. 1393.

(2) (1929) A. I. R. (Mad.) 641.

can no longer be said to be subject to the prohibition against alienation attaching to a mere right to sue. Indeed, a preliminary decree may not be capable of immediate execution but nevertheless it creates some rights which must be regarded as property, and there can be no doubt that such property is attachable under section 60 of the Code of Civil Procedure.

In *Sailendra Krishna Chaudhury v. Harendra Kumar Roy*⁽¹⁾ it was no doubt held that preliminary decree for accounts in a suit for dissolution of partnership and accounts is not attachable in execution of another decree. In that case which was heard *ex parte* no reference appears to have been made to the provision of section 60 or clause (4), Order XXI, rule 53, of the Code of Civil Procedure. Clause (1) of the last mentioned rule refers to a decree either for the payment of money or for sale in enforcement of a mortgage or charge. Clause (2) refers to decrees of all other kinds. So the preliminary decree in question which falls under clause (4) can be attached in the manner provided therein. With all respect to the learned Judges who decided the case of *Sailendra Krishna Choudhury v. Harendra Kumar Roy*⁽¹⁾, I am unable to concur in their view.

The case of *Dhanaraju v. Moti Lal Daga*⁽²⁾ does not really support the view taken by the learned Subordinate Judge. There the question whether a preliminary decree for accounts in a suit for dissolution of partnership and accounts can be attached in execution of another decree did not really arise, and it appears that it was rather assumed that such a decree could be attached. The main controversy in that case was whether such preliminary decree could be regarded as a decree for the payment of money and whether the sale of such decree was valid in view of the provisions of rule 184 of the Civil Rules of Practice

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framed by the Madras High Court under the powers conferred by the Code of Civil Procedure.

Sir M. N. Mukherji has referred to *Syud Tuffuz-zool Hossain Khan v. Raghoonath Pershad*(¹). There with the consent of the parties, the accounts of a partnership Firm were referred under order of the Court to arbitrators, but before any award was made the rights and interests of one of the parties in the award were by order of the Court sold by auction in satisfaction of a decree against him made in another suit by a third party. It was held that the expectant claim under an inchoate award was not property within the meaning of section 205 of Act VIII of 1859, and was not saleable in execution of a decree. The very decision suggests that if the execution sale had taken place after the award the position would have been quite different. Their Lordships held that "a mere right of suit is not property." The reasons for that decision do not, to my mind, apply to a case like the present where there has been a decree of Court, though preliminary. Sir M. N. Mukherji has also referred to *Khettra Mohan Das v. Bishwanath Bera*(²). The question for decision in that case was whether the right to sue for accounts was assignable and it was held that it was not under section 6, clause (e), of the Transfer of Property Act. This decision is, therefore, of no assistance.

I should observe here that reference was made on both sides to Order XXI, rule 42, of the Code of Civil Procedure which runs thus:—

"Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money."

With reference to this rule the learned Judges in *Sailendra Krishna Choudhury v. Harendra Kumar Roy*(³) decided that the words "any other matter"

(1) (1871) 14 Moo. I. A. 40.

(2) (1924) A. I. R. (Cal.) 1047.

(3) (1936) 40 Cal. W. N. 1393.

cannot include a preliminary decree directing the taking of accounts in a partnership suit. Their Lordships further observed " This rule deals expressly with the decrees 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 those cases, rendering the plaintiff liable to the defendant. That is the essential difference between those decrees and a 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 accounts". The position thus indicated may, perhaps, be correct. But Order XXI, rule 42, is not relevant for our present purpose, because all that that rule provides is that there can be an attachment under a preliminary decree but it does not touch the question whether the preliminary decree itself is capable of attachment.

In my view the preliminary decree in question was attachable and the learned Subordinate Judge was wrong in allowing the claims.

It was further contended on behalf of the petitioners that the claimants had no locus standi to object to the attachment, the judgment-debtor himself having raised no such objection. In view of my decision on the other point it is not necessary to deal with this question.

In the result I would allow the applications and reject the claim petitions. The petitioners are entitled to costs of both Courts; hearing fee sixteen rupees in each case in the lower Court and one gold mohur in each case in this Court.

FAZL ALI, J.—I agree.