

**APPELLATE CIVIL.***Before Agarwala and Rowland, JJ.*

KHIMJI POONJA AND CO.

v.

RATANSHI HIRJI BHOJRAJ.\*

1940.

April, 30.

May, 1.

*Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 53—decree for partnership accounts, whether saleable at the instance of a creditor who has attached it in execution of his decree.*

A decree for accounts passed in a suit for dissolution of partnership and for partnership accounts, though attachable, is not saleable at the instance of a creditor who has attached it in execution of his decree.

*Sidlingappa v. Shankarappa*(1) and *Dhanraju v. Motilal Daga* (judgment of Phillips, J.)(2), followed.

*Ratanshi Hirji Bhojraj v. Tricumji Jiwandas*(3), distinguished.

Appeal and application in revision on behalf of the judgment-debtors.

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

*Sir M. N. Mukherji* and *N. N. Ray*, for the appellants.

*R. S. Chatterji*, for the respondents.

AGARWALA, J.—This miscellaneous appeal and civil revision have been preferred against the same order of the Subordinate Judge of Dhanbad. Many questions of law have been raised and argued in the course of this hearing, but in the view we take of the matter, it is only necessary to refer to one of them. The

\*Appeal from Original Order no. 5 of 1940 and Civil Revision no. 28 of 1940, from an order of Babu Jadunandan Sahay, Subordinate Judge of Dhanbad, dated the 22nd December, 1939.

(1) (1903) I. L. R. 27 Bom. 556.

(2) (1929) A. I. R. (Mad.) 641, F. B.

(3) (1939) I. L. R. 18 Pat. 688.

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question of law which has to be dealt with is whether a decree for accounts passed in a suit for dissolution of partnership and for partnership accounts is saleable at the instance of a creditor who has attached it in execution of his decree. In *Ratanshi Hirji Bhoiraj v. Tricumji Jivandas*(<sup>1</sup>) it was held that such a decree is liable to attachment and that the attachment should be made in the manner prescribed by Order XXI, rule 53(4), of the Code of Civil Procedure. In that case it was not necessary to decide whether the decree which had been attached would be saleable. When the preliminary decree in the partnership suit eventuates in a final decree, what the decree-holder obtains is a decree for money and such a decree is not saleable but must be executed by the attaching creditor under rule 53(1) of Order XXI. Of the many cases to which we have been referred, the only one directly in point is *Sidlingappa v. Shankarappa*(<sup>2</sup>). That was a case of creditors of a partnership obtaining a money decree against a firm and in execution of the decree seeking to attach and sell a decree for dissolution of the firm and for the taking of the partnership accounts. It was held that the decree could be attached, but could not be sold. The same view was taken by Mr. Justice Phillips in *Dhanraju v. Motilal Daga*(<sup>3</sup>). Mr. Justice Thiruvengkatachiar took a different view in that case and it was his view which eventually prevailed. There are great difficulties with regard to the sale of a preliminary decree for accounts in a partnership action. It is not known at the time of the preliminary decree whether any of the partnership assets will be available for distribution among the partners after the creditors of the firm have been satisfied. It is not even known whether out of the assets, if any, that are available to the partners the plaintiff will be entitled to any part of them or whether he will be found to be liable to the

(1) (1939) I. L. R. 18 Pat. 688.

(2) (1908) I. L. R. 27 Bom. 556.

(3) (1929) A. I. R. (Mad.) 641.

defendant. In these circumstances there is no basis on which prospective buyers of such a preliminary decree are able to estimate the value of the decree, and it is conceivable that, considering the risks involved, a speculative buyer might offer a very small bid for such a preliminary decree and have it knocked down to him and that eventually it will be found that he has purchased an interest of very great value. The result of such a purchase will be that a speculative buyer will obtain a valuable right for a very small sum at the cost of the judgment-debtor whose interest it is the duty of the court to guard. Therefore, on grounds of general policy, it seems undesirable that the courts should sanction such a state of affairs. For these reasons I agree with the Bombay view that a preliminary decree for accounts in a partnership action, although attachable, is not saleable.

It is conceded that the appeal in this case is not maintainable, but we are asked to interfere in exercise of our revisional jurisdiction. The order of the Court directing the sale of the preliminary decree appears to me to be a material irregularity in the exercise of the Court's jurisdiction. I would, therefore, exercise our revisional powers and set aside the order of the Court below, the preliminary decree remaining under attachment.

In the circumstances the appeal is dismissed without costs and in the revisional application parties will bear their own costs.

ROWLAND, J.—I entirely agree.

I would like in addition to point out that our order does not deprive the attaching creditor of all remedy in respect of the decree which he seeks to execute. As an attaching creditor under Order XXII, 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

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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 XXI, 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 and is entitled to such information and aid as may reasonably be required from the holder of the decree attached under this rule. The inconvenience of putting to sale a decree of which it is at present impossible to estimate the value has been referred to by my learned Brother and in Bihar it may be noticed incidentally that where a decree sought to be executed is based on a loan, the Bihar Money-Lenders Act would appear to make the holding of a sale impossible until the executing Court has adequately estimated the value of the property to be sold. The value of the decree under attachment will of course be ascertained in the course of the taking of accounts; but by the time that has been done, it seems inevitable that what will emerge will be a pure money decree and nothing more or less.

S. A. K.

*Appeal dismissed.**Application allowed.*

### APPELLATE CIVIL.

*Before Agarwala and Rowland, JJ.*

MUKH NARAIN SINGH.

v.

RAMLOCHAN TIWARI.\*

*Mortgage—co-mortgagor redeeming the whole mortgage—suit by other mortgagors against the co-mortgagor for*

\*Appeal from Appellate Decree no. 768 of 1938, from a decision of Babu Dwarika Prashad, Subordinate Judge at Chapra, dated the 30th April, 1938, affirming a decision of Babu Kedar Nath, Munsif of Siwan, dated the 13th February, 1937.

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25.  
May, 3.