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Court : Chennai

Decided On : Sep-21-1916

Reported in : 37Ind.Cas.900

Judge : Oldfield and ;Krishnan, JJ.

Appellant : S. Venkatakrishna Pattar and ;r. Krishna Pattar

Respondent : R. Venkatakrishna Pattar

Judgement :

Oldfield, J.

1. The grounds, on which relief is asked for in these appeals, against appellate orders would justify interference under Section 115 of the Code of Civil Procedure. It is, therefore, unnecessary to decide whether appeals will lie or whether the remedy in these cases should be sought in revision.

2. The appellants, petitioners, are two creditors, who hold decrees against the plaintiff, decree-holder in Original Suit No. 27 of 1911 on the file of the Court of the Subordinate Judge of Palghat, and who apparently after obtaining transfer of their decrees from the decreeing Courts, are claiming rateable distribution of money belonging to plaintiff, which is in the Subordinate Judge's Court, This money represents the balance of plaintiff's share in family property, awarded to him by that Court on partition, and sold by it in order to discharge the claim of

Government to a portion under Order XXXIIT, Rule 10. One creditor in Execution Appeal No. 529 of 1914 claimed rateable distribution; and, a fact which may be material when the merits are considered, the Subordinate Judge held in his order that he would be entitled to it, after the claim of Government had been satisfied. Later the plaintiff asked for a cheque for the amount standing to his credit; and, on the creditors opposing, the order we are concerned with was passed, rejecting their claims on their merits, because their decrees were against plaintiff's family property, whilst the money in Court belonged to him as a separated member. On appeal against this, the lower Appellate Court decided that no appeal lay; and we have to decide whether it was right. It proceeded, as plaintiff's argument has done here, on the ground that the Subordinate Judge's order, being one under Section 73 of the Code of Civil Procedure, is not appealable with reference to any special provision and is not an order under Section 47, which would be appealable as a decree.

2. This takes no account of the fact, which in my opinion is material, that the order obtained by an attaching creditor under Section 73 of the Code of Civil Procedure ordinarily embodies expressly or impliedly three distinct decisions that 15 W. R. 219. his application for execution is generally valid, (2) the fund in Court is available towards satisfying his claim, and (3) he is entitled to a particular proportion of it. For, though the special procedure prescribed requires that one order only shall be passed, that, as was held in *Radha Gobind Shah v. Shaikh Onzeer Jemadar* (1) and *Bithal T)as v. Nand Kishore* (2) cannot deprive the judgment-debtor of his right to a decision on the first two points above referred to and the fact that those cases dealt with Section 295 of the former Code of Civil Procedure does not affect their value as expositions of the principle involved.

2. The foregoing leads to a distinction between the third and the first and second of the points enumerated, because in a decision on the third only the creditors are interested, since, whatever the manner of division of the fund, the judgment-debtors debts will be discharged to the same total extent, whilst in decision on the first and second each creditor is interested with him separately and directly and his and the creditor's interest would be the same, if there were no question of rateable distribution at all. Cases of collusion between him and an individual creditor will be

subject to special considerations, on which it is unnecessary to enter for the present purpose. Here the conclusion must be that, when the objection to the order under Section 73 is based on the invalidity of the execution application or, as in this case, on the character of the fund in Court, the question is between the judgment-debtor and individual creditors, not the creditors as a body, and the decision on it is really given under Section 47, although it may be contained in an order passed ostensibly under Section 73 of the Code of Civil Procedure.

3. This was recognised directly in *Balmer Laivrie and Go. v. Jadu Nath Banerjee* (3) and is the foundation of the decision in *Kashi Earn v. Mani Ram* 14 A.s 210. where the question was of the validity of the execution application, but the judgment-debtor was not made a party and consequently the parties to the proceedings were not parties to any common suit. In this Presidency there is no doubt one case, *Pungalur Chennamma v. Rajah of Karvetinagar* (5) in which it was held generally that orders passed in connection with rateable distribution are not appealable, not with standing that the judgment-debtor was the respondent. But it does not appear that argument was attempted with reference to the distinctions drawn above or the nature of the question raised. Moreover in *Venkataperumal v. VenkataReddi* 29 Ind. cas. 231 that decision was distinguished on the ground that in it the appellant was a decree-holder creditor to whom a suit was open. In any case, however, that ground of distinction was (with all respect) inadequate, since the suit contemplated in Section 73 (2), is by a person *****entitled to receive part or all of the assets against a person not entitled to receive the same, and, apart from Section 47, there is no reason why the judgment debtor should not be covered by the first of these descriptions, if, as was alleged in *Venkataperwmal v. Venkata Reddi*, (6) the creditors had received more than they were entitled to. That case related to the right of certain decree-holders to rateable distribution of the money in Court without making a fresh application, when their previous application had not been formally disposed of, although all the reliefs asked for in it had been given; and it would, it may respectfully be suggested, have been a sufficient ground of distinction that the real question, whether there was a valid execution application, was one of those above referred to as covered by Section 47 [t. should be added that *Venkala-perumnl v. Venkata Reddi*, (6) is directly consistent with this view in so far as it recognizes explicitly

that orders passed under Section 73 are appealable, if they affect parties to the suit, and that in the absence of any denial in the Section of the right of appeal to parties, who have it under Section 47, they should not be deprived of it.

4. In these circumstances the conclusion must be in favour of the creditors right of appeal. The lower Appellate Court's order is set aside and the appeals are remanded to it for re-admission and disposal on the merits, the Appeals against Appellate Orders being allowed with costs in this Court, costs in the lower Courts to abide and follow dismissed without costs.

Krishna, J.

5. I agree with my learned brother that the appellants, decree-holders, had a right of appeal to the lower Court under Sections 47, 2 and 96 of the Code of Civil Procedure against the order of the Subordinate Judge and that the District Judge was in error in rejecting their appeals as incompetent.

6. The order appealed against was passed on a petition by the respondent, the judgment-debtor, in the three decrees under execution in the Subordinate Judge's Court, which prayed that a certain sum of money realized by the sale of his partition decree by the Court should be paid out to him after deducting the sale expenses and the amount of Court fees, due to the Government and that the claim of the decree holders to attach it should be rejected. That order decided that the money was not attachable by the decree-holders as their decrees were against the respondent's family property whereas the money in Court was his separate property. The Court, therefore, disallowed the claim for rateable distribution of all the decree holders and directed the money to be paid to the judgment-debtor. It seems to me quite clear that, this order so far as it affected each decree holder separately was an order between him and the judgment-debtor and related to the execution of his decree, as it refused his prayer to pay towards his decree a certain sum of money of his judgment-debtor representing his rateable share in the whole amount, which he claimed was attachable. It is thus an order falling under Section 47 of the Code of Civil Procedure and is, clearly appealable.

7. Does the fact that the three decree holders had applied under Section 73 of the Code of Civil Procedure for rateable distribution and that the Subordinate Judge had rejected the applications of all of them take away their right of appeal against their judgment-debtor? I do not think so. It is no doubt true that one decree-holder cannot appeal against another decree-holder from an order under Section 73 of the Code of Civil Procedure. That has been often laid down. See *Kashi Ram v. Mani Jadu Nath Banerjee* 27 Ind. Cas. 644 The ratio decidendi is that an order between two rival decree holders is not an order between parties to any suit and cannot, therefore, be treated as an order under Section 47 of the Code of Civil Procedure. A decree-holder's remedy against his rival decree-holder is by suit as provided for in Section 73 of the Code of Civil Procedure. But that cannot affect a right of appeal that he has against his judgment-debtor, under the other provisions of the Code. Such a right of appeal has been recognised, in *Surab i Covarji v Kala Righunnath* (7) and in the case of a judgment-debtor appellant (7) in *Venkataperumal v. Venkata Reddi* (6). If a judgment-debtor has a right of appeal because the order falls under Section 47 of the Code of Civil Procedure the decree-holder must equally have that right. In fact as the learned Judges observe in the case last cited orders under Section 73 of the Code of Civil Procedure are appealable so far as they affect parties to a suit.

8. The learned Vakil, for the respondent, relied upon the case of *Pungalur Chennammav. Rajah of Karvetinagar* (5) for his contention that no appeal lay from any portion of an order under Section 73 of the Code of Civil Procedure at the instance of the decree holder even as against his judgment-debtor. That decision was based on the ground that 'every decree-holder (party to the order under Section 73) was interested in any order that might be passed in appeal.' The facts of the case are not properly stated in the report but on examining the record in Court 1 find that the order appealed against held that there was no pending application by the appellant under Section 73 of the Code of Civil Procedure and it directed the whole money to be paid out to the other attaching decree holder. The appellant sought in appeal to get that order reversed and his rateable share of the money paid to him, which had already been ordered to be paid to his rival decree-holder. The appeal though in form against the judgment-debtor was in substance to get back the money paid to the second decree-holder and was thus one in the

result of which the latter was manifestly interested. Their Lordships dismissed the appeal. In the present case it is not necessary for us to consider whether we should follow this ruling as here we have a case in which the relief asked in appeal does not affect the rival decree-holders. The claim for the rateable distribution has been dismissed in toto. Each appellant in his appeal only asks that that portion of the judgment-debtor's money which would have fallen to his share if rateable distribution had been allowed should be paid over to him. There is thus in appeal no conflict between the interests of the decree-holders inter se but only between their interests and that of the judgment-debtor. It seems to me that the present case is thus clearly distinguishable from the case of *Pungalur Chennammav. Rajah of Rarvetinagar* (5) though it must be conceded, with due respect to the learned Judges, that the ground of distinction taken by them in *Venkataperumal v. Venkata Reddi* (6) is hardly valid. The fact that there is a remedy by suit available cannot affect a person's right of appeal as it is a right and not a matter of the Court's discretion in which case alone the existence of another remedy will be material. The case may, however, be distinguished on the ground that the appeal by the judgment-debtor did not in any way imperil the order passed in favour of the decree-holders not parties to the appeal and no question between the decree-holders arose for decision in appeal.

9. For the purposes of the present appeals it is sufficient to hold, as I do, that in so far as an order under Section 73 of the Code of Civil Procedure can be treated as an order under Section 47 of the Code of Civil Procedure between the parties to a suit an appeal lies at the instance of either party where such an appeal does not affect orders in favour of third parties such as other decree-holders, For the same reason that an appeal lies to the lower Court a second appeal lies to the High Court and the civil revision petitions, therefore, fail.

10. I will, therefore, allow the second appeals against Appellate Orders and reversing the orders of the District Judge? remand the appeals to him for disposal on the merits according to law. The respondent 1 will pay the appellants' costs of the appeals in the High Court, costs in the lower Courts will abide and follow the result. The Civil Revision Petitions are dismissed without costs.

