
(1932) 01 J&K CK 0002
In the Jammu And Kashmir High Court

Firm Bhila Shah Narsingh Das	Vs	APPELLANT
Firm Gian Chand Durga Das		RESPONDENT

Date of Decision : 06-01-1932

Acts Referred:

Jammu and Kashmir Civil Procedure Code, 1977 — Order 21 Rule 50(2)

Citation : (1932) 01 J&K CK 0002

Hon'ble Judges : B.J.Dalal, C.J and B.R.Sawhny, J

Bench : Division Bench

Advocate : Chaman Lal, Dina Nath, R.L.Anand, Advocates appearing for the Parties

Judgement

This is a first appeal in an execution matter. A foreign decree passed against the firm of Gian Chand Durga Das was transferred to the Subordinate

Judge, Jammu for execution. The Subordinate Judge dismissed the application on two grounds : (1) That against Gian Chand one of the partners,

first an application was made for his arrest and afterwards for sale of his property. The decreeholder ought to choose one or the other remedy for

satisfying his decree and was not at liberty to choose two remedies at once or one remedy after another and going back to the first remedy; (2) As

regards Durga Das he came under the exemption of Order 21 Rule 50 so far his individual property cannot be attached in execution of the decree

passed against the firm because he was not individually served as a partner with a summons in the foreign court.

It is obvious that the first ground must fail. It is open to a decreeholder to follow any remedy or any two remedies or remedies one after another

and again going back to the first remedy as he pleased in order to get satisfaction of his decree. The matter was not really before the court. The

court has given a general opinion on the subject and then stated that no process fee has been deposited for the arrest of Gian Chand. We note this

for the information of the court that the decreeholder is at liberty whenever he likes to seek whichever remedy he desires for the satisfaction of decree.

The second ground is of importance. We have considerable doubt on the subject but we accept it as a correct finding of fact of the executing court

of Jammu that Durga Dass was a person who had not been individually served as a partner with summons in the foreign court. In that case also we

must go on to the second clause of rule 50. That clause is as follows:

Where the decree holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in

subrule (1) clause (c) as being a partner in the firm, he may apply to the court which passed the decree for leave, and where the liability is not

disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and

determined.

The executing court at Jammu did not hold any such enquiry when Durga Das disputed his liability presumably under the belief that it was not a

court which passed the decree and had no jurisdiction to make any such enquiry under Order 21, rule 50 (2). If the court at Jammu had any such

belief it was wrong. It has been held by the Allahabad High Court that the provisions of Section 42 of the Code of Civil Procedure will apply and

that the court which passed the decree would include the court to which a decree was transferred for execution. Two learned Judges of the

Allahabad High Court made the following observations at page 398 of the case *Sital Prasad v. Messrs Robson and Company*, 43 All. 394:

But the application for leave must be made to the court which passed the decree, which is the court answering this description when the decree

has been transferred from the original court. Section 42 provides that the court executing a decree so sent to it shall have the same power in

executing such decree as if it had been passed by itself. In other words for the purpose of execution it is so to be deemed to be the court which

passed the decree. No limitation is contained in this enactment, which is clearly intended to be of general application, and which must, we think,

have been intended as a matter of general convenience to remove all questions arising out of the decree, such as those dealt with by Section 47 of

the Code, and the like, from the cognizance of the court which made the transfer and which passed the decree.

This view was reaffirmed by the Allhabad High Court in another Divisional Bench in 46 All. 560. The view has not been dissented from and was

referred to by the Lahore High Court in 1926 Lahore 547 and relied upon by the Sind Court in 1929 Sind 728.

It is clear therefore that it was the duty of the Jammu Court to enquire under the circumstances of the present case as accepted by us whether

Durga Das was a partner in the firm of Gian Chand Durga Das or not. If it arrived at the affirmative conclusion the personal property of Durga Das

would be liable under the decree. If it is held that Durga Das was not a partner, then the personal property of Durga Das would not be so liable.

In the result we set aside the order of the Subordinate Jammu of Jammu, dated 26th Assuj 1988, and direct it to restore the transfer application for

execution and process with it according to law after noting the observations made by us above. Costs here and heretofore shall abide the result.