

(1932) 02 PAT CK 0016

In the Patna High Court

Kalu Ram and Others

APPELLANT

Vs

Sheonand Rai Jokhi Ram

RESPONDENT

Date of Decision : 22-02-1932

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 42

Citation : AIR 1932 Patna 323

Hon'ble Judges : Courtney-Terrell, C.J.;Fazl Ali, J

Bench : Full Bench

Judgement

Courtney-Terrell, C.J.—In this case firm Sheonand Rai Jokhi Ram, sued a firm named Ganpat Rai Hanuman Bux situated at Jayanagar in the district of Darbhanga in the High Court of Fort William in Bengal to recover a sum of money and obtained a decree against the defendant firm for that sum and the case was transferred to the Court of the Subordinate Judge at Darbhanga for the purpose of executing the decree. There the decree-holders applied, purporting to act under Order 21, Rule 50, Civil P.C., for execution of the decree against five persons who are the appellants before us alleging that they were partners in the defendant's firm of Ganpat Rai who were defendants in the suit in Calcutta. An objection was taken that the executing Court had no jurisdiction to add the appellants to the proceedings or what is in effect to amend the decree passed by the Calcutta High Court. Now execution proceedings against a firm are provided for under Order 21, Rule 50 in the most specific terms. That rule provides that where a decree has been passed against a firm execution may be granted:

(a) against any property of the partnership (b) against any person who has appeared in his own name or who has admitted on the pleading that he is, or who has been adjudged to be a partner, (c) against any person who has been individually served as a partner with a summons and has failed to appear.

2. It is conceded that none of these provisions applies to the case of the appellants before us. Then by para (2) of the same rule it is laid down that where a decree-holder claims to be entitled to cause a decree to be executed against

any person other than such persons as are referred to in para 1. I have quoted as being a partner in the firm he may apply to the Court which passed the decree for leave and then the rule goes on to say that the Court may deal with that application and determine the liability of such person against whom the application is made. It is perfectly clear that the words "the Court which passed the decree for leave" do not include the executing Court but in this case refers to the High Court of Calcutta and to no other Court. The words "Court which passed the decree" are mentioned in other rules and have universally been construed to mean not the executing Court but the original Court which actually passed the decree: see *Amar Chandra v. Guru Prosnnno* [1900] 27 Cal. 488. *Tameshar Prasad v. Thakur Prasad* [1903] 25 All. 444.

3. One would have thought that this was sufficient to deal with the case but the learned Subordinate Judge was induced by the citation of the case of *Ram Pal and Others Vs. Musammatt Batashia*, to take a different view. The facts in that case are in the first place entirely different from the facts of this case. In the case before the Allahabad High Court execution was sought against two persons who had in fact appeared before the Court which passed the decree. They had denied their liability as partners but the High Court seems to have sent the case to the subordinate Court with a view to determine as to whether these persons were or were not partners so that the facts of that case are entirely different from the facts of this.

4. The High Court however proceeded upon a line of reasoning which, with the greatest respect, I am unable to follow. They based their decision partly upon a construction of Section 42, Civil P.C., which does not commend itself to me and indeed the reasoning of the learned Judges seems, if I may say so with respect, to be self-contradictory. Section 42 states that the Court executing the decree sent to it shall have the same powers in executing- such decree as if it had been passed by itself. That rule was construed in effect to mean that by going to the executing Court a litigant was entitled to obtain the same reliefs that he would be able to obtain if he had gone to the Court which passed the decree. Indeed at p. 402 the learned Judges say:

The decree-holder is thus enabled to obtain what amounts to a decree upon the question of the liability without resorting to hazardous and intractable proceedings against a person whose liability is doubtful,

that is to say, he is enabled to obtain in fact the same sort of decree which might have been obtained but was not in fact obtained before the Court which passed the decree. To my mind this reasoning cannot be sustained and I am unable to follow it.

5. There is in the case of suits against partners a very sound reason for compelling resort to the Court which passed the original decree. A person sued as a partner is entitled to dispute the plaintiff's claim upon its merits and quite apart from the question of his liability as a partner. If the construction contended

for by the respondents were right it would enable a plaintiff to sue a firm and prevent a person against whom execution was intended and ultimately sought from disputing the claim upon its merits and enable him to bring that person into the proceedings not in the suit but in the later stages of execution which would defeat the whole purpose of the procedure which has been provided for in dealing with suits against firms and against persons whom it is sought to be made liable as being members of the firm. In my opinion the judgment of the learned Subordinate Judge was erroneous and should be set aside. The proper course is for the plaintiffs to go to the High Court at Calcutta and apply under Order 21, Rule 50 if they are so advised. I would allow this appeal with costs.

Fazl Ali, J.

6. I agree.