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**(1945) 01 CAL CK 0003**

**In the Calcutta High Court**

**Case No : Appeal from Original Order No. 189 of 1943**

Pulin Behari Pal and Another

APPELLANT

Vs

Late Iswar Chandra Pal, Firm and Others

RESPONDENT

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**Date of Decision : 09-01-1945**

**Acts Referred:**

**Citation : (1945) 01 CAL CK 0003**

**Final Decision : Allowed**

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## **Judgement**

Mukherjea, J.—The facts giving rise to this appeal may be shortly stated as follows. The Respondent before us which is a firm carrying on business under the name and style of late Iswar Chandra Pal obtained a money decree in the Original Side of this Court against another firm known as Late Ram Krishna Pal and late Kali Krishna Pal for a sum of Rs. 18,456 annas odd on March 6th, 1931. In the beginning of 1943, the decree was transferred for execution to the Court of the Fourth Subordinate Judge at Dacca, and the application for execution was filed by the decree-holder in that Court on February 12th, 1943. In this petition, the decree-holder prayed for realisation of the decretal amount by attachment and sale of certain movable properties belonging to the present Appellants who were made parties to the execution proceeding as judgment-debtors Nos. 2 to 6, on the allegation that they were partners of the firm against which the decree was obtained. The Appellants resisted the application for execution substantially on the ground that the decree could not be executed against them personally without leave of the Court which passed the decree as contemplated by Or. 21, r. 50 (2) of the Code of Civil Procedure, and that it was not within the competence of the Court to which the decree was sent for execution to grant that leave. The learned Subordinate Judge by his order dated July 3rd. 1943, dismissed the Appellant's petition of objection and directed that the matter would be heard by him under Or. 21, r. 50 (2) of the Code of Civil Procedure. It is against this order that the added judgment-debtors have come up on appeal to this Court.

2. It is not disputed that the decree-holders obtained a decree against the

Defendant firm in the firm name and that the present Appellants were neither individually served with summons nor did they appear in the suit and certainly did not admit nor were adjudged to be partners. As the decree-holder wants to execute the decree not against the partnership property but personally against the Appellants who do not come within the purview of cls. (a) and (b) of Or. 21, r. 50 (1) of the Code of Civil Procedure, it admits of no doubt that they can be proceeded against only in the manner contemplated by Or. 21, r. 50 (2) of the Code. The sub-rule stands 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 sub-r. (1) cls. (b) and (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, such Court may grant such leave, or, where such liability is 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.

3. Two questions which arise for consideration in this appeal are: (1) whether the sub-rule contemplates a separate application for leave which is to be made prior to the presentation of the execution petition itself; and (2) whether the leave under the sub-rule could be granted by a Court which did not pass the decree but received it for execution on transfer by such Court.

4. The first question admits of an easy answer. It is true that the sub-rule speaks of an application for leave "to the Court which passed the decree," but it is fairly well settled that it is not necessary that leave under Or. 21, r. 50 (2) of the CPC should be asked for in a separate petition before filing an application for execution. It is permissible to make one application combining both the prayers, and it is not even required to ask for leave separately as the application for execution against a particular person necessarily implies such a prayer. Vide *Jagat Chandra Bhattacharjya v. Gunny Hajee Ahmed I. L. R. 53 Cal. 214 : s. c. 30 C. W. N. 11 (1925)* and *Jagannath Jugalkishore v. Chimanlal Chowdhury 48 C. W. N. 645 (1944)*. The point, therefore, must be decided against the Appellants, and we cannot reject the application for execution simply because no separate application within an express prayer for leave under Or. 21, r. 50 (2) of the CPC was made.

5. The other point raised in this appeal involves a question of some nicety which, so far as this Court is concerned, is not covered by any previous authority and in regard to which divergent views have been expressed by other High Courts in India. The question is whether the application for leave under Or. 21, r. 50 (2) of the CPC is to be made only to the original Court which passed the decree or can such leave be granted by the executing Court to which a decree has been transmitted for execution ?

6. The Patna High Court held definitely that the words "the Court which passed the decree" occurring in sub-r. (2) referred to the original Court which made the

decree and did not include the execution Court. Vide *Kalu Ram v. Firm Sheonand Rai* I. L. R. 11 Pat. 580 (1932) and this view was adopted by the Madras High Court in *Pottiswami v. Salt Sulaiman* I. L. R. [1942] Mad. 688. On the other hand, a contrary view was taken by the Allahabad High Court in *Sital Prasad v. Messrs. Clement Robson and Company* I. L. R. 43 All. 394 (1921) where it was held, relying on the provision of sec. 42 of the Code of Civil Procedure, that the Court executing a decree which has been sent to it for execution is to be regarded for purposes of Or. 21, r. 50 (2) as the Court which passed the decree. This view was followed in a subsequent decision of the same High Court in *Sanwal Das v. Collector of Etah* I. L. R. 46 All. 560 (1924) and by the Lahore High Court in *Bombay Company, Limited, Karachi v. Kahan Singh* I. L. R. 13 Lah 327 (1931).

7. In our opinion, the view taken by the Patna High Court is right. If we look to the language of the different rules contained in Or. 21 of the Code of Civil Procedure, we find that where the provision of rule 10 applies and the decree-holder has the option of applying either to the Court which passed the decree or the Court to which the decree is sent for execution, the word "Court" alone has been used in a general way without any further specification, but where the intention of the Legislature is that the application is to be made only to the Court which passed the decree and not to any other Court, that one Court has been specifically referred to. This is the case with regard to the provisions of Or. 21, r. 16 as well as of r. 50 (2) of the Code of Civil Procedure. So far as rule 16 is concerned, it has been held in *Amar Chandra Banerjee v. Guru Prosunno Mukerjee* I. L. R. 27 Cal. 488 (1900) that an application for execution by the transferee of a decree under old sec. 232, which corresponds to Or. 21, rule 16 of the present Code, can be entertained only by the Court which passed the decree the Court to which the decree has been transmitted for execution has no jurisdiction to entertain such application. In Or. 21, r. 26 of the CPC again a distinction has been drawn clearly between a Court to which a decree has been sent for execution and the Court which originally passed the decree and this shows that the latter cannot mean or include the former. Sec. 42 of the CPC lays down 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. This undoubtedly is the general rule, but exceptions have been made by the Legislature itself in special cases where the matter for investigation is considered to be of such a character as could more properly be determined by the original Court which decided the suit.

8. We may agree with Dr. Pal that a decree obtained against a firm in the firm name has the same effect as a decree against all the partners. All the partners, therefore, are bound by the decree irrespective of the fact whether they appeared in the suit or not. The decree, however, is passed in such cases upon service of summons of an extremely technical type as is provided for in Or. 30, r. 3 of the Code of Civil Procedure, and all the existing partners of a firm may not be actually aware either of the institution of the suit or its result. With regard to

the persons coming under cls. (b) and (c) of Or. 21, r. 50 (1) of the Code of Civil Procedure, it may be presumed that they were aware of the suit or their liability as partners has been in some way or other established. With regard to persons not coming within the purview of these clauses, the Legislature on grounds of policy deemed it expedient to provide that if they disputed their liability, the matter should be heard and determined as an issue in the suit itself. The determination though it takes place in execution is given the force of a new decree and is appealable as such. It is strictly speaking not a matter coming under sec. 47 of the Code of Civil Procedure, for unless and until the liability of a person as partner is established, he cannot be deemed to be a party to the suit. In these circumstances, it seems to us proper to conclude that the Legislature intended that the matter should be investigated by the original Court which made the decree and not by the Court to which the decree is sent for execution.

9. In deciding the case of *Sital Prosad v. Messrs. Clement Robson and Company* I. L. R. 43 All. 394 (1921), the Allahabad High Court proceeded upon an interpretation of sec. 42 of the CPC which cannot in our opinion be accepted as proper. All that sec. 42 of the CPC lays down is 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. This does not mean that a litigant can approach the executing Court for obtaining a particular relief, for which he has been expressly directed to apply to the original Court. The cases of *Sanwal Das v. Collector of Etah* I. L. R. 46 All. 560 (1924) and *Bombay Company, Limited, Karachi v. Kahan Singh* I. L. R. 13 Lah 327 (1931) simply followed the earlier decision of the Allahabad High Court without any independent discussion or additional reason.

10. It may be pertinent, we think, to refer in this connection to the decision of the Judicial Committee in *Jang Bahadur v. Bank of Upper India, Ltd.* L. R. 55 I. A. 237 : s. c. 32 C. W. N. 790 (1926) which turned upon the construction of sec. 50 of the Code of Civil Procedure. In that case a decree made by the Subordinate Judge of Lucknow was transferred to the Court at Hardoi for execution. While the proceedings were pending before the Hardoi Court the judgment-debtor died, and that Court, on the application of the decree-holder made an order under sec. 50 of the CPC to the effect that execution would proceed against the legal representative of the deceased judgment-debtor. This order was challenged on behalf of the judgment-debtor as being without jurisdiction on the ground that under sec. 50 (1) of the Code of Civil Procedure, the application has to be made to the Court which passed the decree and that Court alone was competent to make the order and not the Court to which the decree was sent for execution. It was held by their Lordships of the Judicial Committee that undoubtedly the Court which passed the decree was the proper Court to make an order that execution of the decree was to proceed against the legal representative of the judgment-debtor, but as the Court to which a decree is sent for execution does not lose jurisdiction over the proceedings even if the judgment-debtor dies before the proceedings come to an end, the matter was one of procedure and not of jurisdiction, and if the executing Court did make an order for substitution, it was

an irregularity which could be waived by the judgment-debtor. Their Lordships observed in the course of their judgment that the conflict of judicial opinion on this point was more apparent than real and expressly referred to the observation of Banerjee, J., in *Amar Chundra Banerjee v. Guru Prosunno Mukerjee* I. L. R. 27 Cal. 488 (1900). In that case, Banerjee, J., pointed out the distinction between sec. 234 of the old Code (which corresponds to sec. 50 of the present one) and sec. 232 (which is reproduced in Or. 21, r. 16 of the present Code): When the judgment-debtor dies pending the execution proceedings, the application for substitution of his heirs should indeed be made to the Court which passed the decree, but that Court has no discretion in the matter and an order for execution must be made. This, therefore, can be regarded as a matter of form and any irregularity in the proceeding can be cured by sec. 99 of the Code of Civil Procedure. The case is different when an application is made by a transferee of a decree under Or. 21, r. 16 of the Code of Civil Procedure, and there the Court has got to determine judicially whether the transferee should be allowed to execute the decree or not. This is not a matter of procedure, and if the Legislature lays down that the application has to be made to the Court which passed the decree, no other Court could possibly exercise jurisdiction.

11. In our opinion, the reasoning applies with full force to an application made by the decree-holder under Or. 21, r. 50 (2) of the Code of Civil Procedure. Here also the Court has got to determine in the same way as it determines an issue in a suit as to whether the person proceeded against is liable as a partner or not. The decree-holder cannot, as a matter of course, have an order for execution against such person, and in such circumstances, it must be held that the jurisdiction to determine the particular question has been given by the Legislature to the Court which passed the decree and not to any other Court.

12. The result, therefore, is that this appeal is allowed. The order of the Court below is set aside. It will be open to the decree-holder to make an application to the proper Court as is contemplated by Or. 21, r. 50 (2) of the Code of Civil Procedure.

13. We make no order as to costs in this Court.

Ellis, J.

I agree.