

(1965) 02 CAL CK 0007
In the Calcutta High Court

Seth Issurdas Ramchand and Another	APPELLANT
Vs	
Heeralal Agarwalla and Co. and Others	RESPONDENT

Date of Decision : 16-02-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 50

Citation : 70 CWN 131

Hon'ble Judges : Sinha, J;Arun K. Mukherjea, J

Bench : Division Bench

Advocate : Arjya Mitra, for the Appellant;Monotosh Mookherjee, for the Respondent

Final Decision : Allowed

Judgement

Sinha, J.—This is an appeal against an order of Ray, J., dated 6th June, 1963. The facts are as follows: The appellants in this appeal filed a suit against the defendant describing it as "Heeralal Agarwalla & Co., affirm duly registered and carrying on business at No. 4, Cooper"s Lane within the aforesaid jurisdiction." In other words, the defendant was described as a partnership firm. Three persons were partners, Bansidhar Agarwalla, Jawaharilal Agarwalla and Ganesh Prosad Agarwalla. They were three brothers and at the present moment only Ganesh Prosad is alive. The suit was filed against the firm but writ of summons was personally served only on Ganesh Prosad. It is not disputed that the writ of summons was not personally served on either Bansidhar or Jawaharilal Agarwalla. It appears that Bansidhar died having him surviving his three sons, Mahesh Prosad Agarwalla, Ramesh Prosad Agarwalla and Biswanath Prosad Agarwalla. Jawaharilal died leaving him surviving two sons, Manik Shankar Agarwalla and Umashankar Agarwalla. A decree was passed in the said suit against the said firm on the 19th January, 1960 for the sum of Rs. 75,312/6/3 pies together with interest and costs. On or about the 10th January, 1963 the plaintiffs sought to execute the decree by filing a tabular statement, a copy whereof is at pages 1 to 8 of the paper book. It appears that in the tabular

statement it was prayed that the decree be executed against Ganesh Prosad under Order XXI, by examining him as to the assets of the firm. The other prayer was that - "leave be given to your petitioners u/s 50 and Order XXI, Rule 22(b) of the CPC for execution of the said decree against the legal representatives of the deceased partners". According to the practice of this Court, summons was issued to the alleged heirs and legal representatives in the form that is used in this Court. They are entitled to "Notice under Order XXI, Rule 50(2) and 22(1)(a) (b), C.P.C." They call upon such heirs and legal representatives to attend before the learned Judge sitting in Chambers to show cause why the said decree should not be executed against them and why the prayers of the plaintiffs should not be granted, for execution of the decree dated 19th January, 1960 against such persons as heirs and legal representatives. As against Ganesh Prosad, summons was issued entitled "Notice under Order XXI, Rule 22(1)(a) and 41, Cr.P.C." At the hearing before the learned Judge in the Court below, Ganesh Prosad appeared as also Manik Shankar Prosad and Umashanka. As regards Mahesh Prosad, Ramesh Prosad and Biswanath Prosad Agarwalla, a copy of an affidavit was served on the other side which has been printed in the paper book at pages 15 to 17 but at the hearing neither was this affidavit filed nor did any one appear on behalf of them. In fact, before us in the appeal nobody appears on behalf of the Mahesh Prosad Agarwalla group. The learned Judge, after hearing the application made an order against Ganesh Prosad Agarwalla for his examination under Order XXI, Rule 41, C.P.C. but as against the others he made no order at all. It is against this order dated 6th June, 1963 that this appeal has been preferred. So far as Ganesh Prosad Agarwalla is concerned, he has not appeared or contested the order, Mr. Mookerjee however appears on behalf of the sons of Jawaharilal and contests this appeal. It is unfortunate that the learned Judge neither dealt with that part of the application for execution which relates to the heirs and legal representatives of the partners, nor has he given any reasons for not having done so. We have therefore to deal with the application ourselves, so far as they are concerned.

2. The first point taken is that if leave under order XXI Rule 50(2) is necessary, then there is no application for such leave contained in the tabular statement. I have already described above, the way in which the prayers has been framed. There is no express prayer for such leave, although the summons was issued in the manner in which it is usually issued in this Court. It asked the alleged heirs and legal representatives to show cause why the decree should not be executed against them and reference has been made to Section 50 and Order XXI, Rule 22(a) of the Civil Procedure Code. This point has been dealt with in two decisions of this Court. The first is a Bench decision of this Court in (1) Jagat Chandra Bhattacharyya and Others Vs. Gunny Hajee Ahmed . It has been pointed out there that it has been the practice of this Court for a long time that leave under order XXI Rule 50(2) need not be asked for in the body of the tabular statement, but what happens is that summons is issued by the Registrar for that purpose and it is upon a determination of that summons that leave is granted or not granted. This practice has also been referred to and the Bench decision

abovementioned was approved, in another Bench decision of this Court in (2) Jagannath Jugal Kishore v. Chimanlal Choudhury & Ors., AIR 1949 Cal 113. McNair, J. referred to the decision of Buckland, J. in (1) Jagat Chandra Bhattacharyya and Others Vs. Gunny Hajee Ahmed and stated that it was the long-standing practice of this Court to issue such summons and as the practice was a long-standing practice, it should be taken notice of and followed. In our opinion, therefore, there is no substance in this point.

3. The next point is as to the merits. I must mention here that Mr. Mookerjee tried to take a point that Jawarilal Agarwalla had died before the decree had been passed and therefore the firm should be taken to have been dissolved before the passing of the decree and in such a case, he or his estate could not be made liable unless he was served with the writ of summons or the legal representatives had been made parties to the suit before the decree was passed. It is necessary to decide whether this is a sound point; Mr. Mookerjee cannot be permitted to urge this point now as it has nowhere been stated in the affidavit filed by Manik Shankar Agarwalla that Jawaharilal Agarwalla had died prior to the passing of the decree, or that the firm had been dissolved before was passed. There is nothing on the materials before us to establish any such fact. So far as Mahesh Prasad Agarwalla's affidavit is concerned, where there is some mention to Bansidhar Agarwalla dying in November, 1940, I have already mentioned that the affidavit itself has not been filed and nobody has appeared on behalf of the Mahesh Prosad Agarwalla group. Consequently no notice can be taken of the statements made therein which is not admitted by the appellants.

4. Mr. Mookerjee has next drawn our attention to the provisions of Order XXI, Rule 50 and has argued that unless the writ of summons was served on a partner, a decree-holder could under no circumstances proceed against any property other than the partnership property, not even under sub-rule (2). This is one of the precise points that was dealt with in the case mentioned above Jagat Chandra Bhattacharya v. Gunny Hajee Ahmad, (supra) and has been negatived. It has been pointed out that if that was so, then the provisions of sub-rule (2) would be rendered wholly nugatory. In fact, sub-rule (2) speaks of persons other than such persons as are referred to in sub-rule (1)(c), which refers to persons who have been individually served as partners with the writ of summons but have failed to appear. This clearly shows that sub-rule (2) does not require that the partners should have been served with the writ of summons individually to enable the decree-holder to proceed against the partnership property. It is only where no such writ was served that it is necessary to make an application under that sub-rule for leave to proceed, not against the partnership property which has already been provided for under sub-rule (1), but against his individual property. This sub-rule gives an opportunity to a person sought to be proceeded against as a partner to deny that he is a partner before recourse could be had to his personal property. Mr. Mookerjee tried to refer to certain cases where the partner had died before the decree was passed and the partnership stood dissolved. As I have mentioned above, those are on a different footing

altogether, and his clients cannot be permitted to take that stand, not having stated any such fact in the affidavit.

5. Lastly, Mr. Mookerjee says that inasmuch as the learned Judge has said nothing upon this point, it should be taken that he has considered the application of the decree-holder and has negatived the reliefs asked for against his clients as heirs and legal representatives of Jawaharilal, deceased. In our opinion, such an inference is not logical. But in any event, if the learned Judge has either failed to decide the point or by his not saying anything be deemed to have decided the point, we, as the Court of appeal can always decide as to whether such decision express or implied is correct or not and grant necessary reliefs. In our opinion, no cause has been shown to disentitle the decree-holder from getting the reliefs asked for against Mr. Mookerjee's clients and the application for execution in so far as it asks for leave u/s 50, under Order XXI, Rule 22(b) and Order 21, Rule 50(2) against the sons, heirs and legal representatives of Jawaharilal, deceased should be granted. In other words, the decree-holder is granted leave to proceed against the heirs and legal representatives of the two partners Bansidhar and Jawaharilal, since deceased, but it is made clear that this would be confined to the properties of the said partners in the hands of his heirs and legal representatives. The appeal is therefore allowed to this extent that the order of the Court below is upheld, excepting the order as to costs, but in addition thereto there will be the order that we have made above. The costs in the Court below as well as of the appeal will be added to the claim of the decree-holder.

Arun K. Mukherjea, J.

6. I agree.