

**(1936) 07 CAL CK 0033**

**Calcutta High Court**

**Case No:** Appeal from Original Decree No 56 of 1934

Purna Chandra Shaha and  
Others

APPELLANT

Vs

Hossain Kasim Dada and Others

RESPONDENT

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**Date of Decision:** July 31, 1936

**Final Decision:** Allowed

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### **Judgement**

D.N. Mitter, J.

This is an appeal against an order of the Subordinate Judge of Chittagong, dated the 6th December, 1933, made in the course of proceedings taken under Or. 21, r. 50, cl. (2) of the Code of Civil Procedure. The appeal is on behalf of Defendants Nos. 1 to 3 and 8 to 11. In order to understand the points in controversy in the present appeal, a few relevant facts require to be briefly stated. It appears that a suit was brought against certain persons described as carrying on business under the name and style of Ramkanai Jagabandhu Saha, having their Gadl at Chittagong. Although this plaint in this suit, which is printed at page 200, Part II of the Paper-Book, does not really conform to a plaint to which the provisions of Or. 30 of the Code applies, in substance it must be so treated, and it appears that the parties proceeded on the footing that this was so-a plaint which was directed! against a firm-but whether that was so or not, it is clear that a decree in the present case which is printed at page 267, Part II of the Paper-Book, was directed against the firm of Ram Kanai Jagabandhu Saha, and the order was that the said firm do pay to the Plaintiff the sum of Rs. 9,729-15-9 with interest thereon at the rate of 6 per cent, per annum from this date to the date of realisation of the said sum and do also pay Rs. 1,126-13-0 the proportionate costs of this suit with interest. This decree is dated the 27th February, 1932. The decree-holder in the present case applied for execution of the said decree (see application for execution, pages 2 and 4 of Part I of the Paper-Book) and in the column in which it is required to state the mode in which the assistance of the Court is required the decree-holder stated that the Defendants Nos. 1 to 15 of the suit may be adjudged as partners of the firm Ram Kanai

Jagabandhu Saha and liable for the decretal amount under Or. 21, r. 50 (2) of the Civil Procedure Code, and the decretal amount may be realised by attachment of movable and immovable properties belonging to them. In column 2 of the said application, it is to be noticed that the Defendants judgment-debtors were described as members of a firm carrying on business at Daulatganj Bazar. In the plaint, however, as has already been stated, Defendants are described as members of the firm carrying on business at their Gadi at Chittagong.

2. The first contention which was raised in the Court below and which has been repeated before us by Mr. Carden Noad, the learned Counsel who is appearing for the Appellants, is that the provisions of Or. 21, r. 50(2) do not apply to the present case as the decree was passed against a firm and execution may be granted against any person who has appeared in his own name under Or. 30, r. 6 or 7 or who has admitted on the pleadings that he is or who has been adjudicated to be a partner [see Or. 21, r. 50, sub-r. (1), cl. (b)], and it is contended that cl. (b) applying to the present case, the enquiry under Or. 21, r. 50 (2) is excluded, having regard to the provisions of the said clause. The question therefore will have to be determined with reference to the course which the proceedings have taken as to whether the present Appellants can fall under the category of persons to whom r. 50, sub-r. (1), cl. (b) of Or. 21 applies.

3. It appears from an application which was made in the course of the suit and which affects the present Appellants (see page 223, Part II of the Paper-Book) dated the 11th January, 1932, (Exhibit 9c) that objection under protest under Or. 30, r. 8, Civil Procedure Code, was filed on behalf of the Defendants, who are the Appellants before us in which it was stated in Paragraph 6 that the predecessor of the Defendants Nos. 8 to 11 were not partners of the said original partnership firm and the Defendants also are not partners. The Defendants Nos. 8 to 11 are not liable for the Plaintiffs' debts, that the Plaintiffs have no cause of action against the Defendants, now Appellants. This appears to bring the case, in our opinion, within the r. 8 of Or. 30 which runs as follows:-

Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the Plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared.

Apparently this application of the 11th January, 1932, was made in view of Or. 30, r. 8. It has been contended by the learned Counsel that the case is really covered by Or. 30, r. 6, which is in these terms:-

When persons are sued as partners in the name of their firm they shall appear individually in their own names, but all subsequent proceedings shall nevertheless, continue in the name of the firm,

We do not think that having regard to the application to which reference has just been made, the matter comes within Or. 30, r. 6, but in our opinion it comes under Or. 30, r. 8 and we are of opinion that the learned Subordinate Judge is right in repelling the contention of the Appellants before us that Or. 30, r. 6 applies to the case and the enquiry under Or. 21, r. 50, cl. (2) is excluded.

4. The next ground is one which affects the jurisdiction of the Court below to determine this matter under Or. 21, r. 50 (2) and it is said that it was the executing Court which was the proper Court to determine this matter and a transfer having been made by the District Judge from the Executing Court to that Court which dealt with it, the enquiry is without jurisdiction. A complete answer to this contention is furnished by the circumstance that the precise question was raised at an earlier stage of these proceedings and was determined both by the lower Court and by this Court that that Court has jurisdiction to deal with this enquiry. There is therefore no substance in this contention which must be overruled.

5. The next question argued was with regard to the merits of the appeal. We have been taken through the entire evidence in the case, both documentary and oral, and we can state at once that so far as Defendants Nos. 8 to 11 are concerned, we think that there is not sufficient evidence to justify the findings of the Subordinate Judge in this behalf that the decree-holder is entitled to execute the decree personally against Opposite Parties Nos. 10 and 11 and also against the assets left by Ram Krishna, son of Ram Kanai, father of Opposite Parties Nos. 8 and 9. So far as the Opposite Party Defendants Nos. 8 and 9 are concerned, (some of the Appellants before us) the order of the Subordinate Judge cannot possibly be defended. It is not stated that the Opposite Parties Nos. 8 and 9 were partners and, in our opinion, the enquiry under Or. 21, r. 50 (2) is limited to the determination as to whether the two who are sought to be made liable under the decree are partners or not. It is not intended to affect the legal representatives of the partner, and we have no doubt "that this part of the order is altogether erroneous.

6. So far as Defendants Nos. 10 and 11 are concerned, we are not satisfied that there is sufficient evidence to show that Defendants Nos. 10 and 11 were partners in this firm. We therefore set aside that portion of the order which relates to Defendants Nos. 8 to 11.

7. It remains to consider the question of the partnership of Defendants Nos. 1 to 3 and this is a matter which has been argued at considerable length on both sides.

[His Lordship then went into the evidence and concluded as follows].

8. Having regard to the cumulative effect of the documentary evidence taken along with the evidence of respectable witnesses-the two to whom we have referred-and who are believed by the Subordinate Judge-we think that we would not be justified in dissenting from the decision of the Subordinate Judge with reference to the partnership of these three Defendants, namely Defendants Nos. 1 to 3. We would

therefore confirm the conclusion of the Judge below.

9. It remains to notice an argument which was advanced that even assuming that these three persons were partners of the Daulatganj firm, that does not show that they are partners of the Chittagong firm against which the decree was directed. The decree of course does not state the location of the firm but the decree has to be taken along with the plaint where the firm is sought to be located at Chittagong. The difficulty in the way of the Appellant is that the issue which arose for determination is issue No. 3 which will be found at page 101 of the Paper Book which takes the following form: " Was there any firm styled Ram Kanai Jaga-bandhu Saha as stated by the decree-holder?" and the decree-holder in his petition for execution to which reference has already been made stated at pages 1 and 2 of Part I of the Paper Book that the firm was carrying on business at Daulatganj. No doubt the case made by the decree-holder is that the Daulatganj firm is really the main firm and the Chittagong firm is a branch. It does not appear that any discrimination was made in the Court below with regard to these two firms.

10. We do not think, it would be right for us to allow this point to be raised.

11. The result is that all the points raised on behalf of these three Appellants must fail and the appeal must be dismissed. It follows therefore that the appeal of the Defendants Nos. 8 to 11 must be allowed, that is, the Plaintiff decree-holder will not be entitled to execute the decree against them in any way, and the appeal of the Defendants Nos. 1 to 3 must be dismissed. The appeal is allowed in part, the Respondent decree-holder will bear one-third of the costs of the preparation of the Paper Book incurred by the Appellants the other two-thirds will be borne by the Appellants themselves.

S.K. Ghose, J.

I agree.