(1914) 03 CAL CK 0025

Calcutta High Court

Case No: Appeals from Orders Nos. 515 and 594 of 1912

Baisnab Charan Shaha and another		APPELLANT
	Vs	
Bank of Bengal		RESPONDENT

Date of Decision: March 2, 1914

Final Decision: Dismissed

Judgement

Mookerjee, J.

This appeal is directed against an order made on the 17th September 1912 for execution of a decree for money obtained by the Respondent (Bank of Bengal) against two firms. The suit was instituted on the Original Side of this Court against the firms of Dinanath Narayan Chandra Shaha and Churamoni Dey and Jotindra Narayan Dey. As regards the first firm, the names of the partners were not disclosed in the plaint, but as regards the second, it was stated that; Jotindra Narayan Hey, Narendra Narayan Dey and Ganendra Narayan Dey were the members of the partnership business. The decree as drawn up was against these two firms. We are not concerned with the second firm, as execution in the present instance is sought against three persons who are alleged to have been partners of the firm named Dinarnath Narayan Chandra Shaha. The District Judge has dismissed the application as against Lakshikant Shaha, on the ground that he has not been proved to be a partner; but he has directed execution to issue against Abhoy Charan Shaha and Baisnab Charan Shaha as, in his opinion, the case, as against them, has been brought within the terms of r. 50 of Or. 21 of the Code of 1908. The present appeal has been preferred by these two judgment-debtors, against the order in so far as it directs execution to issue against them. A preliminary objection has been taken on behalf of the Respondent to the competency of the appeal and reliance has been placed in support of it upon the cases of Deoki Nand Singh v. Bansi Singh 16 C.W.N. 124 (1911) and Punch Duar Thakur v. Mani Raut 16 C.W.N. 970 (1912). It has not been disputed that if the order made falls within sec. 47 of the CPC and is a final order, it is a decree within the meaning of the Code and is liable to be challenged by

way of appeal. In order to determine whether the order falls within, the terms of sec. 47, sub-sec.(1), it is necessary to determine whether the order decides a question arising between the parties to the suit in which the decree was passed and relates to the execution of the decree. There is no room for controversy that the order relates to the execution of the decree; nor is there any room for discussion that the question does arise between the parties to the suit. The case for the decree-holder is that although the suit was instituted nominally against the firm, it was in essence a suit against all the partners of that firm. But it has been argued that the order is not final, and reliance has been placed upon the circumstance that, at the present stage, the District Judge has only directed the issue of a notice under r. 22 of Or. 21, and it has been pointed out that after the judgment-debtors have been arrested, it will be open to them to show cause under r. 40, why they should not be released. In our opinion the fact that it is open to the judgment-debtors to avail themselves of the provision of sub-r. (1) of r. 40 does not alter the nature of the order. The order is not interlocutory and it is final in the sense that, in so far as the execution Court is concerned, it determines finally the liability of these persons to have execution issued against them on the basis of the decree. An order of this description is plainly a final order made under sec. 47 and is essentially a decree, as it determines a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree [Jogodishury v. Kailash Chandra 1 C.W.N. 374 : s.C. I. L. R. 24 Cal. 725 (739) (1897)., Mukhtar Ahmad v. Muquarrab Husain ILR 34 All. 530 (1912).]. The cases upon which reliance has been placed by the Respondent are clearly distinguishable. In those cases, an order had been made by the execution Court determining the value of the property sought to be seized in execution, and it was ruled that an order of that description was not a final order, as it determined a merely incidental question as to the mode of conduct of the proceedings. The preliminary objection must consequently be overruled.

2. As regards the merits of the appeal, it has not been disputed that the cases of the two Appellants do not stand on the same footing. In so far as Abhoy Charan is concerned, his case is covered by cl. (6) of r. 50 of Or. 21 of the Code; sub-r. (1) of cl. (b) of r. 50 provides that where a decree has been passed against a firm, execution may be granted against any person who has admitted on the pleadings that he is or has been adjudged to be a partner. In so far as Abhoy Charan Shaba is concerned, in the written statement which he filed in the suit on the 25th November 1909, he admitted that he and his partners carried on business in the name and style of Dinanath Narayan Chandra Shaha. His case consequently is completely covered by r. 50, sub-r. (1), cl. (6), and execution has rightly been directed to issue against him.

3. The case of Baisnab Charan Shaha stands on an entirely different footing. On behalf of the decree-holder it has been argued that his case is covered by cl. (c) of sub-r. (1) of r. 50. That clause provides that where a decree has been passed against a firm, execution may be granted against any person who has been individually served as a partner with a summons and has failed to appear. The question for

consideration is, whether Baisnab Charan Shaha was individually served as a partner with a summons in the suit, and notwithstanding such service failed to appear. The facts necessary for the determination of this question may be briefly stated. On the 2nd September 1909, an application was made on behalf of the Plaintiff, in which it was stated that Baisnab Charan Shaha was a partner of the firm and it was prayed that the writ of summons in the suit might be served on him on behalf of the firm. On this petition the following order was recorded : "Be it so, at the applicant''s own risk, under Or. 80, r. 3, sub-r. (a)." That Rule provides that where persons are sued as partners in the name of their firm, summons shall be served either (a) upon any one or more of the partners or (b) at the principal place at which the partnership business is carried on within British India, upon any person having at the time of the service the control and management of the partnership business, as the Court may direct. It is plain consequently that the Plaintiffs elected to have summons served in accordance with cl. (a) of r. 3 of Or. 30 of the Code. When the summons came to be served, so far as can be gathered from the return of the peon, it was tendered to Baisnab Charan Shaha, who refused to grant a receipt, whereupon the peon hung up a copy of the summons on the outer door of the place of business of the firm. The affidavit of the identifier describes Baisnab Charan Shaha as the agent of the firm who was found present and was asked to receive the summons in the name of his master. There is no evidence on the record, except what appears on the affidavit, as to what was precisely stated to Baisnab Charan Shaha. But it may be assumed for our present purpose that the summons was tendered to him and he was asked to receive it as the manager and agent of the firm. The question arises, whether this mode of service may be deemed individual service on him as a partner within the meaning of cl. (c), sub-r. (1) of r. 50. As already explained, r. 3 of Or. 30 defines the two alternative modes of service of summons in a suit instituted against a firm. The first mode is by service upon one or more of the partners. The second mode is by service upon the person who has the control or management of the business. If service is effected in either of those modes in accordance with law, there is a good service upon the firm as a corporate entity, and it is immaterial whether all or any of the partners are within or without British India. But there is a fundamental difference in the result of the two modes of service. In the case of service upon a partner, there is a good service not only on the firm, but also upon the partner personally, which may render him liable in proceedings in execution to the extent stated in r. 50 of Or. 21. On the other hand, if there has been service upon a person who has the control or management of the business, but is himself not a partner, although there is good service upon the firm there is no individual service upon any of the partners. In this latter case, however, the decree-holder is entitled to proceed under sub-r. (2) of r. 50. In this connection the effect of r. 5 of Or. 30 requires careful consideration. That Rule is in these terms : Where summons is issued to a firm and is served in the manner provided by r. 3, that is, in accordance with either of the modes specified in that Rule, every person upon whom it is served shall be informed by notice in writing given at the time of

such service whether he is served as a partner or as a person having the control or management of the partnership business or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner. The object of the notice as to the capacity of the person served is obvious, namely, the Legislature intended to remove the possibility" of dispute as to the character in which a particular person has been served. If there is a notice in writing, the person served is apprised the character in which he is sought to be made liable. The notice may intimate to him that he is served as a partner or tha he is served merely as the manager of that he is served in a two-fold capacity namely, both as a partner and as : manager. It is worthy of note that the language used is, not that the person served shall be presumed to be served a partner, but that the person shall be deemed to be served partner. The Legislature plainly intended not merely to raise a rebuttable presumption as to the character in which he was served, but to lay down definitely the legal effect of service. In the absence of a notice consequently, the person must be deemed to have been served as a partner, and he is in reality not a partner, he, should proceed in accordance with r., 8. That Rule lays down that any person serve with summons as a partner under 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 defau of appearance where no partner has a] peared. In the case before us, there was no written notice in terms of r. 5 Or. 30. Consequently the Appellant whose case is now under consideration must be deemed to have been served as partner, and he cannot rely moon any no presentation alleged to have been made to him, as regards his capacity, by the agent of the Plaintiff decree-holder would, indeed, defeat the whole policy the law, if these provisions express formulated in r. 5 were allowed to be evaded by any representation made at the time of service. The object of the Legislature was to secure the service of process in partnership suits, against a firm without practical difficulty, and that object would be completely defeated if the precise statutory rule were allowed to be evaded in the manner suggested by the Appellant. There is no room for question that the Appellant was duly served. The notice was tendered to him; he declined to sign the receipt, and it was thereupon posted on the outer door of the premises of the firm; and the service effected in this manner was clearly in accord with r. 17 of Or. 5, which has in this respect altered the procedure laid down in sec. 80 of the Code of 1882. It was, consequently, incumbent upon the Appellant to appear in the suit, if he wished to raise the question that he was not a partner of the firm and could not be made liable in that character. R. 7 of Or. 30, to which reference was made in the course of argument, does not militate against this view. That Rule merely provides that where summons is served in the manner provided by r. 3 upon a person having the control and management of the partnership business, no appearance by him shall be necessary, unless he is a partner of the firm sued. In the present case, the legal effect of the service of summons upon the Appellant without the prescribed notice under r. 5 was service upon him in his capacity as partner, and the only method by which he could contest

his liability as partner, was by appearance under protest in accordance with r. 8. On these grounds I hold that the Appellant was individually served as a partner with summons in the suit, and that notwithstanding such service, he failed to appear. It is consequently open to the decree-holder to proceed with execution against him under r. 50, sub-r. (1), cl. (c). The ground upon which the appeal is sought to be supported must consequently be overruled in so far as both the Appellants are concerned.

4. The result is that the order of the District Judge is affirmed and this appeal dismissed with costs. "We assess the hearing fee at three gold mohurs.

5. The other appeal, it is conceded, will be governed by this judgment, and a similar order will be drawn up therein.

Beachcroft, J.

6. The decree has been passed against the firm of which the Appellant Baisnab is alleged to be a partner. Therefore under Or. 21, r. 50 (1), cl. (c), execution may be granted against Baisnab who admittedly failed to appear if it be shown that he was individually served as a partner. That he was individually served there is no question. Not only is service proved, but the Appellant relies on the affidavit of the identifier, who accompanied the serving peon, to support the argument that he was served not as a partner, but as manager of the firm, for it is on this argument that he relies to escape the provisions of Or. 21, r. 50 (1), cl. (c).

7. The Appellant did not appear at any stage of the proceedings till he filed his appeal against the order for the issue of a warrant of arrest against him. It appears that he refused to accept service of summons and it may be a matter form argument whether a person who has refused to accept service of a summons can plead that he was in fact served in one capacity and not in another. This pre has, however, not been argued and I Prefer to rest my decision on other grounds.

8. The only question then is whether he was served as a partner.

9. The application for service summons on Appellant on behalf of the firm alleged that he was a partner in the firm, and the order was for service on him under Or. 30, r. 3 (a). The affidavit shows that the summons was handed to him at the place of business of the firm and that he was asked to receive it in the names of his masters, the Defendants, the identifier regarding him as the ammukhtar and agent of the firm. When he refused to give a receipt, the summons was affixed to the door of the place of business. This was good service under Or. 5, r. 17, whether Appellant was served as partner or as the person having the management of the partnership business. Now under Or. 30, r. 5, when a summons has been served in the manner provided by r. 3, the person served is to be informed by written notice whether he is served as partner or as a person having the control or management of the partnership business or in both characters and in default of notice he shall be

deemed to be served as a partner. The concluding words of r. 5 do not merely raise a rebuttable presumption, but lay down a definite rule of law that service on a person without the written notice contemplated by the rule is equivalent to service with notice that the person is served as a partner. Can this definite rule of law be affected by the fact that the identifier or the serving peon-the affidavit does not state which-asked him to accept the summons in the capacity of manager-assuming that the affidavit means this-of the firm? I am of opinion that it cannot.

9. It is clear that a person may be both partner and manager of the partnership business. R. 5 of Or. 30 also contemplates such a position. The affidavit does not suggest that the request to accept service as manager involved the representation that Appellant was not regarded as a partner. But, in any case, the terms of r. 5 of Or. 30 are clear and whether the Appellant was addressed as partner or manager when the summons was handed to him, the absence of a written notice had the effect of making the service as on a partner.

10. It was suggested that the Court might under Or. 21, r. 50 (2), order trial of the question whether Appellant was in fact a partner or not. But that sub-section is only applicable in the absence of the conditions in sub-sec. (1). I put it to Mr. Caspersz in the course of argument whether cl. (c) of sub-sec. (1) of r. 50 would be applicable in the case of a person who was in fact not partner, if the summons : was accompanied by a notice that he was served as a partner. Counsel''s reply, which was undoubtedly correct, was that it would be applicable. That being so cl. (c) must be equally applicable, when by Or. 30, r. 5, the absence of the notice has the same effect as notice that the Appellant was served as a partner.

11. There is no real hardship in the Rule If the Appellant wished to take the position that he was not a partner, he could have appeared under r. 8 of Or. 30 under protest denying that he was a partner It is suggested that as he was served an manager, it was not necessary for him to appear under r. 7. But that Rule must be read as subject to r. 5 and contemplate only a case where service is on a manage and not a case where the person served in deemed to be served as a partner.

12. The Appellant could have appeared under protest, but did not do so and if it (sic) a fact that he is not a partner, he has only himself to thank for not having taken advantage of the steps which the lay allows him to protect himself. I agree that the appeals of both the Appellants should be dismissed.