

PETITIONER:
GAJENDRA NARAIN SINGH

Vs.

RESPONDENT:
JOHRI MAL PRAHLAD RAI

DATE OF JUDGMENT:
13/11/1962

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
GAJENDRAGADKAR, P.B.
WANCHOO, K.N.
GUPTA, K.C. DAS

CITATION:
1964 AIR 581 1963 SCR Supl. (2) 303

ACT:
Execution-Partnership firm-Summons on individual partner-Maintainability-Code of Civil Procedure 1908 (Act V of 1908), Or. 30, rr. 6, 7; Or. 21, r. 50.

HEADNOTE:

The respondent-plaintiff sued the firm of M/s. Tirhut Umbrella Works in the Bombay City Civil Court for a decree for Rs. 20,320/-. The summons in the suit was served on the appellant as a partner of the firm. The appellant appeared in the Civil Court through ;in advocate without protest and obtained an adjournment for filing a written statement. Later the advocate sought leave to withdraw the appearance on the ground that the appellant was not a partner of the firm but the application was rejected by the court which proceeded to try the suit ex-parte and decreed it as prayed for. The decree was transferred for execution to the District Court, Patna, where the respondent first applied for leave to execute the decree against the appellant but later wanted to proceed with the execution without leave. The District Court held that the appellant was not a partner and that as the City Civil Court had not decided, that question, it was open to the executing court to decide it. On appeal, the High Court reversed the order and directed the execution to proceed against the appellant. Held, that on the evidence on record and in view of the appellant not having produced the original summons served upon him it must be held proved that the appellant had been served as a partner of the firm and had appeared under rr, 6 and 7 of Or. 30 of the Code of Civil Procedure. The District Court by refusing leave to withdraw on the ground that the appellant was not a partner the City Civil Court had impliedly decided that the appellant was a partner and there not having been any appeal against that decision, the order was final and the decree could be executed against the appellant under Or. 21, r. 50 Civil Procedure Code.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 268 of 1960.

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Appeal from the judgment and order dated September 5, 1958, of the Patna High Court in Misc. Appeal No. 252/55.

A. V. Viswanatha Sastri, Yogeshwar Prasad and U. P. Singh, for the appellant.

G. S. Pathak, Rameshwar Nath and S. N. Andley, for the respondents.

1962. November 13. The judgment of the Court was delivered by

SHAH, J.-M/s. johri Mal Prahalad Rai-hereing after referred to as 'the plaintiffs'-commenced an action against M/s. Tirhut Umbrella Works (a firm carrying on business at Laheriasarai in the State of Bihar) in the City Civil Court, Bombay, for a decree for Rs. 20,320/- with costs and interest. Summons of the suit was served upon one Gajendra Narain Singh-hereinafter referred to as 'Singh'-at Road 8, R Block at Patna (Bihar) as a partner of the defendant firm. Mr. D. B. Tilak an advocate who was engaged by Singh, filed on April 22, 1953 in the Court a Vakalatnama signed by Singh authorising him to act, appear and plead in the suit. A chamber summons for directions for trial of the suit as a commercial cause was thereafter served on Singh. On September 9, 1953 Mr. Tilak a, advocate for Singh addressed a letter to the Attorneys of the plaintiffs requesting them to consent to an "adjournment of the x x x suit" to enable Singh "to file his written statement." By consent of the advocates the chamber summons for directions stood adjourned by order of the Court for a fortnight. When the chamber summons for directions was taken up for hearing on September 24, 1953 Mr. Tilak informed the Court that his client Singh claimed that he was not a partner of the defendant firm, and orally prayed for an order permitting withdrawal of the appearance filed in Court. The Court declined to accede to the oral request and directed that appropriate proceedings to withdraw the

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appearance may, if so advised, be taken by Singh. The Court directed that the suit be transferred to the list of commercial causes and gave directions for the progress of the suit. When the suit was taken up for hearing before the City Civil Court on November 27, 1953 Mr. Tilak again appeared and submitted that his client on whom summons was served in the suit, was not a partner of the defendant firm and prayed that he be allowed to withdraw the appearance which was filed without protest. The Court rejected the application for leave to withdraw the appearance and also rejected the application of Mr. Tilak for an adjournment of the suit. Mr. Tilak then withdrew from the suit with leave of the Court, and the suit was heard ex parte. The Court recorded the evidence of a witness for the plaintiffs and admitted certain correspondence tendered by the plaintiffs, and decreed the suit as prayed.

The decree was forwarded by the-Registrar of the City Civil Court, Bombay to the Court of the District Judge, Patna, with a certificate of non-satisfaction. The plaintiffs then applied for leave to execute the decree against Singh under O. 21, rule 50(2) of the Code of Civil Procedure. Singh contended that he was not a partner of the defendant firm and that he was not liable to satisfy the debts of that firm; that he was not 'served with summons in the suit; that he had appeared in the suit in which the decree was passed not as a partner, but in his individual capacity; and that he had informed the Court that he was not a partner of the defendant firm. The plaintiffs then applied for execution

of the decree claiming that no order of the Court granting leave to execute the decree was necessary. The District judge, Patna, by his order dated May 12, 1955 held that the execution could not be directed against Singh relying upon sub-clauses (b) or (c) of rule 50, O. 21, for the question whether he was a partner of the defendant firm was left undecided by

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the City Civil Court. The learned District judge further held on the evidence that Singh was not a partner of the defendant firm.

In appeal against the order of the District Judge rejecting the application for execution against Singh the High Court at Patna had that on the facts proved the plaintiffs were entitled as of right to execute the decree under O. 21 rule 50(1)(b) against Singh. The High Court accordingly reversed the order passed by the District judge and directed execution to proceed against Singh. With certificate under Art. 133(1)(a) granted by the High Court, this appeal has been preferred by Singh.

Order 30 of the Code of Civil Procedure deals with the manner in which suits may be filed by or against firms. Two or more persons carrying on business in India may be sued in the name of the firm of which they were partners at the time of the accrual of the cause of action. Where a suit has been filed against the firm summons may be served in the manner prescribed by rule 3. That rule, in so far as it is material, provides-

"Where persons are sued as partners in the name of their firm, the 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 India, upon any person having, at the time of service, the control or management of the partnership business there,
- as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without India

Provided x x x".

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The plaintiffs had sued the partners of M/s. Tirbut Umbrella Works in the firm name, and the summons was served on Singh at Road 8, R Block, Patna. The original summons would normally be with Singh but he did not care to 'produce it before the District judge, Patna. The High Court on a review of the circumstances arrived at the conclusion that Singh was served with summons of the suit as a partner of the defendant firm. That conclusion is amply supported by the evidence, and the presumption which arises under rule 5 of O. 30 which provides

"Where a summons is issued to a firm and is served in the manner provided by rule 3, 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."

It is not possible to say whether the summons was accompanied by the notice contemplated by rule 5, but it is

clear by the express words of the rule that in default of such notice the person served shall be deemed to be served as a partner. Singh has in his affidavit sworn in the suit, and also in his testimony at the hearing in the execution proceeding admitted that he was served with a summons in the suit, and Mr. Vishwanath Sastri appearing for Singh has fairly not challenged the finding- that Singh must be deemed to have been served as a partner of the defendant firm.

Rule 8 of O. 30 provides :-

"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

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serving a summons on the firm and obtaining decree against the firm in default of appearance where no partner has appeared."

The rule enables the person served as a partner to appear under protest and to deny that he is a partner of the firm which is sued. Appearance under protest by the person sued renders the service of summons as regards the defendant firm in effective. The plaintiff may obtain a fresh summons against the firm and serve it in the manner prescribed by O. 30 rule 3 against another person who is alleged to be a partner by the plaintiff or against the person who has the control or management of the partnership business. A decree against the defendant firm so obtained may with leave under O. 21 rule 50 (2) be executed against the firm and also against the person who had been initially, served as a partner and who had appeared under protest denying that he was a partner. The plaintiff however, is not obliged to obtain a fresh summons: he may request the Court to adjudicate upon the plea of denial raised by the person served and appearing under protest. The Court will then proceed to determine the issue raised by that plea. If the Court finds on evidence that the person served was not a partner at the material time, the suit cannot proceed, unless summons is served afresh under rule 3 : if the Court holds that he was a partner service on him will be regarded as good service on the firm and the suit will proceed against the firm.

In the present case Singh did not enter appearance under protest. He filed an appearance in his individual name in the suit, and obtained an adjournment from the Court to enable him to file his written statement. The appearance so filed must be deemed to be on behalf of the firm. At the hearing of the summons for directions he contended that he was not a partner of the defendant firm and applied for leave to withdraw his appearance which was filed without

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protest. Unless the Court permitted Singh to withdraw the appearance initially filed, it continued to be an appearance under rule 6 of O. XXX on behalf of the firm. We are not concerned in this case to decide whether the application of Singh for leave to withdraw his appearance was properly rejected. That question could only be raised in adopted by Singh in the proper Court challenging decision of the duty Civil Court and not for execution of the decree. Order 21 rule 5(the Code of Civil Procedure deals with execution of decrees against firms. By cl. (1) it is provided:

" 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 under rule 6 of 'rule 7 of Order XXX or who has admitted on the pleadings 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.

Provided x x x x x."

Clause (2) provides

"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-rule (1), clauses (b) and (c) as being a partner in the firm, he may apply to the Court r which passed the decree or 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 per-son be tried and determined in any manner in

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which any issue in a suit may be tried and determined."

By cl. (3) it is provided

"Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

Manifestly relying upon sub-clauses (b) and (c) of subrule (1) a plaintiff who has obtained a decree against a firm may execute it against any person who has been individually served with the summons as a partner and has failed to appear and also against any person who has appeared in his own name under rule 6 or rule 7 of Order 'XXX. Singh being a person who had after being served as a partner appeared under rule 6, the decree of the City Civil Court, Bombay was executable against him.

The plaintiffs did undoubtedly make an application for leave to execute the decree against Singh on the footing that he was a person other than a person referred to in cls. (b) and (c) of sub-rule (1) of r. 50 O. 21, but that proceeding was plainly the result of an incorrect appreciation of the true position in law. On that account his right under O. 21 rule 50 (1) (b) was not lost. The plaintiffs were entitled to abandon the application for leave under sub-rule (2) and to execute the decree under sub-rule (1).

The record of the City Civil Court, Bombay, tendered before the District judge clearly establishes that Singh who was served as a partner of the defendant firm filed an appearance under rule 6 O. 30 of the Code of Civil Procedure, and thereafter his application for withdrawal of appearance was rejected and the suit was decreed against the firm. This decree

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against the firm was by virtue of sub-rule (1)cl. (b) of rule 50 O. 21, liable to be executed against Singh.

The High Court was therefore, in our judgment right in directing execution of the decree of the City Civil Court, Bombay, against Singh. The appeal fails and is dismissed with costs.

Appeal dismissed.

JUDIS