

## APPELLATE CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,  
Mr. Justice Wallace, and Mr. Justice Anantakrishna  
Ayyar.*

T. MAHOMED YUSUF AND FIVE OTHERS,  
(DEFENDANTS), APPELLANTS,

1929,  
March 12.

v.

KHAN BAHADUR MUHAMMAD SADULLA BADSHA  
SAHIB AND FIVE OTHERS (PLAINTIFFS), RESPONDENTS.\*

*Code of Civil Procedure (Act V of 1908), Order XXI, rule 50—  
Death of partner before institution of suit against partner-  
ship—Decree in firm name alone—Execution of decree—If  
private estate of deceased partner liable in—Order XXI, rule  
50 (2)—Applicability of—Plaintiff not aware of death of  
partner before institution of suit—If would entitle him to  
obtain leave to execute against legal representatives under  
Order XXI, rule 50.*

Where a partner dies before the institution of a suit against the partnership, and a decree is obtained against the firm alone in the firm name, the private estate of the deceased partner is not liable to be proceeded against in execution of such decree.

Order XXI, rule 50 (2), of the Code of Civil Procedure in terms applies only to a person who is alleged to be a partner, and does not apply to legal representatives of a partner who was dead at the time the plaint was filed.

The circumstance that the plaintiff had no knowledge of the death of a partner before the institution of the suit would not make any difference on the question.

*Ellis v. Wadson*, [1899] 1 Q.B., 714, and *Muthurdas Canji v. Ebrahim Fazalbhoy*, (1927) I.L.R., 51 Bom., 986, followed.

ON APPEAL from the order of Mr. Justice WALLER, dated 7th day of October 1927, and passed in the

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\* Original Side Appeal No. 92 of 1927.

MAHOMED  
YUSUF  
v.  
BADSHA  
SAHIB.

exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 63 of 1926.

This appeal coming on for hearing before COURTS TROTTER, C.J., and ODGERS, J., their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH:—

COURTS TROTTER, C.J.—This case raises a point of some difficulty which in my opinion ought to be referred to a Full Bench. The facts are not in dispute. The suit was brought against the firm of Haji Sheik Mira Sahib & Co., in the firm name. The plaintiff in that suit was given a decree against the firm for Rs. 6,453. It is conceded that Haji Badrudeen Sahib, now deceased, was at one time a partner in the defendant firm. The application under review was an application to issue execution against his assets in the hands of his legal representatives and the learned Judge granted leave. It is argued before us that, having regard to the way in which the suit was framed, this cannot be done, and that execution must be confined to the partnership assets, if any, which can be traced to the hands of the deceased partner's legal representatives and cannot be extended to his estate generally. The difficulty appears to me to arise by reason of the provisions of Order XXI, rule 50 as contrasted with Order XXX, rules 3 and 4. Order XXI is the part of the Code which specifically deals with execution, and rule 50 deals with the question of executing decrees against a firm where the decree is granted against the firm in its firm name. This is on the face of it the operative rule, and it is fairly clear that sub-rule (b) of that rule, which is the only one that can possibly be suggested as applicable to the present case does not so apply, for it confines execution to a person who has appeared or who has admitted upon the pleadings that he is, or has been adjudged to be, a partner. The question is, to what extent Order XXX, which is a new order corresponding in the main to Order XLVIII-A of the Rules of the Supreme Court of England, can be held by necessary implication to have extended this liability. The facts here are that at the time he got his decree the plaintiff knew that Badrudeen Sahib was dead but he did not know that he had in fact been a partner. That appears to exclude the operation of the proviso to Order XXX, rule 3, which deals with the case of a partnership, which had been

MAHOMED  
YUSUF  
v.  
BADSHA  
SAHIB.

dissolved to the knowledge of the plaintiff before the institution of the suit. I do not myself see how it can be said that the plaintiff had knowledge of dissolution, merely because he knew that a particular individual was dead, though at the time he instituted the suit he did not know that he was a partner. But the real difficulty is created by Order XXX, rule 4, which enacts that, where two or more persons may sue or be sued in the name of a firm and any such person dies, whether before the institution or during the pendency of the suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit. The question that is to be determined is whether this amplifies the scope of Order XXI, rule 50 and makes the legal representatives liable in execution in a case like the present. It is contended that Order XXX, rule 4 (1), only means that it is not necessary to join the legal representatives of the deceased in order to issue execution against them. It is argued on the other side that the purpose of that sub-rule is merely to preclude the possibility of the suit being said to be bad for non-joinder of such legal representatives and that, unless it means that and no more, it is impossible to reconcile it with the proviso to rule 3. The whole subject has been elaborately discussed in *Mathurdas Canji v. Ebrahim Fazalbhoy*(1), where all the authorities, both Indian and English are reviewed. I do not think myself that the English authorities are of much help because there is nothing in the provisions of Order XLVIII-A, rule 3 corresponding to our Order XXX, rule 4. I would formulate the question thus:—

“Where a decree is passed against a partnership in its firm name and the plaintiff at the time of filing his suit knew that a person who was afterwards discovered to be a partner was dead but did not know that he was a partner, can execution be issued against the legal personal representatives of such deceased person?”

The question is one that is likely to recur, and I think there ought to be an authoritative ruling for the guidance of the Courts of this Presidency.

ODGERS, J.—Speaking for myself, I should have been content to rest our decision on *Mathurdas Canji v. Ebrahim Fazal bhoy* (1) which seems to me to be correct and relevant to this case.

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(1) (1927) I.L.R., 51 Bom., 986.

MAHOMED  
YUSUF  
v.  
BADRSHAH  
SAHIB.

There is, however, as my Lord has pointed out, the difficulty with regard to rule 4 of Order XXX, and I have no desire to oppose the reference of this important point to a Full Bench and accordingly concur in the order of reference proposed.

#### ON THIS REFERENCE—

*P. Viswanatha Ayyar* for appellants.—The facts in this case are undisputed. The only question is whether Order XXI, rule 4 of the Code extends the liability beyond the classes of persons who are specifically referred to in Order XXI, rule 50 (2). Order XXX appears for the first time in the Code of 1908, and is modelled after Order XLVIII-A of the Rules of the Supreme Court in England. Whereas before the Code of 1908 a plaintiff suing a partnership had to mention the names of the partners in the plaint, now he is permitted, if he so chooses, to sue the partnership in the firm name. Order XXI, rule 50, restricts execution to partners who have been served with a summons to appear and answer. In the present case Badruddin Sahib died before the institution of the suit. Order XXX, rule 3, deals only with service of summons. The question of execution must be determined only under Order XXI, rule 50. There is no allegation here that the legal representatives were ever partners. The personal estate of the deceased partner could not be made liable in execution unless the legal representatives had been made parties to the action. The case of the death of a partner before suit is fully considered by Lord Justice ROMER in *Ellis v. Wadeson*(1), and that decision is entirely in my favour. A recent Indian decision, *Mathurdas Ganji v. Ebrahim Fuzalbhoy*(2), construing Order XXX, rule 4 says that "it was enacted to set at rest the doubt that existed in connexion with section 45 of the Indian Contract Act . . . but it was not intended that a suit in a firm name should be deemed to include the personal representatives of a deceased partner." In *Veerappa Chetty v. Tindal Ponnen*(3), which was followed in *In re Arunachalam Chettiar*(4), it was held that no suit could be filed against a dead person.

*G. Krishnaswami Ayyar* (with him *T. R. Srinivasa Ayyar*) for respondents.—The only question the Court could go into at the execution stage is as to whether Badruddin Sahib was or

(1) [1899] 1 Q.B., 714 at 718.

(2) (1927) I.L.R., 51 Bom., 986.

(3) (1907) I.L.R., 31 Mad., 83.

(4) (1915) 2 L.W., 828.

was not a partner in the firm. In *Jivraj v. Bhagvandas*(1), leave was given to execute against legal representatives, see also *Motilal v. Chandmal*(2), and *Wigram v. Cox*(3).

*P. Viswanatha Ayyar* replied.

The OPINION of the Court was delivered by

ANANTAKRISHNA AYYAR, J. The question that has been referred for the opinion of the Full Bench is "where a decree is passed against the partnership in its firm name and the plaintiff at the time of filing his suit knew that a person who was afterwards discovered to be a partner was dead but did not know that he was a partner, can execution be issued against the legal personal representatives of such deceased person", in respect of assets in their possession belonging to the deceased partner?

Before the enactment of Act V of 1908, the procedure that was generally adopted in Indian Courts in respect of suits against firms was to have the names of the members of the firm set out in the plaint and to have them or one of them personally served with a summons. In the case reported in *Yeknath Babaji v. Gulabchand Kahanji*(4),

FORBES, WESTROPP, and TUCKER, JJ., held that

"The suit being instituted against the firm, the names of the members of the firm should have been mentioned in the plaint, and they or one of them should have been personally served with a summons, if within the jurisdiction."

Sir BARNES PEACOCK, Chief Justice, and HOBHOUSE, J., in *Koylash Chunder Roy v. Edward Ellis*(5), observed as follows:

"In the case of an unincorporated or unregistered company, the proper course would be to sue the individual members of the company in the same way as the individual members of

MAHOMED  
YUSUF  
v.  
BADSHA  
SAHIR.

ANANTA-  
KRISHNA  
AYYAR, J.

(1) [1922] 24 Bom. L.R., 1087.

(2) [1923] 25 Bom. L.R., 1081.

(3) [1894] 1 Q.B., 792.

(4) [1863] 1 Bom. H.C.R., A.C.J., 85.

(5) [1867] 8 W.R., 45 (Civil Rulings).

MAHOMED  
YUSUF  
v.  
BADSHA  
SAHLB.  
—  
ANANTA-  
KRISHNA  
ATTAB, J.

any other firm, not being incorporated or registered, would have to be sued. But it appears that the plaintiff does not know of what persons the company is composed; if that is so, we are of opinion that he might sue the company by the name of 'the Bengal Indigo Company', the name under which they are carrying on business and contracted with him, if at all. But he will have to state in his plaint that he is unable to give any better description of the defendants than that. The suit will then proceed against that company, and any property belonging to the firm will be liable to be taken in execution, if a decree be obtained."

In Macpherson's Procedure of the Civil Courts of the East India Company, published in 1850, it is stated that

"If there be a demand against a partnership, all the partners must be before the Court and if any of the partners liable to the demand are dead, their representatives ought to be parties."

Under section 74 of Act XIV of 1882,

"If the defendants are partners and the suit relates to a partnership transaction or to an actionable wrong in respect of which relief is claimable from the firm, the service may be made, unless the Court directs otherwise, either (a) on one defendant for himself and for the other defendants, or (b) on any person having the management of the business of the partnership at the principal place of such business."

Subject to that exception, the section states that

"When there are more defendants than one, service of the summons shall be made on each defendant."

Order V, rule 11 of the present Civil Procedure Code (V of 1908) enacts that

"Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant."

Thus, according to the procedure followed by the Indian Courts, in a suit against an unincorporated company, the names of all the individual members must be given in the plaint. The practice of English Courts was different, and there such a partnership or firm may sue or be sued by its usual designation. When the new

Civil Procedure Code was passed, opportunity was taken to permit of a similar procedure being followed in cases of suits by and against firms, and Order XXX was inserted which proceeded on the lines of Order XLVIII-A of the Rules of the Supreme Court.

MAHOMED  
YOUSUF  
v.  
BADSHA  
SAHIB.  
—  
ANANTA-  
KRISHNA  
ATTAR, J.

Thus an alternative procedure was prescribed, of which parties could, in their option, take advantage. In suits against firms, if the plaintiff be so minded, he could sue any two or more persons claiming or being liable as partners and carrying on business in British India, in the name of the firm of which such persons were partners at the time of the accruing of the cause of action. The plaintiff in such cases is not bound to disclose the names of the partners in the plaint. As regards service of summons in such cases, Order XXX, rule 3, prescribes the procedure, that it may be served (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 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 British India. There is a proviso to rule 3 which enacts

“That, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable.”

Further, when the suit is filed as aforesaid against a firm, if any of the persons sued in the name of a firm should happen to die, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representatives of the deceased as a party to the suit.

MAHOMED  
YUSUF  
v.  
BADSHA  
SAHIB.

ANANTA-  
KRISHNA  
AYYAR, J.

The procedure in case of suits against firms has been thus simplified, following the English practice.

When the question is how such decrees against firms can be executed, the Code lays down the general rule in Order XXI, rule 50, viz., that such decrees can be executed against any property of the partnership; but that a decree against a firm shall not release, render liable, or otherwise affect, any partner therein, unless he has been served with a summons to appear and answer.

These being the general principles laid down by the Code regulating the procedure to be followed in suits against firms and the mode of executing such decrees, we may refer to the special facts found in the particular case in which reference to the Full Bench has been made. A decree for money was passed against the firm of Haji Sheik Mira Sahib and Company for Rs. 6,453. It was conceded that Haji Badruddin Sahib was a partner in the defendant's firm, but he was dead before the suit was instituted. The plaintiff—decree-holder applied under Order XXI, rule 50, sub-clause (2), for leave to execute the decree against the legal representatives of the deceased Badruddin Sahib. The question is whether the decree-holder is entitled to have such leave.

It is contended that the decree-holder is entitled to cause the decree to be executed not only against persons referred to in sub-rule (1), clauses (b) and (c) of Order XXI, rule 50, but that he is also entitled to have the decree executed against any other person as being a partner in the firm; and it was argued that the circumstance that the person who was a partner in the firm was dead at the time of the application could be no bar to the decree-holder being granted leave for execution as claimed, and that the only question which the legal representatives could raise would be whether the



deceased was a partner in the firm or not. On the other hand it was urged on behalf of the legal representatives that the Civil Procedure Code has only followed the procedure prescribed by the Rules of the Supreme Court, and that under the English Rules, where a partner dies before action and a decree is obtained against the firm alone in the firm name, the private estate of the deceased partner is not liable to be proceeded against in execution.

Having considered the provisions of Order XXI, rule 50, and Order XXX, rules 1 to 5, and also the corresponding provisions of Order XLVIII-A of the Rules of the Supreme Court, we are of opinion that the decree-holder is not entitled to claim leave to execute the decree against the personal properties of the deceased partner in the hands of his legal representatives. When the partnership is a going concern and the partners are sued in the name of the firm, the summons is to be served as laid down in the first portion of Order XXX, rule 3 ; but, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable. Order XXX, rule 3 of the Civil Procedure Code, is thus relevant only when the question of the *service* of a summons is concerned, and questions relating to *execution* of decree against firms have to be decided with reference to Order XXI, rule 50. It is admitted that neither clause (b), nor clause (c) of rule 50, sub-rule (1), applies to the present case. In our opinion, neither can sub-rule (2) of rule 50 apply to the present case. According to the wording of the sub-rule (2), it would apply only when the decree is sought to be executed against any person as being a partner in the firm. Here it is not contended that the legal representatives

MAHOMED  
YUSUF  
v.  
BADSHA  
SAHIB.

ANANTA-  
KRISHNA  
AYYAR, J.

MAHOMED  
YUSUF  
v.  
BADSHA  
SAHIB,  
—  
ANANTA-  
KRISHNA  
AYYAR, J.

against whom the decree is sought to be executed were ever partners in the firm; so that unless the person against whom leave to execute the decree is asked is alleged to be a partner in the firm, sub-rule (2) cannot be invoked by the decree-holder. As observed by BENSON and SUNDARA AYYAR, JJ., in *Sahib Thambi v. Hamid*(1),

“The general rule of law is that in suits where one person is allowed to represent others as defendant in a representative capacity, any decree passed can bind those others only with respect to the property of those others which he can in law represent, and no personal decree can be passed against them, although the parties on record *eo nomine* may be made personally liable. . . .

The principle is recognized in England in partnership suits in Order XLVIII (a), rule 8, Judicature Act, which lays down that where a judgment or order is against a firm, execution may issue only against any property of the partnership, so far as partners who are not individually served and those who have not appeared are concerned.”

In England, it has been held that if one of several partners dies before action is brought, and the plaintiff seeks, in suing the firm, to make the deceased partner's private estate liable, he must add as defendant the personal representative of such deceased partner. (See the Annual Practice, 1928, pages 840 and 841.) In *Ellis v. Wadeson*(2), ROMER, Lord Justice, delivering the judgment of the Court of Appeal observed at page 718:—

“Now consider the question of death. Suppose a partner dies before action brought, and an action is brought against the firm in the firm's name. The dead man is not a party to the action so far as his private estate is concerned, for a dead man cannot be sued, though the legal personal representatives of a dead man can be sued in a proper case. In that case, the action would be an action solely against the surviving partners. At common law, if a creditor sued joint debtors and one died, the survivors only could be sued. Since the Judicature Act,

(1) (1911) I.L.R., 36 Mad., 414 at 417.

(2) 1899] 1 Q.B., 714.

undoubtedly, in the case of a partnership liability, the creditor might now join in one action the surviving partners, and the legal personal representatives of the deceased partner, but the latter would have expressly to be added as defendants. If the legal personal representatives of a deceased partner are not added expressly as defendants, and the action is brought against the firm in the firm's name, then judgment can only be obtained as against the surviving partners and be enforced against them and against the partnership assets. I may mention that the reason why the partnership assets can be reached is because, notwithstanding the dissolution by death, the surviving partners for many purposes have authority continued to them to bind the dead man's interest in the partnership assets, for the authority of partnership extends to enable the surviving partners in case of dissolution by death, to wind up the affairs of the partnership, to pay the partnership debts, to defend claims against the partnership, and so forth. See Lindley on Partnership, 5th Ed., pp. 217, 218 and 587."

MAHOMED  
YUSUF  
v.  
BADSHA  
SAHIB.  
—  
ANANTA-  
KRISHNA  
AVYAR, J.

Evidently, it was not the intention of the Indian Legislature to depart from the above statement of law in England since we do not find any such indication in the provisions of the Civil Procedure Code. No doubt Order XXX, rule 4, is new, and there is no corresponding provision in the English rules, but rule 4 only gives the legal representatives a right to apply to be made a party to suits in the name of firms. It has been enacted in the Code, evidently to obviate difficulties that might otherwise be suggested, having regard to the provisions of section 45 of the Indian Contract Act. But it does not in our opinion enable a decree-holder to claim the right now claimed by him before us.

The case before us is not the case of a partner dying after suit. The deceased partner in the case before us had no opportunity of contesting the suit, neither had the legal representatives of the deceased partner any such opportunity. If the decree-holder's contention regarding Order XXI, rule 50, be accepted, then the only question that could be decided in an inquiry under

MAHOMED  
YUSUF  
v.  
BADSHA  
SAHIR.  
—  
ANANTA-  
KRISHNA  
Ayyar, J.

that sub-rule being whether a particular person was a partner or not, no other contentions relating to the suit could be raised or tried at the instance of the legal representatives. The correctness of a decree could not be impugned in execution proceedings. The legal representatives would thus be deprived of all defence to the suit. The other surviving partners could not have any right to represent a deceased partner except as regards partnership properties. Thus the contention of the decree-holder involves manifest injustice to the estate of the deceased partner and unless there be anything in any enactment compelling us to uphold that contention, it seems to us that we should avoid such a conclusion, if possible. It thus being clear that, so far as the private estate of the deceased partner is concerned, there has been no representation in the suit, the legal representatives of the deceased partner, so far as the personal estate of the deceased is concerned, could not be held in any way to be bound by the decree obtained by the plaintiff against the firm. In our view, if the Legislature wanted to go further than the English practice on the point, it would have made sub-rule (2) of Order XXI, rule 50, clear on the point; and having regard to the decision of the Court of Appeal in the case of *Ellis v. Wadeson*(1), given on the corresponding provisions of the English rules (which are practically the same as the provisions of the present Civil Procedure Code), we think that the contention of the decree-holder should be disallowed. No suit can be instituted against a dead person and a plaint filed against a dead person is a nullity "even when the suit is instituted *bona fide* and in ignorance of the death of the defendant." See *Veerappa Chetty v. Tindal Ponnem*(2), *per*

(1) [1899] 1 Q.B., 714.

(2) (1907) I.L.B., 31 Mad., 86.

WALLIS and MILLER, JJ., and *In re Arunachalam Chettiar*(1). It cannot be said that in the present case there were any valid proceedings in which the personal estate of the deceased Badrudin Sahib could be said to have been represented in law. The question has not been discussed in either of the cases *Jivraj v. Bhagvandas*(2), or *Motilal v. Chandmal*(3), nor have the English decisions been referred to therein. We agree generally with the more recent decision of the Bombay High Court reported in *Mathuradas Canji v. Ebrahim Fazalbhoy*(4). No doubt the learned Judges there remarked that the firm concerned in that case had been dissolved to the knowledge of the plaintiff before the institution of the suit, by reason of the death of a partner. But, for the reasons already given, we think that the circumstance that the plaintiff had no knowledge of the death of a partner before the institution of the suit does not make any difference on the question now before us, and unless the legal representatives had been made parties to the suit, the personal estate of the partner who died prior to the institution of the suit, in the hands of the legal representatives, could not be made liable in execution of a decree obtained against the firm, and the plaintiff in such a case is not entitled to apply for leave under Order XXI, rule 50 (2).

The new provisions introduced in the Civil Procedure Code of 1908 are only enabling provisions which may be taken advantage of by a plaintiff who wishes to institute suits against firms. There are some advantages undoubtedly in following that procedure, but at the same time, there are some disadvantages also as the case before us emphasizes. The language of Order XXI, rule 50 (2), in terms applies only to a person who is

MAHOMED  
YUSUF  
v.  
BADSHA  
SAHIB.  
—  
ANANTA-  
KRISHNA  
AYYAR, J.

(1) (1915) 2 L.W., 828 at 830.

(2) (1922) 24 Bom. L.R., 1037.

(3) (1923) 25 Bom. L.R., 1081.

(4) (1927) I.L.R., 51 Bom., 986.

MAHOMED  
YUSUF  
v.  
BADSHA  
SAHIB.  
—  
ANANTA-  
KRISHNA  
AYYAR, J.

alleged to be a partner and does not apply to legal representatives of a partner who was dead before the plaint was filed. The scope of that sub-rule cannot be enlarged by reference to the rule of service prescribed by Order XXX, rule 3. Sub-rule (4) of Order XXI, rule 50, is very clear, that "save as against any property of the partnership, a decree against a firm shall not release, render liable, or otherwise affect, any partner therein, unless he has been served with a summons to appear and answer." A reference to the Rules of the Supreme Court makes it reasonably clear that in execution of a decree obtained against a firm as such, the separate property of a partner who was dead at the date of the issue of the writ cannot be proceeded against in execution; and in our opinion that seems to be the law which is sought to be reproduced in the provisions of the present Civil Procedure Code. The plaintiff as soon as he ascertained the facts should have applied to amend his claim by adding the personal representatives of the deceased partner. He did not choose to do so, and preferred to take his chance on the point of law.

The answer to the question referred to us is accordingly in the negative.

B.C.S.

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