

appeal before the District Judge of Bhagalpur was also dismissed, as there was no point of law; and a revision before this Hon'ble Court was also dismissed.

Mr. Gupta, appearing on behalf of the petitioners, urges that the trial court was wrong in dismissing the suit no. 26 of 1924 on the ground that all the arbitrators were not made parties. This contention of Mr. Gupta is justified for there is no provision of law under which it is necessary to make the arbitrators parties to the suit. On the question of limitation the position is different. Mr. Gupta urges that during the minority of the petitioners limitation did not run against them. Mr. Janak Kishore, appearing on behalf of the opposite-party, points out that section 6 of the Indian Limitation Act does not apply to cases under paragraph 20, Schedule II, of the Civil Procedure Code [*see Ram Ugrah Pande v. Achraj Nath Pande*(1); *Ma Thein Tin v. Maung Ba Than*(2)].

In the face of these decisions it must be held that the application was time-barred. We regret that we are obliged to arrive at this decision because there are circumstances in the case which we could have wished to investigate but the law leaves us no choice in the matter. The rule is therefore discharged.

COURTNEY TERRELL, C. J.—I agree.

Rule discharged.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Fazl Ali, J.

FIRM HAZARILAL MATHUR PRASAD

v.

MAHABIR SAH.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rules 50 and 58—ex parte order, after notice, under

* Appeal from Original Order no. 198 of 1934, from a decision of S. K. Das, Esq., I.C.S., District Judge of Chapra, dated the 8th February, 1934, affirming a decision of Babu Brindaban Behary Lal, Munsif of Chapra, dated the 27th June, 1933.

(1) (1915) I. L. R. 38 All. 85.

(2) (1923) I. L. R. 1 Rang. 256.

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Order XXI, rule 50, whether binding on the executing court—claim under Order XXI, rule 58, allowed—subsequent application for leave to proceed against that property under rule 50—decree-holder, whether precluded from levying execution.

Order XXI, rule 50, Code of Civil Procedure, 1908, provides :—

“(1) 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 or 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.....

(2) 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 which passed the decree for 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 person be tried and determined in any manner in which any issue in a suit may be tried and determined.”

Held, that the executing court cannot go behind an order, even though made *ex parte*, passed by the trial court giving leave under Order XXI, rule 50(2), where such order is made after notice to the person against whom the application was made and that person had failed to appear and contest his liability before that Court.

G. Atherton & Co. v. S. Habib Baksh(1), distinguished.

An order allowing a claim under Order XXI, rule 58, releasing a certain property from attachment on the ground that it was the exclusive property of the claimant, cannot preclude the decree-holder from executing his decree against that property after obtaining leave of the court, which passed the decree, under Order XXI, rule 50(2), on the ground that the claimant was a partner in the firm against which the decree had been originally obtained.

Appeal by the decree-holder.

(1) (1929) A. I. R. (All.) 390.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

K. N. Lal, for the appellant.

B. C. De, for the respondent.

FAZL ALI, J.—The facts of this case are quite simple and may be shortly stated as follows :—

The appellant-firm obtained a decree at Lakhimpur in the district of Kheri in the United Provinces against the firm Lalchand Sah Rupchand Ram, which carries on business at Masrakh in the district of Saran, on the 1st October, 1929. In the decree four persons including one Lalchand Sah were mentioned as proprietors of the latter firm and the name of Mahabir Sah, the present respondent, did not appear. Subsequently the decree was transferred to Chapra for execution and the appellant attempted to realise the decretal amount by the attachment and sale of certain properties belonging to the respondent, alleging that he was joint with Lalchand Sah, one of the judgment-debtors, and the property sought to be attached was joint family property of both Lalchand and the respondent. Thereupon the respondent preferred an objection under Order XXI, rule 58, before the executing court at Chapra, alleging that he was separate from Lalchand and that the property sought to be attached was his exclusive property. On the 10th September, 1930, the Munsif allowed the respondent's objection, holding that the respondent was not joint with Lalchand and that the property in dispute belonged to him exclusively. The appellant then made an application to the Munsif at Lakhimpur for leave to execute the decree against the respondent under Order XXI, rule 50(2), alleging that the latter was in charge of the firm against which he had obtained the decree. The Munsif issued notice to the respondent but as the latter did not appear, he granted leave to the appellant to execute his decree against him (the respondent). When the appellant

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subsequently proceeded to execute the decree, the respondent appeared once more before the court at Chapra and objected to the execution on a number of grounds. His objection was again upheld by the Munsif who held that the decree could not be executed against him or his property and his decision was upheld on appeal by the District Judge. The appellant has in these circumstances preferred this second appeal under section 47 of the Code of Civil Procedure.

A number of points were raised on behalf of the appellant before the Munsif, but in this appeal we are called upon to deal with only two of them on which the decision of the learned District Judge is based.

The first question is whether the appellant-firm having failed to institute a suit under Order XXI, rule 63, to set aside the order in favour of the respondent under Order XXI, rule 58, could execute the decree against the very property of the respondent which was the subject-matter of dispute in the proceeding under Order XXI, rule 58. The learned District Judge is of opinion that he cannot; but in my opinion his view is not correct. Order XXI, rule 63, provides that where a claim or an objection is preferred under Order XXI, rule 58, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive. Now all that was decided in the previous execution proceeding was that the property sought to be attached was the exclusive property of the respondent and there can be no doubt that this decision now binds the parties and after that order the property could no longer be attached in execution of the decree as it originally stood. It is, however, to be remembered that after that order the appellant went to the court at Lakhimpur and obtained leave to execute the decree against the judgment-debtor on the

ground that he was a partner in the firm against which the decree had been originally obtained. That being so, the decision of the Munsif made under Order XXI, rule 58, cannot stand in the way of the appellant executing the decree against the property of the respondent. The property sought to be attached may be the exclusive property of the respondent and may not have been liable to attachment under the decree as it originally stood but the decree-holder has now obtained an order from the trial court that he is entitled to proceed against the respondent and his property as he is a partner in the judgment-debtor firm. It is needless to say that the order under Order XXI, rule 50, must be deemed to be a good one until it is set aside by a superior court.

The next question is whether the executing court can go behind this order passed by the Munsif of Lakhimpur under Order XXI, rule 50, and undertake to decide whether or not the respondent is one of the partners in the judgment-debtor firm against which the decree was obtained. Now, having regard to the language of Order XXI, rule 50, it appears to me that the question whether the respondent was liable as a partner could have been tried and determined only by the court to which an application was made under Order XXI, rule 50. As I have already stated, before the order was passed by the Munsif at Lakhimpur a notice had been issued to the respondent, but he did not appear and it has nowhere been found that the notice was either not actually served on him or that it was deliberately suppressed. Under Order XXI, rule 50, the court may at once grant leave to a decree-holder to proceed under that section where the liability of the person against whom the decree is sought to be executed is not disputed and so the order passed by the Munsif was a valid order under that section and in my opinion the executing court cannot go behind it. In this connection the learned Advocate

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for the respondent strongly relies on the decision in *G. Atherton & Co. v. S. Habib Baksh*⁽¹⁾. But the facts of the case appear to me to be distinguishable, because in that case before the leave under Order XXI, rule 50, was granted it had already been decided that the sole proprietor of the firm against whom the suit was decreed had died before the institution of the suit. That question thus could not be re-opened in a subsequent proceeding under Order XXI, rule 50. No doubt the learned Judges in that case held that an *ex parte* order granting leave under Order XXI, rule 50, to apply for execution is not a decree, nor has it the force of a decree because sub-clause (3) of Order XXI, rule 50, indicates that only such order granting leave as is passed after dispute and after the question has been tried and determined as if it were an issue in a suit is to have the force of a decree. As at present advised, however, I am not prepared to adopt this view without further scrutiny, because *prima facie* it appears to me that if a party is given an opportunity to dispute his liability and does not come forward to dispute it, an order passed against him in such circumstances should in principle have the same force as an order passed against him after the question of his liability has been tried and determined against him. However that may be, it appears to me that the executing court cannot sit in judgment over the order of the court which had passed the original decree and the question of the liability of the respondent should have been raised and determined in the court which passed the decree.

I would, therefore, allow this appeal with costs and set aside the judgment of the courts below and direct that the execution may proceed according to law.

COURTNEY TERRELL, C.J.—I agree.

Appeal allowed.