

## APPELLATE CIVIL.

*Before Addison and Coldstream JJ.*

BOMBAY COMPANY LIMITED, KARACHI

(DECREE-HOLDER) Appellant

*versus*

KAHAN SINGH AND ANOTHER (JUDGMENT-DEBTORS)

Respondents.

Civil Appeal No. 1919 of 1928.

*Arbitration—Indian Arbitration Act, IX of 1899—Award against a Firm—whether valid. Execution of decree against an individual partner—Civil Procedure Code, Act V of 1908, Order XXI, Rule 50 (1) and (2)—Separate application for leave—whether necessary. Limitation—Indian Limitation Act, IX of 1908, Article 182—Transfer of decree for execution—power of executing Court to decide whether the person is a partner.*

An award was given against a firm, Kahan Singh-Mohan Singh, under the Indian Arbitration Act, and filed in Court on 12th November 1923. The arbitrators and the Court both served Kahan Singh with notice of the proceedings before them. On 20th February 1924, the firm in whose favour the award was passed, was granted a certificate of transfer of the decree to the District Judge, Lahore, this being admittedly a step-in-aid of execution. An application for execution of the decree was lodged in the Court of the District Judge, on 20th December 1926, who sent it to the Court of the Senior Sub-Judge. The present application was made on 10th February 1927 asking for the execution to proceed against Kahan Singh. One of the objections raised was that it was only the Karachi Court, where the award was filed, that could grant leave to the decree-holder to execute the decree against Kahan Singh as an individual partner. The Senior Sub-Judge repelled this objection and directed the decree-holder to put in a separate application to him asking for leave to proceed against Kahan Singh. The decree-holder lodged that application on 2nd March 1928. Kahan Singh then pleaded that the application was barred by time having been made more than 3 years after the award was filed in

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Court. The Senior Sub-Judge gave effect to that contention and refused to grant leave to execute the decree obtained against the partnership as against Kahan Singh.

*Held*, that an award against a firm is a good award and is governed by the provisions of Order XXI, Rule 50, Code of Civil Procedure.

Bannerjee and Das's Law of Arbitration in British India, 3rd Edition, page 471, Rustomji's Law of Arbitration in India, page 293, and Mulla's Code of Civil Procedure, 9th Edition, page 701, relied upon.

*Louis Dreyfus and Company v. Purusottum Das-Narain Das*, per Rankin J. (1), *Sital Prasad v. Clement Robson and Company* (2), *Mangairmal v. Akbar Ali and Company* (3), *Adamji Jafferji and Co. v. Shamsudin Imamdin* (4), and *Pokhar Das v. Radha Kishen* (5), followed.

*Vallabhadas v. Keshavlal*, per Mirza J. (6), dissented from.

*Held also*, that notwithstanding the wording of Order XXI, Rule 50 (2) of the Code of Civil Procedure, a Court to which a decree is sent for execution has power to decide whether a particular person, against whom it is desired to proceed, is a partner or not.

*Sital Prasad v. Clement Robson and Company* (2), followed.

It having been contended on behalf of appellant decree-holders that Order XXI, Rule 50 (1), Code of Civil Procedure, applied to the present case as Kahan Singh had been served with notice by the arbitrators and by the Court of the Judicial Commissioner, Karachi, where the award was filed.

*Held*, that as it was doubtful whether the proceedings leading up to the decree could be said to be a suit, it followed that Rule 50 (1) of Order XXI of the Code would not apply in a case like the present, though it would apply in the case of a decree passed against a firm *in a suit*. And that therefore it became necessary under Rule 50 (2) of that Order, for the

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(1) (1920) I. L. R. 47 Cal. 29. (4) (1925) 86 I. C. 1013.  
(2) (1921) I. L. R. 43 All. 394. (5) 1924 A. I. R. (Lah.) 544.  
(3) 1929 A. I. R. (Sindh) 28. (6) 1927 A. I. R. (Bom.) 428.

Court of the Judicial Commissioner or the Court to which the decree had been transferred for execution to decide whether Kahan Singh was liable to be proceeded against in execution as an individual partner.

*E. D. Sassoon and Company Ltd. v. Shivji Ram-Devi Das* (1), relied upon.

*Held however*, that the application for execution was within time inasmuch as where a decree has been passed against a firm and an application is made to execute it against a particular person as an individual partner of that Firm, no separate application for leave to execute the decree against that partner is necessary as the application asking for execution against that particular person necessarily implies such a prayer for leave to proceed against him as an individual partner.

*E. D. Sassoon and Co. Ltd. v. Shivji Ram-Devi Das* (1), relied upon.

*Held further*, that an application under Order XXI, Rule 50 (2) of the Code is not an application in the suit but an application in execution and that it can be made at any time during which the decree remains capable of being executed.

A decree-holder can proceed first against the partnership property and after exhausting that remedy apply for execution against one or all the individual partners, obtaining leave if necessary under Rule 50 (2), and he can do this even if more than 3 years have elapsed since the passing of the decree, provided that execution has not become barred in any other way, the application for leave being ancillary to the application for execution against the partner as an individual.

*Kanji Vishram v. Jivraj Dayal* (2), referred to.

*Miscellaneous first appeal from the order of Pandit Devi Dayal Joshi, Senior Subordinate Judge, Lahore, dated the 17th April 1928, dismissing the application for leave to execute the decree against Kahan Singh in his personal capacity.*

D. C. RALLI, for Appellant.

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RAM LAL ANAND, for JAGAN NATH AGGARWAL,  
for Respondents.

ADDISON J.—An award was given against a firm on the 22nd October, 1923, under the Indian Arbitration Act. It was filed in Court on the 12th November, 1923. The arbitrators and the Court both served one Kahan Singh with notice of the proceedings before them, the name of the firm against whom the award was given being Kahan Singh-Mohan Singh. On the 20th February, 1924, the firm, in whose favour the award was passed, was granted a certificate of transfer of the decree to the District Court, Lahore. It is not disputed that this is a step-in-aid of execution. It has been established that, on the 20th December, 1926, an application for the execution of the decree was lodged in the Court of the District Judge, who sent it to the Court of the Senior Subordinate Judge. The present application for execution was made on the 10th February, 1927. It asked for the execution to proceed against Kahan Singh. Three objections were taken before the Senior Subordinate Judge. The first was that execution could only proceed in the Court of the District Judge, Lahore. This objection is no longer pressed, and it is clear that he could transfer the execution to any competent Court under him. The second objection taken was that it was only the Karachi Court, where the award was filed, that could grant leave to the person, in whose favour the award had been given, *i.e.* the decree-holder, to execute the decree against Kahan Singh as an individual partner. The Senior Subordinate Judge repelled this objection and held that he also had power to give leave. As a separate application, however, had not been made to him for this leave, he directed the decree-holder to put one in

by the 3rd March, 1928. Accordingly the decree-holder complied with this direction. Kahan Singh then put forward his third objection that this application was barred by time. The Senior Subordinate Judge held that the application was one made in the suit, that Article 181 of the Indian Limitation Act applied to it and that, as it was made on the 2nd March, 1928, *i.e.* more than three years after the award was filed in Court, it was barred by time. Accordingly the Senior Subordinate Judge refused to grant leave to execute the decree obtained against the partnership as against Kahan Singh. The decree-holder has appealed against this order. There is also a connected appeal in a similar case as two awards were filed, one against Kahan Singh-Devi Das and the other against Kahan Singh-Mohan Singh, the same orders being passed in both.

It is clear that an award against a firm is a good award and is governed by Order XXI, rule 50, Code of Civil Procedure; see Bannerjee and Das's Law of Arbitration in British India, III Edition, Page 471; Rustomji's Law of Arbitration in India, page 293, and Mulla's Code of Civil Procedure, 9th Edition, page 701.

This question is fully discussed by Rankin J. in *Louis Dreyfus & Company v. Purusottum Das-Narain Das* (1), and was assumed by the Judges composing the Division Bench who decided *Sital Prasad v. Messrs. Clement Robson & Company* (2). It is true that Mirza J. in *Vallabhdas v. Keshavlal* (3), doubted whether a firm can be lawfully made a party to a reference to arbitration; but his decision is fully discussed and dissented from in *Mangairmal v. Akbar*

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*Ali & Company* (1). Another judgment of the Sind Court is *Adamji Jafferji & Co. v. Shamsudin Imamdin* (2), and the same view has been taken by a single Judge of this Court in *Pokhar Das v. Radha Kishen* (3).

It is also settled that, notwithstanding the wording of Order XXI, rule 50 (2) of the Code of Civil Procedure, a Court, to which a decree is sent for execution, has power to decide whether a particular person, against whom it is desired to proceed, is a partner or not; *vide Sital Prasad v. Messrs. Clement Robson & Company* (4). This follows from the provisions of section 42 of the Code of Civil Procedure. There is no doubt, therefore, that the Senior Subordinate Judge had power to decide whether Kahan Singh is liable to be proceeded against in his individual capacity as a partner.

It was contended by the learned counsel appearing for the appellants that Order XXI, rule 50 (1) applied to the present case, as Kahan Singh had been served with notice both by the arbitrators and by the Court of the Judicial Commissioner where the award was filed. If the proceedings before the arbitrators and in the Court of the Judicial Commissioner can be looked upon as a suit, then, by virtue of Order XXX, rule 5 of the Code of Civil Procedure, there is no question but that the execution can proceed at once against Kahan Singh under the provisions of Order XXI, rule 50 (1) (c). The heading of Order XXX is "Suits by or against firms and persons carrying on business in names other than their own." When an award is filed in Court it becomes enforceable as a decree and, therefore, all the provisions in

(1) 1929 A. I. R. (Sind) 28.

(3) 1924 A. I. R. (Lah.) 544.

(2) (1925) 86 I. C. 1013.

(4) (1921) I. L. R. 43 All. 394.

the Code about execution of decrees do apply. But I am somewhat doubtful whether it can be said that the proceedings leading up to the decree can be said to be a suit. It would, therefore, follow that rule 50 (1) of Order XXI would not apply in the case like the present, though it would apply in the case of a decree passed against a firm in a suit. A single Judge of this Court in *E. D. Sassoon and Company Limited v. Shivji Ram-Devi Das* (1), took the same view. It follows that it became necessary under Order XXI, rule 50 (2) either for the Court of the Judicial Commissioner or the Court to which the decree had been transferred for execution, to decide whether Kahan Singh was liable to be proceeded against in execution as an individual partner.

The learned Judge, who decided *E. D. Sassoon & Company, Limited v. Shivji Ram-Devi Das* (1), went on further to decide that, where a decree has been passed against a firm and an application was made to execute it against a particular person as an individual partner of that firm, no separate application for leave to execute the decree against that partner need be put in, as the application asking for execution against that particular person necessarily implied such a prayer for leave to proceed against him as an individual partner. With that view I am in entire agreement. It follows that the decision of the Senior Subordinate Judge was wrong when he insisted upon a separate application for leave to proceed against Kahan Singh. He should have treated the application for execution against him as being one also for leave. In this view no question of limitation arises, as a step-in-aid was taken on the

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20th February, 1924, when the order of transfer to Lahore was made by the Karachi Court and again on the 20th December, 1926, when an application was made to execute the decree in the Court of the District Judge. The next application, dated the 10th February, 1927, asked for execution against Kahan Singh as well as Mohan Singh in the one case, while the application in the other case of the same date asked for execution against Kahan Singh and Devi Das. These are the applications which are the subject of these appeals and they are clearly within time for the reasons given.

Further, the view of the Senior Subordinate Judge that an application under Order XXI, rule 50 (2) is an application in the suit cannot be upheld. This question came before the Bombay High Court, a Division Bench of which held in *Kanji Vishram v. Jivraj Dayal* (1), that proceedings, in which leave is applied for to execute a decree under Order XXI, rule 50 (2), Code of Civil Procedure, is not a suit within the meaning of section 30 of the Small Cause Courts Act. I have no hesitation in holding that such an application is an application in execution, and that it can be made at any time during which the decree remains capable of being executed. That is to say, a decree-holder can proceed first against the partnership property and need not apply for leave under sub-rule (2) of rule 50 against any individual partner until he has exhausted all his remedies against the partnership property. When these remedies are exhausted he can then apply for execution against one or all of the individual partners, at the same time obtaining leave, if necessary, under sub-rule (2)

of rule 50 and he can do this even if more than three years have elapsed since the passing of the decree, provided always that the execution had not become barred in any other way. This follows from the wording of Article 182 of the Indian Limitation Act which gives three years for the execution of a decree from the date of the decree or from the date when the last step-in-aid in execution of the decree was taken. The application under sub-rule (2) of rule 50 is ancillary to the application for execution against the partner as an individual.

It follows from what has been said above that the decision of the Senior Subordinate Judge to the effect that he could not proceed to investigate the claim of the decree-holder to execute the decree against Kahan Singh personally by reason of its being barred by limitation is wrong.

I would accordingly accept both the appeals, set aside that portion of the decision of the Senior Subordinate Judge to the effect that he could not go into this question by reason of its being barred by limitation, and remand the execution proceedings to him to decide on the merits under Order XXI, rule 50, sub-rule (2) whether Kahan Singh is a partner, if this is denied, and to allow the execution to proceed against him if he is a partner.

COLDSTREAM J.—I agree.

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*Appeals accepted*