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April 17.

GAMBHIR MAL PANDIYA

v.

J. K. JUTE MILLS CO., LTD., KANPUR AND ANOTHER

(S. K. DAS, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Partnership—Decree against firm—Execution against partner not summoned in suit—Liability of such partner—Whether partner can raise issues between himself and other partners—Code of Civil Procedure, 1908 (Act 5 of 1908), O. 21. r. 50(2).

A contract entered into between the respondent company and a firm consisting of two partners, T and G, was signed by T. A dispute relating to the contract was referred to arbitration in pursuance of the terms of the contract providing for such arbitration, and an award was given in favour of the company. The award was made into a rule of the court and a decree was passed against the firm. In execution of the decree the company sought to proceed against the personal property of G and made an application for the leave of the Court under O. 21, r. 50(2), of the Code of Civil Procedure. G pleaded that the award and the decree passed thereon were not binding on him on the grounds, that the other partner who had signed the contract had no authority to enter into the agreement containing the arbitration clause or to refer the dispute to arbitration and that he had not been served in the proceedings relating to the arbitration.

Held, that G was liable for the decree passed against the firm. A decree passed against a firm may be executed against a partner who was not summoned in the suit, but O. 21, r. 50 (2), of the Code of Civil Procedure gives him an opportunity of showing cause if he disputes his liability. In such a case he can prove that he was not a partner or that he was not a partner at the time the cause of action accrued. He can also question the decree on the ground of collusion, fraud or the like, but he cannot have the suit tried over again or arise issues between himself and his other partners.

Jagat Chandra Battacharjee v. *Gunny Hajee Ahmed*, (1926) I.L.R. 53 Cal. 214, *In re Malabar Forests & Rubber Co.* A. I. R. 1932 Bom. 334, *Rana Harkishandas* v. *Rana Gulabdas*, I. L. R. [1956] Bom. 193, *C. M. Shahani* v. *Havero Trading Co.*, (1944)51 C. W. N. 488, *Maharanee Mandalea Kumari Devi*

v. *M. Ramnarain Private Ltd.*, I.L.R. [1959] Bom. 1468 and *Kuppuswami* v. *Polite Pictures*, I.L.R. [1955] Mad. 1106, approved.

Bhagvan v. *Hiraji*, A.I.R. 1932 Bom. 516, *Ceoverji Varjang* v. *Cooverbai Nagsey*, A.I.R. 1940 Bom. 330 and *In re Tolaram Nathmull* I.L.R. [1939] 2 Cal. 312, disapproved.

Munster v. *Cox*, (1885)10 App Gas-680 *Davis* v. *Hyman & Co* [1903] 1:K.B. 854 and *Weir & Co.* v. *Mc Vicar & Co.* [1925] 2 K.B. 117, relied. on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 19 of 60.

Appeal from the judgment and decree dated September 25, 1957, of the Allahabad High Court, in Civil Revision No. 815 of 1955.

M. C. Setalvad, Attorney-General for India and *B. P. Maheshwari*, for the appellants.

S. M. Sikri, Advocate-General for the State of Punjab and *K. P. Gupta*, for respondent No. 1.

1962. April 17. The Judgment of the Court was delivered by

HIDAYATULLAH, J.—This is an appeal on a certificate granted by the High Court of Allahabad against an order dated September 25, 1957, dismissing a revision petition filed by the present appellant. *Hidayatulla J.*

The facts of the case are very simple. Messrs. J. K. Jute Mills Co. Ltd. (the answering respondents), entered into a contract with a firm, Messrs. Birdhi Chand Sumer Mal, for the supply of certain articles. The contract was entered into by one Seth Tikam Chand, a partner in the firm. One of the terms of the contract was that in a case of a dispute between the parties, it would be referred to the Merchants Chamber of Commerce, Kanpur, for arbitration. It appears that a dispute arose, which was referred to the Chamber of Commerce,

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and an award in favour of the Mills was given on January 8, 1947. Two years later, the award was made into a rule of the Court, and a decree followed in favour of the Mills. The firm of Birdhi Chand Sumer Mal consisted of two partners; the other partner was one Mr. Pandiya, the predecessor-in-interest of Seth Gambir Mal Pandiya, the appellant. In execution of the decree passed against the firm, the Mills wished to proceed against the personal property of Mr. Pandiya, and filed an application for the leave of the Court under O. 21, r. 50(2), of the Code of Civil Procedure. In answer to the notice which was issued, the appellant, Seth Gambir Mal Pandiya, appeared and raised objections. He contended that he had not been served in the proceedings relating to the arbitration; nor of the making and the filing of the award in Court. He also contended that Seth Tikam Chand, who had signed the contract containing the arbitration clause with the Mills, had no authority to enter into an agreement containing such a clause or to refer the dispute to arbitration on behalf of the other partners. He, therefore, maintained that the award was not binding on him.

The connections of the appellant were not accepted by the First Civil Judge, Kanpur, who allowed the application of the Mills and granted them leave under the rule. The appellant then filed an application for revision in the High Court of Allahabad, which was heard by C. B. Agarwala and Beg, JJ., Agarwala, J., held that although the decree passed against the firm was to be deemed to have been passed against all the individual partners thereof, it was binding *proprio vigore* only against the partnership property and personally against those persons, who are mentioned in cls.(b) and (c) of r. 50(1), O. 21, and that the decree was not binding against the appellant, who had

not been served in the suit and would be binding only when a summons was served upon him to appear under sub-r. (2) and his liability was determined. The reason given by the learned Judge was that a person who was not served in the suit could question his personal liability under the decree, even though he admitted himself to be a partner, upon any ground which was open to him if he had been served in the suit, and that such a person could raise the objection that as the decree was the result of an reward which was based upon an agreement of reference to arbitration to which he was not a party, he was not personally liable under the decree, Beg, J., on the other hand, held that inasmuch as the appellant admitted that he was a partner in the firm of Birdhi Chand Sumer Mal, he was not entitled to raise any objection either to the contract or the reference to arbitration or the award. The learned Judge having disagreed about the interpretation to be placed on sub-r. (2) of r. 50, the case was laid before Mukherji, J. He agreed with the conclusion of Beg, J., and in accordance with his opinion, the application for revision was dismissed. The Divisional Bench, however, certified the case as fit for appeal to this Court, and the present appeal has been filed.

Order 21, r. 50, of the Code of Civil Procedure reads as follows:—

> "50. (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;

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(c) against any person who has been individually served as a partner with a summons and has failed to appear:

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872.

(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), clause (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.

(3) 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.

(4) Save as against any property of the partnership, a decree against a firm shall not realise, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer."

This rule deals with the execution of decrees obtained against firms. It enable the decree to be executed against the partnership assets. It also enables that the decree may be executed against any one who appeared in the suit, and admitted that he was a partner or who was lawfully adjudged in the suit to be one. It also enables

that the decree may be executed against any person lawfully summoned in the suit as a partner but who did not choose to appear individually to defend the action. Lastly, it provides that if it is desired to execute the decree against a person as being a partner of the firm who does not belong to the categories already mentioned, then the leave of the Court must be obtained and the Court before granting such leave should summon that person whose liability, unless he admits it, should be tried as an issue. So far, the matter is quite simple. The difficulty appears only when one begins to give a meaning to the expression "the liability of such person", and this raises the question: what kind of defences are open to such a person ? The learned Attorney-General has argued that the expression admits of a narrow construction, a wide construction and a construction which is in between the two. The narrow construction, according to him, is that the only issue to be tried is whether that person was a partner or held himself out to be one. The wide construction, according to him, is that the issue may take in all defences open to the partnership not raised in the suit and also all defences personal to that person to avoid his individual liability. Under the middle view, according to him, the Court is to try an issue relating to the personal liability of that person. On the other hand, the learned Advocate-General of the Punjab, who appeared for the respondent Company, contends that if the person summoned, admits that he is a partner, there is nothing further to try, and execution can issue against him individually without trying any other issue he may wish to raise. This contention as raised by the learned Advocate-General prevailed in the Allahabad High Court, while the contention of the learned Attorney-General was accepted by Agarwala, J.

Order 21, r. 50 (2), of the Code deals with executions, but really is a part of the provisions

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relating to suits against firms. Those provisions are contained in O. 30 of the Code, and must be viewed alongside to get the true meaning of the words. Order 30 and the provisions of r. 50 of O. 21 were taken from O. XL VII. a, of the Rules of the Supreme Court in England. Though there are slight variations in language, the provisions of our Code are in *pari material* with the provisions of the Rules of the Supreme Court, as amended in 1891. Under common law, an action against firms was not known. All actions had to be brought against the partners individually. After the Judicature Acts, rules were framed in 1883, which enabled actions to be brought against firms in the names of the firms.

The rules provided forms for appearances by persons who entered appearances in answer to summons lawfully issued; but the later rules which are more exhaustive, though they do not dispense with the forms of appearance, prescribe how the presence of the firm and of individual partners is to be secured and how defences are to be raised. It is not necessary to reproduce the English rules. They are to be found in the Annual Practice, Vol. I, p. 1151 (1962). The rules of 1891 are almost reproduced as O. 30 and O. 21, r. 50, of the Code of Civil Procedure. Order 30 deals with procedure in suits against firms in the firm name, and O. 21, r. 50 with the execution of decrees obtained against firms. These provisions are in themselves a Code. To understand the meaning of r. 50 (O. 21), one must first consider the provisions of O. 30, which contains ten rules. The first rule enables a plaintiff to sue in the name of the firm, two or more persons liable as partners, or of which they were partners when the cause of action accrued; and the plaintiff may also apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accrual of the cause of

action, partners in such firm. The rule also permit the signing of the written statement and the verification by one partner only. The second rule enables the defendant to ask for the disclosure of the names of partners, where a firm sues as a plaintiff. The third rule then provides for service of summons upon the firm and the partners. Such summons may be served, as the Court may direct:—

(a) upon all or any of the partners; or

(b) upo n any person having control or management of the business, at the principal place of business of the firm within India.

A service upon the firm is deemed to be good service, whether all or any of the partners are with in or without India. But if the firm is dissolved to the knowledge of the plaintiff, the summons must be served on every person within India whom it is sought to make liable. The fourth rule provides for right of suit on death of partner. We are not concerned with that eventuality. The fifth rule then provides that where the summons is issued to a firm under r. 3, every person served shall be informed by notice whether he is served as a partner or as a person having the control and management of the business or both; but in the absence of notice the person is deemed to be served as a partner. Rule 6 lays down that persons served as partners in the name of the firm shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm. Rulo 7 then says that if a notice is served upon a person having the control or management of the partnership business, he need not appear unless he is a partner. Rule 8 enables a person served as a partner to appear under protest denying that he is a partner, but the appearance does n ot preclude the plaintiff from serving a summons

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on the firm and obtain an *ex parte* decree, if no other partner appears. The remaining rules do not concern us in this case.

From the above analysis, it is clear that a plaintiff need sue only the firm, but if he wants to bind the partners individually he must serve them personally, for which purpose he can get a discovery of the names of partners of the firm. Persons served individually may appear and file written statements, but the proceedings go on against the firm only. They may, however, appear and plead that they are not partners or were not partners when the cause of action arose. But even if no other partner appears, there may be a decree against the firm if the firm has been served with the summons. The gist of O. 30 thus is that the action proceeds against the firm, and the defence to the action by persons admitting that they are partners is on behalf of the firm. Persons sued as partners may, however, appear and seek to establish that they are not partners or were not partners when the cause of action arose; but if they raise this special plea, they cannot defend the firm. This was laid down in connection with the analogous provisionsof the English rule in *Weir & Co.* v. *Mc Vicar & Co.*(1). Partners appearing and admitting their positions as partners can only defend the firm, because the suit continues in the firm's name. The law is thus not concerned with a fight between the partners *inter se*, and an action between the partners is not to be tried within the action between the firm and the plaintiff. Of course, the partners who admit that they are partners need not raise a common defence. They may raise inconsistent defences, but all such defences must be directed to defend the firm and the plaintiff must surmount all such defences. See *Ellis* v. *Wadeson* (2). The purport of the rules as well as the two English cases

(1) (1925) 2 K. B. 127. (2) (1889) 1 Q B. D. 714.

which have correctly analysed the rules on the subject (the English and the Indian rules being alike) is that the partnership is sued as a partnership, and though the partners may put in separate defences, those defences must be on behalf of the firm. If some of the partners do not appear, those that do, must defend the firm; but if no proper defence is raised by them, the plaintiff cannot be deprived of a judgment. The judgment and decree thus obtained are executable against the partnership assets. This brings in the provisions of O. 21, r. 50, of the Code.

That rule enables a decree obtained against a partnership firm to be executed against the property of the partnership. Next, it enables the decree to be executed individually against a person who appeared in his own name under r. 6 or r. 7 of O. 30 or who admitted on the record or was adjudged to be a partner. Next, the decree can be executed against any person who is served individually as a partner but has failed to appear. Next, it permits the decree to be executed with the leave of the Court against persons belonging to the category of the persons above mentioned, provided that they are summoned and either admit their liability or after an issue is tried, their liability is determined.

A large number of cases decided in India and England have laid down the kind of issue which may be tried under O. 21. r. 50 (2), of the Code and the cognate provisions of the English rules. Since the English cases are first in point of time, we shall begin with them. It must be remembered in this connection that the English rules prescribe forms for recording appearance by persons summoned in actions against firms. These are to be found in the Annual Practice, Vol. 1 (1962), at p. 1160 and are six in number :

(1) A. B. a partner in the firm of Brown & Co.

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(2) A.B. a partner in the firm of Brown, Evans & Co. sued as Brown & Co.

(3) A.B. a partner in the firm of Brown & Co. at the time the alleged cause of action arose.

(4) A.B. served as a partner but who denies that he was a partner in the above-named firm at any time.

(5) A.B. served as a partner in the firm but who denies that he was a partner at the time of the accuring of the alleged cause of action.

(6) A person appears subsequently and desires to appear as a partner.

These forms are appropriate to an action, but they are also used for persons summoned under O. XLVIII. a, r. 8, corresponding to our O. 21, r. 50(2).

In *Jackson* v. *Litchfield* (1), which was decided prior to the rules of 1891 the writ was issued against a firm in the firm name. It was held that the judgment must be entered against the firm, but it could not be entered separately against an individual member of the firm who made default in appearing in the action. The decision thus was that if the action was against the firm, the judgment should be against the firm. In *Munster* v. *Cox* (2), the writ was against R & Co. The appearance was "R trading as R and Co." Judgment was by consent. Later, the judgment was sought to be executed against one Cox who was not summoned, and for this purpose, application was made for striking out the words "R sued as" from the appearance recorded. This was disallowed. On appeal, Selborne, L. C., dealing with the former

(1) (1882) 8 Q.B.D. 474. (2) (1885) 10 App. Cas. 680.

O.XLII, r. 8 (corresponding to O. 21, r. 50(2), observed as follows :

> "If execution was sought against any other person as being a member of the firm, then the Court was to exercise its discretion as to whether it would allow execution to issue or not, and upon what terms, and, as justice seemed to require, might let in the party sought to be trying the action over again, but by giving him, as against the application to make him answerable, the benefit of any defence which he might have had if he had been made a party on the record or had had notice the proceeding, so as to relieve him from the risk of suffering by the collusion or the improper defence of his co-partner."

This would show that the defences which the person summoned to answer an execution application can raise are the defences open to him if he had been summoned in the suit. If he denies that he is or was a partner when the cause of action arose, the issue to be tried would be only that. If he admits that he is or was a partner at the material time he can defend on the ground that the decree was the result of collusion, fraud or the like.

In *Ellis* v. *Wadeson* (1), an action was brought against a firm in the firm name. There were two partners, one of whom died after the writ and appearance. The surviving partner put in a defence not on behalf of the firm but a personal defence to the action, but this was disallowed. It was pointed out that if a partner is not served and is ignorant of the action, execution cannot be levied against him unless he is given an opportunity and the plaintiff must establish his liability as a partner of the firm, but the plaintiff

(1) (1889) 1 Q.B.D. 714.

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is not required to meet a defence of a personal character.

Again, in *Davis* v. *Hyman & Co.* (1), in an action against a firm, only one person entered appearance, and judgment was entered against the firm. When the plaintiff applied for a summons against another person under O. XLVIII. a, r. 8 [O. 21, r. 50(2)], the issue to be framed by the master was :

> "Whether the said S. M. H. was or has held himself out as a partner in the defendant firm."

Phillimore, J., modified the issue to read :

> "Whether S. M. H. was at the date the bill of exchange sued on was given or at the date when the goods were supplied, a member of the defendant firm of Hyman & Co."

The Court of Appeal vacated the order of Phillimore, J. Stirling, L.J. observed :—

> "Here we have a person who is alleged to be liable as a member of the defendant firm, and the only question which requires solution is whether his liability arises from his being a member of the firm or from his having held himself out as a partner.....
>
> It is suggested that, if this form of order is adopted, the defendant in the issue might be deprived of some defence that he might have had if he had been served with the writ and had an opportunity of appearing in the action. As to this I would say that under the rule the question to be determined is the general one of the liability, as a member of the firm, of the person sought to be charged, and it seems to me that an issue could, in a proper case, be so framed as to include any

(1) [1903] 1 K.B. 854.

proper defence. No such defence is suggested in the present case."

In *Weir & Co. Mc Vicar & Co.* (1), the action was against a firm. A person who was served as a partner entered appearance under protest denying that he was a partner. It was held that he could not at the same time raise the defence of the firm, nor could he insist that the issue regarding his being a partner be tried first. Scrutton, L.J., referred to the provisions of O. XLVIII. a, r. 8 [O. 21, r. 50(2)], to compare the position in the trial of the suit and that in execution, and made the following remarks :

> "...Order XLVIII. a, r. 8 provides that an issue may be directed to try the question whether the alleged partner or not. But it seems clear that in that issue he cannot raise the question of the liability of the firm, for if he could you might have two separate judgments on the same cause of action, the one already obtained for a specified amount in the action against the firm, and the other, for possibly a reduced amount or for nothing at all, on the trial of the issue under r. 8. The only question that can be raised on the trial of that issue is whether the person against whom execution is sought was a partner at the material time or not."

It was also observed in that case :

> "Order XLVIII. a, r. 8, assumes that judgment has already been obtained against the firm by proper service, and then proceeds to point out who are the persons against whom it is to be enforced."

The English cases thus establish that even in an action the defences may be of two kinds—(1) a

(1) [1925] 2 K.B. 127.

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personal defence that a person summoned as a partner is not a partner and was not a partner at the time the cause of action accrued (2) defence of the firm on the ground of collusion, fraud or the like but not a personal defence. A person who raise the first defence is precluded from raising the second, and a person who admits that he is a partner can only defend the firm but not himself. These two rules apply to persons summoned as partners. Persons not summoned as partners need not appear. But their liability by that reason alone is neither enlarged nor discharged. Indeed, in our Code also, O. 21, r. 50(4), lays down :

> "Save as against any property of the partnership, a decree against a firm shall not realase, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer."

Where the person is sought to be made liable in execution, the defences he can raise, according to the English rulings above examined, are : (i) he can establish that he is not a partner or that he was not a partner when the cause of action arose, and the plaintiff can prove that he held himself out as such ; (ii) he can relieve himself against collusion and fraud of his partner. He cannot, however, raise a defence to have the action tried over again and he cannot raise a defence personal to himself as against his partner or partners.

We shall now consider the decisions of the High Courts in India. It will be found that, with the exception of one or two rulings, the same views have been expressed in India also. In *Jagat Chandra Bhattacharjee* v. *Gunny Hajee Ahmed* (1), a summons was served upon the firm but not upon one K. A decree was obtained against the firm and the decree-holder applied to execute it

(1) (1926) I. L.R. 53 Cal. 214.

against the legal representatives of K by attaching property forming the estate of K. It was admitted that K was a partner. It was held that the assets of A were liable. Sanderson, C. J., held that if in an inquiry under O. 21, r. 50(2), it were decided that a person summoned as a partner was, in fact, a partner, his liability is established. The intention of the rule is to give an opportunity to such a person to dispute his liability. Bucklund, J., held that if after appearance the liability is admitted the Court may grant leave fourthwith, and that it is not open to the person summoned to challenge the decree.

In *In re Malabar Forests & Rubber Co.*(1), Mirza, J., held that where a decree has once been passed against a firm, an individual partner who was not summoned personally, may be summoned in the execution proceedings, and can contend that he was not a partner but cannot be allowed to challenge the authority of the other partner or partners to enter the transaction in dispute. In *Bhagwan* v. *Hiraji*(2), Patkar and Murphy, JJ., took a different view. In that case, a plea that the partners were not authorised to refer a dispute to arbitration was allowed to be raised. Reliance was placed upon the fourth sub-rule of O. 21, r. 50. In *Coverji Varjang* v. *Cooverbai Nagsey* (3), the judgment of Wadia, J., from which an appeal was taken to the Divisional Bench is printed. In that judgment, Wadia, J., held that under O. 21, r. 50(2), the person summoned to show cause may not only prove that he was not a partner but take other defences appropriate to his own liability. The learned Judge apparently differed from Mirza, J., and preferred the view in *Bhagwan* v. *Hiraji*(2), and pointed out that the view was accepted in *Tolaram Nathmull* v. *Mahomed Valli Patel* (4) and *Chhatoo Lal Misser & Co.* v. *Naraindas Baijnath Prasad* (5). In the last mentioned case, two defences

(1) A.I.R. 1932 Bom.334. (2) A.I.R. 1932 Bom. 516.
(3) A.I.R. 1940 Bom.330. (4) I L.R. [1939] 2 Cal. 312.
(5) (1928) I.L.R. 56 Cal. 704.

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were raised—(1) that the person summoned was not a partner, and (2) that the decree could not be personally executed against him as he was a ward under the U. P. Court of Wards Act. The second plea was one of a special protection under law, and the case is thus distinguishable.

The Bombay view has, however, changed in recent years. In *Rana Harkishandas* v. *Rana Gulab das* (1), Gajendragadkar and Gokhale, JJ., dissented from *Bhagwan* v. *Hiraji*(2) and laid down that in an enquiry contemplated under O. 21, r. 50(2), the only question that can be gone into is whether the person summoned as a partner to show cause was a partner at the material time or not. The learned Judges observed that unless the plea on this point by the person summoned to show cause succeeded, leave could not be withheld. According to the learned Judges, "liability" in sub-r. (2) of r.50 means liability as a partner. They relied upon the decision of the Calcutta High Court in *C. M. Shahani* v. *Havero Trading Co.* (3), in which Das, J. (as he then was), and on appeal, McNair and Gentle, JJ., had taken the same view and had dissented from the earlier Calcutta view. *Rana Harikishandas's* case(4) was followed by another Division Bench of the Bombay High Court in *Maharanee Mandalsa Kumari Devi* v. *M. Ramnarain Private Ltd.* (4). A similar view was earlier expressed by the Madras High Court in *Kuppusuami* v. *Polite Pictures*(5).

In our judgment, the view expressed in these later cases is the correct one. As we have pointed out, O. 30 of the code permits suits to be brought against firms. The summons may be issued against the firm or against persons who are alleged to be partners individually. The suit, however, proceeds only against the firm. Any person who is summoned

(1) I.L.R. [1956] Bom. 193.
(2) A I.R. 1932 Bom. 516.8
(3) (1944) 51 C.W.N.488.
(4) I.L.R. [1959] Bom. 146.
(5) I.L.R. [1955] Mad. 1106

can appear, and prove that he is not a partner and never was; but if he raises that defence, he cannot defend the firm. Persons who admit that they are partners may defend the firm, take as many pleas as they like but not enter upon issues between themselves. When the decree is passed, it is against the firm. Such a decree is capable of being executed against the property of the partnership and also against two classes of persons individually. They are (1) persons who appeared in answered to summons served on them as partners and either admitted that they were partners or were found to be so, and (2) persons who were summoned as partners but stayed away. The decree can also be executed against persons who were not summoned in the suit as partners, but r. 50(2) of O. 21 gives them an opportunity of showing cause and the plaintiff must prove their liability. This enquiry does not entitle the person summoned to reopen the decree. He can only prove that he was not a partner, and in a proper case, that the decree is the result of collusion, fraud or the like. But, he cannot claim to have other matters tried, so to speak, between himself and his other partners. Once he admits that he is a partner and has no special defence of collusion, fraud, etc. the Court must give leave forthwith.

In our opinion, of the three constructions suggested by the learned Attorney-General, the widest meaning cannot be attributed to the word "liability". The proper meaning thus is that primarily the question to try would be whether the person against whom the decree is sought to be executed was a partner of the firm, when the cause of action accured, but he may question the decree on the ground of collusion, fraud or the like but so as not to have the suit tried over again or to raise issues between himself and his other partners. It is to be remembered that the leave that is

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sought is in respect of execution against the personal property of such partner and the leave that is granted or refused affect only such property and not the property of the firm. Ordinarily, when the person summoned admits that he is a partner, leave would be granted, unless he alleges collusion, fraud or the like. No such question has been raised in this case, and the decision given by the High Court connot be disturbed.

The appeal fails, and is dismissed with costs.

Appeal dismissed.

1962

April 17:

NEDUNURI KAMESWARAMMA

v.

SAMPATI SUBBA RAO

(S. K. DAS, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Pleading—Written statement not traverred—Relevant issue not raised but material evidence led by parties—Effect—Construction of document, when involves issue of law—Karnikam service inam—Dumbala Dharmila inam—Madras Permanent Settlement Regulation of 1802 (Madras Regulation 25 of 1802)—Madras Karnams Regulation 1802 (Madras Regulation 29 of 1802)—Madras Hereditary Village Offices Act, 1895 (Mad. III of 1895). The Madras Proprietary Estate's Village Service Act, 1894 (Mad. II of 1894) s. 17.

The appellant filed a suit for ejectment of the respondent from 4·80 acres of *jeroyti* land and for mesne profit, which was based on a *kadapa* executed by the respondent in 1951, agreeing to pay an annual rent, and to vacate the land peacefully at the end of the year of tenancy. Similar *kadapas* were executed in earlier years. The respondent denied that the land was *jeroyti* land and alleged that it was a part of *Dharmila* inam land granted to his predecessors more than 100 years ago though *muchilakas* were taken every year, and claimed *kudiwaram* rights for himself. He contended that the appellant had only *melwaram* rights which she had lost as they