CALCUTTA HIGH COURT

Jagat Chandra Bhattacharyya

Vs

Gunny Hajee Ahmed

(Lancelot Sanderson, C.J. Buckland, J.)

27.07.1925

JUDGMENT

Lancelot Sanderson, C.J.

1. This is an appeal by Jagat Chandra Bhattacharyya, Jogesh Chandra Bhattacharyya and Jyotish Chandra Bhattacharyya, who were sued as representatives of Kush Chandra Bhattacharyya: and, the appeal is against an order of my learned brother Mr. Justice C.C. Ghose, which was delivered on the 24th of August 1924.

2. The suit was based on a hundi for Rs. 2,009 drawn by the firm of Kush Chandra Bhattacharyya, carrying on business in Calcutta, in favour of the plaintiff and dated the 24th of February 1921.

3. The facts which it is necessary for me to state for the purpose of my judgment are as follows:

Kush Chandra Bhattacharyya started the firm of Kush Chandra Bhattacharyya & Co. in 1907--the other partners were Anukul Chandra Bhattacharyya, Atul Krishna Bhattacharyya and one Raj Krishna Sinha and the firm carried on business in Calcutta.

4. In 1914, Kush Chandra Bhattacharyya became a lunatic, and the business, as far as I know, was managed by the other partners.

5. It was alleged that the wife of Kush Chandra sometime in March 1919 caused a letter to be sent to the partners, referring to the lunacy of her husband and claiming a dissolution. That letter, however, was not produced at the hearing of this case.

6. The suit was brought on the 16th of July 1921. Kush Chandra Bhattacharyya was not personally served, but the writ of summons was served upon the firm in the way provided by the C.P.C.

7. The decree was made on the 8th of August 1921, for the amount of the hundi and interest, and was ex parte. After the decree was made it was assigned to Hajee Gunny Ahmed, who was joined as aparty to this appeal.

8. In September 1921, the partners of the firm other than Kush Chandra Bhattacharyya petitioned the Court and, on their petition the firm was adjudicated insolvent. Kush Chandra Bhattacharyya died on the 27th of August 1920.

9. On the 7th of April. 1924, the plaintiff made an application ex parte to the learned Judge for an order that he should be at liberty to execute the decree against the three appellants describing them as the sons, heirs and legal representatives of Kush Chandra Bhattacharyya, deceased, who was a partner of the defendant firm, by attachment, of the house and premises No. 90, Raja Nobo Krishna Street in Calcutta. This house was not partnership property, but was the private property of Kush Chandra Bhattacharyya.

10. The learned Judge upon this application made the order, as prayed, ex parte.

11. On the 8th of April 1924, the plaintiff caused a notice to be served upon the three appellants describing them as the sons, heirs and legal representatives of Kush Chandra Bhattacharyya, a partner of the defendant firm. This notice purported to be given in the suit, Gunny Hajee Ahmed v. Kush Chandra Bhattacharyya & Co., and to he under Rule 22(1)(a)(6) of Order XXI, of the C.P.C. and called upon them to appear on the day mentioned, to show cause why the decree passed against them on the 8th of August 1921, in the said suit should not| be executed against them: and, on the same day the plaintiff filed a tabular statement setting out the plaintiffs claim against the defendant firm and praying that the decree might be realized by the attachment and sale of the premises in question, which belonged to Kush Chandra Bhattacharyya, a partner of the defendant firm, which, since, his death, passed into the hands of his sons and legal representatives, the appellants. The tabular statement concluded as follows: "Leave was granted on the 7th day of April 1921 to execute the decree against the legal representatives of Kush Chandra Bhattacharyya, who was one of the partners of the defendant firm."

12. The matter came before the learned Judge on the 21st of May 1924, and on the 29th of May 1924, when the issue between the parties was tried. I do not find that the issue was specifically stated but I assume for the purpose oil my judgment that the issue raised was whether Kush Chandra Bhattacharyya was a partner, in the firm at the time the hundi was executed by the firm, namely, the 24th of February 1921.

13. The learned Judge after hearing the parties made an order granting the plaintiff leave to execute the decree by attachment and sale of the house and premises. No. 90, Raja Nobo Krishna

Street.

14. The matter was determined upon statements contained in the affidavits which were filed and upon certain admissions which were made at the hearing on the 21st and on the 29th of May 1924.

15. It appears that Mr. Bannerjee, who appeared for the appellants, examined a witness on the 21st May and then Mr. Sircar, who appeared for the plaintiff, stated that it was not necessary to cross examine the witness, as for the purposes of the case he was willing to proceed on the footing that Kush Chandra Bhattacharyya was a lunatic. Then Mr. Bannerjee, apparently, having regard to what Mr. Sircar said, withdrew the witness.

16. On the 29th of May, there was a further admission made, as appears from the minutes. Mr. Bannerjee, who appeared for the appellants, admitted that Mr. Sircar's client knew that Kush Chandra Bhattacharya was a partner of the firm prior to the lunacy, and Mr. Sircar said that he was willing to proceed on the footing that Kush Chandra Bhattacharyya was a lunatic from 1914 onwards and Mr. Bannerjee said that he was willing to proceed on that footing.

17. There is one other fact which. I ought to mention and that is that on the 11th of July 1921 the wife of Kush Chandra Bhattacharyya instituted a suit on the Original Side of this Court for dissolution of the partnership. That was before Kush's death, who, as I have said, died in August 1923.

18. After Kush's death, the appellants were substituted as defendants in the partnership suit: and, on the 19th June 1924, a decree dissolving the partnership was made: and it was directed that the dissolution should take effect as from the 19th of March 1919.

19. The application, upon which the learned Judge's decision was given was alleged to have been made in pursuance of the provisions of Order XXI, Rule 50(2). It was based upon the fact that the plaintiff's decree was against the firm, and upon the allegation that the plaintiff was entitled to execute the decree against Kush Chandra Bhattacharyya, as being a partner in the firm, and inasmuch as Kush Chandra Bhattacharyya was dead, against the appellants as his representatives.

20. There is no doubt that the procedure adopted by the plaintiff was irregular.

21. The application to execute the decteo against the appellants should not have been made ex parte, and the order of the 7th of April giving the plaintiff leave to attach the premises should not have been made ex parte, as it was in this case.

22. That order was made upon the assumption that Kush Chandra Bhattacharyya was a partner in

the firm--but the question whether he was a partner had not been decided, either at the trial of the suit or at any other time.

23. It was admitted by the learned, Advocate for the respondent that a summons should have been issued under the provisions of Order XXI, Rule 50(4) reciting the decree against the firm, and calling upon the appellants} to appear and answer the allegation made, by the plaintiff that Kush Chandra Bhattacharyya was a partner in the firm and to meet the claim that execution should issue against the appellants as Kush Chandra Bhattacharyya's representatives.

24. This irregularity, however, in my opinion should not be allowed to vitiate the Proceedings, and it is not by itself sufficient to justify a reversal of the learned Judge's order because notice was subsequently given to the appellants. They appeared before the learned Judge and contested the question whether Kush Chandra Bhattacharyya was a partner in the firm and whether the plaintiff was entitled to execute the decree against the appellants and the property in question, and irregularity in my opinion, did not in any way affect the merits of the case.

25. The first point raised by the learned Advocate for the appellants was that the plaintiff was not entitled to execute the decree against Kush Chandra Bhattacharyya or his representatives or their private property, because Kush Chandra Bhatfcacharyya had not been served with the writ of summons by which the suit was instituted.

26. He based his argument on Order XXI, Rule 50(4), which provides as follows: "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." His argument was to the effect that unless a person who was a partner in a firm, against which a decree had been obtained, had been served with the writ of summons by which the suit was instituted, he or his private property could not be made liable under the decree, and the plaintiff's right to execute the decree was limited to proceedings against the property of the partnership. I am not able to accept that argument. If it were held that in no event could a decree, obtained against a firm, be executed against a partner personally or his personal properly unless he had been served with the writ of summons in the suit, the object of Order XXI, Rule 50(2) would be rendered nugatory.

27. The result would be that in any case when a plaintiff sued a firm, he would have to determine at the outset and before he issued the writ of summons who were the persons against whom he would execute the decree when it was obtained.

28. In many cases it might be difficult and in some cases impossible for a plaintiff, who had been dealing with a firm and who has been obliged to sue the firm, to ascertain, before he brought his

suit against the firm, who were the partners against whom he must eventually execute the decree.

29. The Code enables the plaintiff to bring the suit against the firm, and if after the decree has been obtained against the firm the decree-holder claims to execute it against any person other than those mentioned in Order XXI, Rule 50, Sub-rule (1), Clause (b) and (c) as being a partner, he is enabled by Sub-rule (2) to apply for leave; and that rule provides what procedure is then to be adopted.

30. In my judgment the intention of the rule is that when an application under the rule is made it should be on notice to the person, who is alleged to be liable as a partner; he is to be served with a summons and called upon to answer the application. Then if the Court finds that the liability is not disputed, the Court may grant leave to execute the decree against the person who does not dispute the liability.

31. If the person who is sought to be made liable as a partner having been served with the summons and having appeared to, answer, disputes his liability, then the issue is to be tried in any manner in which any issue in a suit may be tried and determined.

32. There is a further reason which militates, against the argument of the learned Advocate for the appellants. If it were adopted, it seems to me that it would render the provisions of Sub-rule (2) meaningless.

33. Sub-rule (2) applies to the case of persons, against whom the decree-holder seeks to execute the decree, other than the persons, mentioned in Sub-rule (1), Clauses (b) and (c).

34. Clauses (6) and (c) refer to persons who have appeared or who have been individually served as partners and who have failed to appear.

35. A person, therefore, who has been served with the writ of summons is not one of those contemplated by Sub-rule (2): and, if the learned Advocate's argument be accepted and the decree-holder's remedy under his decree against a firm is limited to partnership, property, unless the person sought to be made liable as a partner has been served with the writ of summons in the suit, Sub-rule (2) would be unnecessary, for the decree, against the firm can be executed against, partnership property under the provisions of Order XXI, Rule 50, Sub-rule 1(a).

36. In my judgment the meaning of Order XXI Rule 50, Sub-rules (2) and (4), is that a decree, obtained against the firm, cannot be enforced, except as to partnership property, against a person alleged to be a partner, and against whom an application has been made under Sub-rule (f) unless he has been, served with a summons to appear and answer the application specified in Sub-rule (2) and he has had an opportunity of disputing his liability, as a partner, if he desires so to do.

37. It was argued by the learned Advocate for the appellants that this could not be...the meaning, for it might be that the person sought to be made liable as a partner might desire to contest the validity of the decree, and if he had not been served with the writ of summons he would not have had any opportunity of so doing.

38. In my opinion, there is no substance in that argument. If on the trial of the issue contemplated by Order XXI, Rule 50(2) it is decided that the person, alleged by the decree-holder to be a partner, was a partner in the defendant firm, then it seems to me he has no cause for complaint.

39. Order XXX, Rule 3 provides for the service of the summons in a case where persons are sued as partners in the name of the firm. Assuming that the summons has been served in one of the ways specified in Order XXX, Rule 3 and that the person, sought to be made liable as a partner, was found in fact to be a partner, he would have had an opportunity to defend the suit either by himself or through his other partners who were his agents.

40. In my judgment, therefore, the first point, on which the learned Advocate for the appellants relied, must fail.

41. The second point upon which the learned Advocate for the appellants relied was, that the lunacy of Kush Chandra Bhattacharyya, which occurred in 1914, dissolved the partnership between him and the other members of the firm as from that time. He based his argument on the allegation that in India a lunatic cannot have a contractual relationship with any one. There is, however, no doubt that Kush Chandra Bhattacharyya was of sound mind when he entered into the partnership in 1907; and it remains to be considered whether the partnership came to an end as far as he was concerned by reason of his becoming a lunatic.

42. The learned Counsel argued that it was a partnership at will, and that as soon as Kush Chandra Bhattacharyya became lunatic, he became incapable of exercising his will and making a contract and consequently the contract of partnership came to an end.

43. I find some difficulty in following this argument.

44. Kush Chandra Bhattacharyya was a partner from 1907, if he became incapable of exercising his will power when he became a lunatic in 1914, as alleged, it seems to me that ii, would follow that he was incapable of expressing his will and determination to put an end to the contract of partnership and that in the absence of an order of the Court dissolving the partnership or any action by a person duly appointed to represent the interests of the lunatic, the partnership would continue. A man, who has been of sound mind, and who becomes of unsound mind, may recover his sanity: and, in my judgment the, lunacy of a partner; does not of itself dissolve a partnership, but confirmed lunacy is a ground for dissolution if the other partners apply to the Court for a

decree of dissolution on that ground.

45. Section 254 of the Contract Act provides that "at the suit of a partner the Court may dissolve the partnership in the following cases:

(1) when a partner becomes of unsound mind....

46. This contemplates that an order of the Court is necessary to dissolve a partnership on the ground of the unsoundness of mind of one of the partners such an order would not be necessary if the unsoundness of mind by itself dissolved the partnership.

47. It was then argued that by the decree of the Court, dated the 19th of June 1924, the partnership was in fact dissolved as from the 19th of March 1919.

48. It was alleged on behalf of the respondent that the suit, in which this decree was made, was a collusive suit: having regard to the parties to it and the date when the suit was instituted, viz., the 11th of July 1921, and the date of the decree, viz., the 19th of June 1924 and the date when the suit on the hundi against the firm was instituted, viz., the 16th of July 1921, there seems some ground for that allegation.

49. The decree of the Court for dissolution, however, was made and still remains, and I assume, therefore, for the purpose of my judgment, that the partnership as between Kush Chandra Bhattacharyya and the other partners was dissolved as from 19th March 1919.

50. The question still remains whether that fact is sufficient to relieves Kush Chandra Bhattacharyya and his estate from liability to the plaintiff in this suit.

51. Section 264 of the Contract Act provides as follows:

Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution.

52. The learned Advocate for the appellants argued that this section applies only to persons who dealt with the firm before the dissolution and, therefore, the plaintiff, who, he alleged, had not dealt with the firm before the dissolution, was not entitled to notice, and he could only make liable those who were in fact partners, at the time the hundis were executed.

53. There is no express decision by the learned Judge on the question whether the plaintiff had dealings with the firm before the dissolution, although the learned Judge held that the plaintiff had many dealings with the defendant firm before the execution of the hundis. If the appellants' contention on the above mentioned point were correct, I should be of opinion that it would be

necessary to remand the case for a further hearing in order to have a decision on the question whether the plaintiff had dealings with the firm before the dissolution in March 1919.

54. I am of opinion, however, that no remand is necessary for I do not think the appellants' contention in this respect is correct.

55. In the first place the section says: "persons dealing with a firm." It does not say "persons dealing with a firm before its dissolution;" and I see no reason why the words "before its dissolution" should be interpolated in the section.

56. In the second place the appellants' contention is, in my opinion, contrary to the decision in Chundee Churn Dutt v. Eduljee Cowasjee Bijnee 8 C. 678 : 11 C.L.R. 225 : 4 Ind. Dec. (N.S.) 437 which is a decision of a Bench of this Court, consisting of Garth, C.J., and White, J.

57. In that case the learned Chief Justice said that he felt a difficulty as to the meaning of Section 261 of the Contract Act especially as regards old customers who like the plaintiff in that case had dealt with the firm before its change or dissolution.

58. He proceeded as follows (page 683 pages of 8 C.--[Ed.]): "I suppose the section means that all persons dealing with a firm, whether old customers or new, will be affected by any dissolution of (the firm or any change of its members if they have actual notice of the fact. This would be quite in conformity with the Law of England. But supposing they have no actual knowledge of the fact, is it intended that all persons dealing with the firm, whether old or new customers, are to be bound by public notice of such dissolution or change, whatever the words 'public notice' may mean?" Again at page 684 pages of 8 C.--[Ed.] the learned Chief Justice is reported to have said: "The law which regulates the liability of partners for the acts of their co-partners is a branch of the law of agency; and in the absence of any specific rule upon the subject under the head of partnership, we must look to the law of agency for the solution of our present question. Each partner is the agent of his co-partners for the purpose of conducting debts and obligations in the usual course of partnership (see Sections 249 and 251 of the Contract Act, Lindley on Partnership, 3rd Edition, p. 248). And when this agency has once been established, it does not cease as regards third persons, until its termination has become known to them (see Section 208 of the Contract Act)."

In the case, therefore, of a dissolution of the partnership or of the retirement of one of its members, the agency as between the partners themselves would cease from the time of such dissolution or retirement; but as regards third persons the agency would continue until it had been duly notified. And the mode of notification which the law requires is different in the case of old and new customers of the firm from what it is in the case of other persons.

59. In my judgment it is clear that the above-mentioned case is an authority for the proposition that the section applies not only to persons who dealt with the firm before the dissolution but also to persons dealing with the firm after the dissolution or change of partners.

60. This, as already stated, is the natural construction of the section giving the ordinary meaning to the words used in section.

61. In this case it was admitted that the plaintiff knew that Kush Chandra Bhattacharyya was a partner of the firm prior to the lunacy: and it has not been suggested that any public notice of the dissolution or change of partners was given, or that the plaintiff himself had notice of the dissolution.

62. In my judgment, therefore, the plaintiff dealing with the defendant firm, of which he knew Kush Chandra Bhattacharyya was a partner, and having had no notice of the alleged dissolution was not affected by the dissolution.

63. For these reasons, I am of opinion that the appeal should be dismissed with costs.

Buckland, J.

64. On the 8th of August 1921. Gunny Hajee Ahmed obtained a decree against the firm of Kush Chandra Bhattacharyya and Co., for Rs. 2009 and costs upon a hundi dated the 24th February 1921, and executed on behalf of the defendant firm. Subsequently an application was made under Order XXI, Rule 50(2) for an order for leave to execute the decree against the present appellants as the sons and legal representatives of their deceased father Kush Chandra Bhattacharyya by attachment of the house and premises No. 90, Raja Nobo Krishna Street which is a part of the personal estate of their deceased father.

65. The applicant has since assigned his decree, but that does not affect the points which now arise for decision.

66. On the 8th of April notice was issued to the appellants under Rule 22(1)(a)(b) of Order XXI of the C.P.C. to show cause why the decree in question should not be executed against them. To that notice I shall have to refer later in more detail.

67. The appellants, as observed, are the sons of Kush Chandra Bhattacharyya who is admitted to have been a member of the firm of Kush Chandra Bhattacharyya and Co., from the year 1907 onwards. It is also admitted that in the year 1914lie became of unsound mind.

68. In the year 1923 he died. It is also alleged and not denied that in March 1919 the wife of the deceased wrote through her Solicitors on behalf of her husband to his partners giving notice of

dissolution of the firm carried on under the name of Kush Chandra Bhattacharyya and Co.

69. The applicant Gunny Hajee Ahmed alleged that he dealt with the firm knowing Kush Chandra Bhattacharyya was partner and that no notice of dissolution was given to him or by public advertisement.

70. The learned Judge made an order granting leave to the plaintiff to execute the decree in the manner desired. There is no finding as to dissolution, though the learned Judge, appears to have dealt with the matter upon the basis of a dissolution in March 1919.

71. The first point argued is that under Order XXI, Rule 50 of the C.P.C. no execution can issue against property other than the partnership property unless the alleged partner has been served with the writ of summons in the suit. This is based on Order XXI, Rule 50(4) which is said to extend to the whole rule.

72. Under Order XXX, Rule 3 the summons in a suit against partners in the name of their firm may be served either upon any one; or more of the partners, or at the principal) place at which the business is carried on upon any person having, at the time of service, the control or management of the partnership business there, as the Court may direct. Order XXX, Rule 6 provides: "Where persons are sued as partners in the, name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm;" and Rule 7 provides: "Where a summons is served in the manner provided by Rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued."

73. Execution in a suit decreed against a firm is provided for by Order XXI, Rule 50. As regards the partnership property no difficulty arises. Execution may issue in. every case. As regards private property of individual partners Rules 50(1)(b)(c) limit it to cases of persons who have appeared tinder Order XXX, Rules 6 or 7 or who have admitted that they are or have been adjudged to be partners or who have been individually served as partners and failed to appear. The persons so classified comprise all who prior to execution against their private estate for one reason or another may be held to be aware of their personal liability to satisfy the decree against the firm.

74. Sub-rule (2) deals with cases of persons said to be partners who are not within the foregoing categories and who, therefore, may be held not to be aware of their personal liability. Hence the need for Sub-rule (4).

75. The principle underlying this rule is that as regards the firm and the partnership property there has been a complete adjudication prior to decree. Service ton the manner prescribed by

Order XXX ensures that due notice shall be given to the firm as such. Then, as regards the liability of individual partners, the object of the. rule is to ensure that no partner shall beheld personally liable unless he shall have had individual notice or may be held to be aware of his liability.

76. It has been argued that Sub-rule (4) is generally applicable and that its effect is to limit execution against individual partners to execution against those who have been served with a writ of summons under Order XXX. Such a construction cannot be reconciled with Sub-rule (1). It would involve both repetition and inconsistency and be so meaningless as to be inconceivable. If "summons to appear and answer" means the writ of summons, as argued, this leads to the anomalous conclusion, that service on partners is twice ensured, by Sub-rule (1)(c) and by Sub-rule (4) while Sub-rule (2) is ineffective and cannot be utilised.

77. The only sensible interpretation is that Sub-rule (4) is intended to apply to persons against whose property execution is sought under Sub-rule (2).

78. This rule is adapted from the English Order XLVIIIA, Rule 8, reference to which makes it clear that the provision as regards service in Sub-rule (4) was intended to be applicable to persons against whom execution was asked for other than those against whom the decree-holder was entitled to execution by reason of Sub-rule (1). The sub-division of the English rule into Order XXI, Rules 50(2) and (4) has led to the elaborate argument which we have heard. The two would more appropriately have been combined in one sub-rule which would have made the intention clear.

79. The English rule of course is in no way binding as an authoritative guide to interpretation, but I am fully satisfied both as to the genesis and the meaning of the rule which we have to construe.

80. The form of summons is challenged and it is argued that by lesson of the form there has been no proper service. Reference has been made to the words in Sub-rule (4) "summons to appear and answer" and it is rightly contended that in relation to Sub-rule (2) they mean that proper notice of what is intended shall be given. The summons should recite the decree, that it, is against the firm, and that the decree-holder claims to be entitled to execute it against the individual to be charged on the ground of his liability as a partner in such firm.

81. In this particular case the summons was issued by the master under Order XXI, Rule 22(1) of which Sub-rules (a) and (6) are both applicable. Where necessary the summons should issue under both, rules of Order XXI and the requirements of each should be complied with.

82. Applications for execution are ordinarily made ex parte on a tabular statement. In cases to which Order XXI, Rule 22 applies it appears to be the practice, to file the tabular statement and

at the same time to take out of summons under that rule. This practice appears to be convenient, and it might well be followed where Order XXI, Rule 50(2) applies, whether in conjunction with Order XXI, Rule 22 or not, but the summons should be served before any order is made against the persons to be held liable.

83. To conclude these observations on the practice under Order XXI, Rule 50(2) which does not seem to be well-settled it also appears, to me that the effect of the language of the sub-rule as to granting leave or trying the liability of the person to be charged where disputed, is that upon the parties being before the Court or properly served, as the case may be, if liability is not disputed, the Court may grant leave forthwith, but if liability is disputed, leave may only be given after such liability has been tried and determined in favour of the decree-holder.

84. In this particular case, the summons does not conform strictly to what, in my opinion, is required by the Code. But I am not prepared to say that on that ground the appeal must succeed.

Though no reference is made in the summons to Order XXI, rule 50(2) nevertheless it contains the title to the suit indicating that the firm was the defendant against whom the decree referred to later was made. It is addressed to the appellants as legal representatives of Kush Chandra Bhattacharyya, "a partner of the defendant firm above named," and calls upon them to show cause why the decree should not be executed against them, which must mean in the capacity in which they are summoned. They appeared and they took no objection. They met the case made against them on its merits, though it was not open to them at that stage to challenge the decree, for the liability of the firm and of its partners, whoever they might be, had been thereby established. How can they now complain? In my opinion, there is no substance in this objection. Section 99 of the C.P.C. has been referred to and it provides: "No decree shall be reversed or substantially varied...on account of any...error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court." If necessary I should be prepared to say, that this section applied.

85. The next point argued is that Kush Chandra Bhattacharyya's lunacy in 1914 ipso facto dissolved the partnership. This argument is based upon an alleged analogy to infancy which, however, in my opinion, does not exist, An infant is under a continuing contractual disability which is finally removed when he attains majority. The disability of a person of unsound mind may begin and end at any time; it may be continuous or it may be intermittent. Section 12 of the Indian Contract Act is consistent with this for the second paragraph provides that, "a person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind" and the third paragraph of the section provides for the converse case. Section 254 provides that "at the suit of a partner the Court may dissolve the partnership when a partner becomes of unsound mind." The provision of the law is wholly inconsistent with the proposition

that the lunacy of a partner ipso facto dissolves the partnership. It shows that lunacy provides a ground for dissolution and whether or not it affords a ground for dissolution and whether war not it is open to another partner to dissolve a partnership without an order of the Court, in the circumstances it is not necessary to consider. It may be necessary therefore, in cases where a partner has become of unsound mind, to consider whether there has been a dissolution in fact otherwise the partnership must be deemed as continuing. In these circumstances, I find that the partnership continued after 1914.

86. In this case no dissolution m 1919 as is alleged to have taken place was actually proved before the learned Judge, nor is there any finding by him to that effect, for the judgment of the Court declaring the partnership to have been dissolved at that date was delivered between the time when the learned Judge heard the application and the date when he made the order which has been appealed against. He assumed, however, that there had been a dissolution in 1919 and seems to have dealt with this matter upon that basis.

87. I may digress at this point to draw attention to the fact that under Order XXI, Rule 50(2) the question of liability should be tried and determined like an issue in a suit. That means on evidence which may be oral or documentary. This ordinarily should be the course pursued. A form of issue which would probably be appropriate to most cases was considered and approved in Davis v. Hyman & Co. (1903) 1 K.B. 854 : 72 L.J.K.B. 426 : 51 W.R. 598 : 88 L.T. 284 : 19 T.L.R. 348.

88. In this particular instance the admission by learned Counsel on the one hand of the lunacy in 1914 of Kush Chandra Bhattacharyya, of partnership and of the plaintiff's knowledge of the partnership before that date on the other, made this unnecessary. Assuming, therefore, that there was no dissolution in 1919, the appellants are clearly liable.

89. The only remaining question is whether upon the materials before the learned Judge he was able to decide the case, having regard to the state of the law, seeing that the transaction upon which the decree was founded did not occur till 1921.

90. It is not alleged that any notice of dissolution was given to Gunny Hajee Ahmed or that the alleged dissolution was publicly advertised. It may, therefore, reasonably be assumed that neither of these things, was done.

91. It is put on issue upon the affidavits whether Gunny Hajee Ahmed ever dealt with Kush Chandra Bhattacharyya & Co., prior to 1921 when the hundi on which the decree was made was executed. I will, therefore, assume that Gunny Hajee Ahmed was a new customer of the firm in the sense that he had not dealt with the firm before 1921.

92. The position, therefore, maybe summarised as follows: That prior and up to 1914 Kush Chandra Bhattacharyya was a member of Kush Chandra Chattacharyya &. Co., that he then became a lunatic, that his widow on his behalf gave notice of dissolution to his co-partners in March 1919, that no further notice of dissolution was given nor notice to Gunny Hajee Ahmed, that Gunny Hajee Ahmed knew prior to 1914 of the constitution of the firm and was a new customer in August 1921. On these (facts is the estate of Kush Chandra Bhattacharyya liable to satisfy the decree against) the firm?

93. The matter appears to be governed in part by Section 264 of the Contract Act, Gunny Hajee Ahmed was a person dealing with a firm. Prima facie, he was not affected by the alleged dissolution.

94. It has been argued that as anew customer he is not within that section. The law of partnership depends on the law of agency. Section 201 of the Contract Act provides that an agency is terminated by the principal becoming of unsound mind, but Section 208 provides that the termination of the authority of an agent does not...take effect...so far as regards third persons, before it becomes known to them." Apart from authority Sections 201, 208 and 264 appear to conclude the matter. But we have the authority of this Court in Chundee Churn Dutt v. Eduljee Cowasjee Bijnee 8 C. 678 : 11 C.L.R. 225 : 4 Ind. Dec. (N.S.) 437 in which the effect of Section 264 was fully considered by Garth, C.J., who was clearly of the opinion that as regards persons who had not dealt with the firm the implied agency of partners would continue until its termination had been publicly notified.

95. It has been submitted that inasmuch as the question in that case was one of Usability to an old customer the learned Chief Justice's observations were but obiter. With this I cannot agree. It does not seem to me that an interpretation of a Statute directly necessitated in order to apply its provisions to the facts of a case should be described as obiter dictum because it involves reference to facts other than those before the Court.

96. I had some doubt at one time whether it would not be necessary to remand the case for trial upon the points last discussed, but in view of the admissions and the law as I conceive it to be, that course now seems to me to be unnecessary.

97. The directions contained in Order XXI, Rule 50(2) as to the trial of an issue should, however, not be overlooked, and it is very desirable that the issue to be tried should be framed and recorded. The same applies to any admissions which may be held to render oral evidence unnecessary either in whole or in part.

98. I have no doubt that the learned Judge who tried this case was fully cognizant of the position,

but the absence of any full and accurate record of what occurred before him, resulting in the prescribed procedure not being strictly followed has added considerably to the difficulties in dealing with this matter on appeal.

99. I agree that this appeal should be dismissed with costs.