

## **BOMBAY HIGH COURT**

Rana Harkishandas Lallubhai

Vs.

Rana Gulabdas Kalyandas

First Appeal No. 224 of 1953

(Gajendragadkar and Gokhale, JJ.)

19.08.1955

### **JUDGMENT**

#### **Gajendragadkar , J.**

1. On 16-02-1948, a decree for Rs. 1,05,251-1-0 was passed against a firm known as Rana Brothers and Co. in favour of Rana Gulabdas Kalyandas (decree-holder-respondent 1). The decree-holder applied for leave to execute the decree under Order 21, Rule 50(2) against respondent 2 and the appellants alleging that they being partners of the firm of Rana Brothers and Co., were liable under the decree. Respondent 2 and the appellants opposed the application on the ground that they were not partners of the firm, and also on several other grounds such as that the decree had been obtained by fraud and collusion and was not binding on them. The Civil Judge, Senior Division at Thana, by his order, dated 6-3-1953, considered the various pleas raised by respondent 2 and the appellants and granted leave to respondent 1 to execute the decree against respondent 2 and the appellants in their capacity as partners of the firm of Rana Brothers and Co. The Civil Judge held that respondent 2 and the appellants were partners of the firm, that they could contend that the suit against the firm was not maintainable and the decree against the firm was illegal, fraudulent and not binding upon them, but they having failed to prove their contention to be correct the decree was binding on them. The appellants appealed to the High Court. The appeal came up for final hearing before Gajendragadkar and Gokhale, JJ. At the hearing of the appeal a preliminary point was raised on behalf of respondent 1 that the only contention which respondent 2 and the appellants could raise in the proceedings under Order 21, Rule 50(2) was whether they were partners of the firm of Rana Brothers and Co., and that it was not competent to them to raise any other contention which might affect the validity of the decree.

#### **Gajendragadkar, J.**

1A. The point of law which arises for decision as a preliminary point is concerned with the

provisions of Order 21, Rule 50, Sub-Rule (2), Civil Procedure Code The decree-holder had asked for leave to proceed in execution against the appellants and their brother under Order 21, Rule 50, Sub-Rule (2), and since the appellants and their brother disputed their liability under the decree sought to be executed, it became necessary to consider what pleas it was open to them to raise in the proceedings under Order 21, Rule 50, Sub-Rule (2). The learned Judge below has held that the pleas which the appellants wanted to raise could be raised by them in the present proceedings and so he proceeded to deal with the merits of the said pleas in the light of the evidence adduced before him. The finding of the learned Judge that the several pleas which the appellants purported to raise before him were competent is challenged before us by Mr. Shastri for the decree holder. Mr. Shastri argues that in a proceeding under Order 21, Rule 50, Sub-Rule (2) where the decree-holder seeks to proceed against the appellants, the only point which the appellants can raise is that they were not partners of the firm against which the decree in question has been passed; it would not be competent to the appellants to raise any other contention which might affect the validity of the decree. That is how the question which falls to be determined is : What are the limits of the enquiry held under Order 21, Rule 50, Sub-Rule (2) ?

2. Before dealing with this question, it would be relevant to refer to the material provisions of O. 21. This Order deals with suits by or against firms and persons carrying on business in names other than their own. Rule 1 Sub-Rule (1) of this Order allows suits to be filed by or against firms in the names of the firms, and Sub-Rule (2) of Rule 1 authorizes any one of the partners of the firm to sign, verify or certify pleadings or other documents in such suits. Rule 2 requires the disclosure of partners names to be made on demand and sub-rr. (2) and (3) of this rule provide for the passing of orders consequent upon the disclosure of the names or its absence. Rule 3 provides for the manner in which notice can be served in actions against firms. If a firm is sued, the summons shall be served either upon any one or more of its partners, or at the principal place at which the partnership business is carried en within India upon any person having, at the time of service, the control or management of the partnership business there, as the Court may direct. This rule provides that service, when thus made, shall be deemed good service upon the firm so sued, whether all the partners are within or without India. The proviso to this rule may be noticed. It deals with the cases of partnership which have been dissolved to the knowledge of the plaintiffs before the institution of suits and it requires that in such cases the summons shall be served upon every person within India whom it is sought to make liable. Rule 6 of O. 30 provides that, where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but even so all subsequent proceedings will continue in the name of the firm. According to Rule 7, 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. Now, when the suit is brought against a firm in conformity with the rules prescribed by O. 30 and a decree is pasted, the said decree can be executed under Order 21. Rule 50 of O. 21 deals with the execution of such a decree. According to Sub-Rule (1) of Rule 50, 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 O. 30 or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner; and (c) against any person who has been individually served as a partner with a summons and has failed to appear. In other words, where a decree has been passed against a firm, it can be executed against the property of the partnership without the decree-holder taking any further step by way of obtaining leave from the Court. Similarly, it can be executed against persons mentioned in Clauses (b) and (c) of Sub-Rule (1) of Rule 50. So long as the decree-holder is content to execute the decree either against the property of the partnership or against the persons mentioned in these two clauses, he is not required to ask for any leave and the execution application is entertained by the executing Court and further steps in execution are ordered to be taken in the ordinary course. Where, however, the decree-holder claims to exercise his decree passed against a firm and wants to proceed in that behalf against persons, other than those mentioned in Clauses (b) and (c) of Sub-Rule (1), he has to obtain leave of the Court and the proceedings which he is required to take for obtaining leave are governed by Sub-Rule (2) of Rule 50. The application for leave would naturally state that the decree-holder has obtained a decree against the judgment-debtor firm and that the person shown as the opponent in the execution application is a partner of the said firm. When such an application is made, summons would issue against the opponent. If the opponent appears and admits his liability as a partner of the firm, execution would proceed against him. If the opponent is served and disputes his liability, the rule provides that the liability of such person has to be tried and determined in any manner in which any issue in a suit is to be tried and determined. If the liability is determined in favor of the decree-holder, execution would proceed against the opponent; if it is determined in favor of the opponent, no further steps in execution can be taken by the decree-holder against, him.

3. Mr. Chhatrapati contends that, in construing the material terms used in Sub-Rule (2) of R. 50 of O. 21, it would be necessary to bear in mind the fact that the opponent to the application has not been directly impleaded in the suit in which a decree has been passed and he has had no individual opportunity to meet or contest the claim made by the plaintiff against the firm in the suit itself. He, therefore, suggests that, if the material words are capable of a wider interpretation so as to enable the opponent to raise all pleas relevant for the purpose of disputing his liability, we should accept the said wider interpretation. Sub-rule (2) of Rule 50 provides that, where such liability is disputed, the Court may order that the liability of such person be tried. According to Mr. Chhatrapati, all pleas which have a bearing on the liability of the appellants should be allowed to be raised in the present proceedings. If the appellants contend that the decree under execution was the result of fraud or collusion, or that the decree has been passed contrary to the provisions of Section 19, Sub-Section (2) (e), Indian Partnership Act, it should be open to them, says Mr. Chhatrapati, to raise these pleas and substantiate them. On the other hand, Mr. Shastri argues that the only point which can be raised in the present proceedings must have reference to the question, whether the opponent was a partner of the firm or not. According to Mr. Shastri, as soon as it is found that the opponent was a partner at the material time, no further issue can be tried and the enquiry must be deemed to have been determined, in favor of the decree-holder,

leaving it open to him to proceed further in execution against the opponent.

4. In construing the provisions of Rule 50, Sub-Rule (2) of O. 21, it would be relevant to remember the scheme of this rule. I have already indicated that, under Rule 50, Sub-Rule (1) a decree passed against a firm can be executed against the property of the firm and against the persons mentioned in Clauses (b) and (c) of Sub-Rule (1) without any difficulty. In case it is found that the appellants were partners of the firm, at the material time, then-share in the property of the partnership would be liable under execution process even if the other points that they seek to raise in the present proceedings are upheld. The words used in Rule 50, Sub-Rule (1) are clear and unambiguous. It is impossible to hold that, the decision recorded in the present proceedings in favour of the appellants can affect the decree-holder's right to proceed in execution of the decree against the partnership property including the appellants' shares in it. In other words, it is clear that whatever may happen in the enquiry in the present proceedings, the validity of the decree qua the partnership property -and qua the persons mentioned in Rule 50, Sub-Rule (1), Clauses (b) and (c), can never be affected or impaired and the shares of the appellants in the partnership property would be available to the decree-holder in execution proceedings. If this be the true position, it inevitably imposes certain obvious limitations on the enquiry contemplated by Sub-Rule (2) of Rule 50. It would be futile to hold an enquiry under Sub-Rule (2) of Rule 50 concerning points which, if found in favor of the opponent, may tend to impair the validity of the decree itself. If the property of the partnership would always remain liable for execution, there would be no point in allowing a point to be raised in these proceedings which, if found in favor of the opponents, may tend to make the decree itself invalid and thus affect its executability. Prima facie, therefore, the pleas which can be taken in the present proceedings should not touch the validity of the decree against the firm and would not be allowed to affect the decree-holder's right to take steps in execution as mentioned in Rule 50, Sub-Rule (1). The material words used in Rule 50, Sub-Rule (2) may now be examined. This sub-rule deals with cases where the decree-holder claims to execute a decree passed against the firm and wants to proceed against a person who has not been impleaded as a partner expressly during the course of the suit, and the basis for proceeding against such a person set out by the decree-holder is that the said person was a partner in the firm. Proceedings under Sub-Rule (2) thus begin with the allegation made by the decree-holder that the person against whom he wants to proceed is liable for the decree passed against the firm because the said person was a partner in the firm. That is the basis and the foundation of his claim to proceed against him in execution. Such a person if, sought to be made liable solely on the ground that, he was a partner and the enquiry becomes necessary in such proceedings where, when the person is served with a summons of these proceedings, he disputes his liability. In our opinion, when Sub-Rule (2) refers to cases where such liability is disputed, the expression "such liability" in the contest means liability as a partner. The person served with a summons denies the allegation made by the decree-holder that he was a partner of the firm and it is on this denial that the issue arises between the parties and the issue inevitably would always be whether such a person was a partner of the firm or not. As soon as it is found that the person was a partner of the firm, the decree would immediately be executed against him. He would then become a

judgment-debtor and it would not be open to him to raise any further contentions against the validity or the executability of the decree which may not be open to the persons mentioned in Sub-Rule (1). In a sense, the position of a person who is found to have been a partner in the proceedings taken under Rule 50, Sub-Rule (2) would be exactly similar to the position of persons mentioned in Clauses (b) and (c) of Sub-Rule (1). It is only such pleas as these latter classes of persons can take in execution proceedings which would be open to the person who is found to be a partner in the enquiry under Sub-Rule (2).

5. If the appellants were allowed to take any pleas in addition to the plea that they were not partners, it would obviously lead to unreasonable, if not absurd, results. One of the points which Mr. Chhatrapati has raised is that the decree has been passed by consent of the two partners that appeared in the suit and he argues that the partners were not entitled to give such consent to the passing of the decree having regard to the provisions of Section 19, Sub-Section (2)(e), Indian Partnership Act.

We will assume for the present that the two partners were not clothed with authority to agree to a consent decree being passed in such suit. But if the plea is allowed to be raised in the present proceedings, it must necessarily lead to the result that the decree passed against the firm would not bind the appellants, and if that is so, the appellants' shares in the partnership properties would cease to be liable in execution. That would be contrary to the provisions of Rule 50, Sub-Rule (i) (a). It would besides mean that two decrees would come into existence in respect of the same suit. In our opinion, such a result is wholly unreasonable and so the wider construction of the material words used in Sub-Rule (2) which leads to such a result must be rejected.

6. There is another aspect of the matter to which reference may be made. In considering the scheme of the provisions in O. 30, I have already pointed out that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of his suit, the proviso to Rule 3 of O. 30 requires that summons shall be served upon every person within India whom it is sought to make liable. This provision clearly overrides the provisions of O. 21, Rule 50, Sub-Rule (2). In the case of a partnership which was known to the plaintiff to have been dissolved before the institution of the suit if the plaintiff does not summon each one of the partners and obtains a decree against the firm, it would not be open to him to take recourse to the provisions of Order 21, Rule 50. Sub-Rule (2) and ask for leave against persons not individually served.

Except for this class of cases, in all actions against firms O. 30 permits a plaintiff to obtain a decree without suing each partner individually. This procedure is based on the principle that in the case of a firm or partnership, each partner is entitled to represent his co-partners, and if the summons is served in the manner required by the material provisions of O. 30 and the decree follows, it should be open to the decree-holders to proceed against the firm in the manner indicated in Order 21, Rule 50. The argument of hardship on which Mr. Chhatrapati has naturally relied cannot, in our opinion, succeed because whenever a person joins any firm he must be taken to be aware that his co-partners might represent him as his agents and that claims against

the firm of which he is a partner may be made without impleading him individually. Therefore, in our opinion, in an enquiry contemplated under Rule 50, Sub-Rule (2) of p. 21, the plea which the opponent to the proceeding is entitled to raise would be in respect of the allegation made by the decree-holder that he was a partner of the firm sued. If the said plea of the decree-holder succeeds, then execution would proceed against the person shown to be a partner. On the other hand, if the contention raised by the person proceeded against succeeds and it is held that he was not a partner, no leave could be granted.

7. This question has been considered by this Court on several occasions and Mr. Chhatrapati has relied on the fact that, so far as decisions of this Court are concerned the decision in *Bhagwan v. Hiraji*<sup>1</sup>, is directly in point and he wants us to follow this decision. Patkar and Murphy, JJ. have held in this case that the question which falls to be determined under Order 21, Rule 50, Sub-Rule (2), is the general one of the liability, as a member of the firm, of the person sought to be charged, and so an issue can in a proper case be so framed as to include any appropriate defense. The defense that was raised by the opponent under Order 21, Rule 50, Sub-Rule (2) was that the decree sought to be executed was based upon an award which was invalid and this defense was upheld with the result that an order was passed preventing the decree-holder from proceeding against

<sup>1</sup> AIR 1932 Bom 516

the personal property of the opponent. Patkar J. who delivered the principal judgment of the Bench, referred to the decision in *Datoobhoy v. Vallu*<sup>2</sup>, in which it was held that one of several partners in a partnership cannot bind the others by a submission to arbitration even on matters arising out of the business of the firm and that it was no part of the ordinary business of a trading firm to enter into a submission to arbitration and he observed :

"It would, therefore, follow that the award was an invalid one so far as the other partners were concerned, and the decree based on the award would not be binding on the other partners."

Patkar, J. then proceeded to consider the provisions of Order 21, Rule 50, Sub-Rule (2), and purporting to follow the observations of Stirling, L.J. in *Davis v. Hyman and Co*<sup>3</sup>. CO) the learned Judge came to the conclusion that under the rule in question the point to be determined was the general one of the liability, as a member of the firm, of the person sought to be charged, and that an issue could in a proper case be so framed as to include any appropriate defense. It must be conceded in favour of Mr. Chhatrapati that this decision is in his favor. If this has been the only decision of this Court on this point, we might either have had to follow it or to refer it to a larger Bench. But there are other decisions of this Court which have taken a contrary view and, as I will presently point out one of these decisions also happens to be the decision of a Division Bench. With very great respect, we are disposed to agree with the view expressed in the other decisions to which I will presently refer and so we do not propose to refer this matter to a larger Bench. Before we part with, judgment of Patkar, J., however, it may be permissible to observe

that, when Patkar, J. came to the conclusion that the award was invalid and so the decree based on the said award would not be binding on the other partners, his attention does not appear to have been drawn to the clear provisions of Order 21, Rule 50, Sub-Rule (1). Otherwise the learned Judge would have had to consider whether or not the decree could be enforced against the shares of the other partners in the partnership property or not and the answer to this question must obviously be in favour of the decree-holder. It would, therefore, we think be unreasonable to hold that, even if a decree was based upon an invalid award, an enquiry under Order 21, Rule 50, Sub-Rule (2) can impair the validity of the decree qua the partnership property itself. It is true that in the final order passed the learned Judges directed that the decree-holder should not proceed against the personal property of the partners who had raised the dispute under p. 21, Rule 50, Sub-Rule (2). But legally and logically, if it was held that the decree was not binding against the said partners, it would seem to follow that the shares of the said partners in the partnership property would not be liable to satisfy the decree which did not bind them. There is another aspect of the matter to which the attention of the learned Judges with respect, does not appear to have been drawn. The plea that the decree was invalid was raised and could have been raised only after the persons in question were found to be partners of the firm. In other words, after the said persons were found to be partners of the firm at the material time, they urged that the decree was invalid because it was based upon an invalid award. Patkar, J. in his judgment, has had to deal with the question of limitation and he has observed and with respect, rightly that the plea of limitation cannot be successfully raised in respect of an application under Order 21, B. 50, Sub-Rule (2) because in substance the proceeding is one in execution and so long as

<sup>21</sup> Bom LR 828

<sup>3</sup>1903-I KB 854 (856)

the decree was capable of execution under Article 182, Limitation Act, it would be idle to contend that the application in question was beyond time. But if the proceeding between the decree-holder and the partners was a proceeding in the nature of execution, it would be relevant to consider whether in such execution proceedings, it would be open to a partner to challenge the executability of the decree on the ground that the decree was based upon an invalid award. If in accepting the plea the learned Judges intended to hold that the invalidity of the award made the decree a nullity, it might be another matter. But if the decree did not become a nullity as a result of the alleged invalidity of the award, then we apprehend that such a plea cannot be taken in execution proceedings. In determining the jurisdiction of the executing Court to entertain pleas under Section 38, Civil Procedure Code, it is always necessary to make a distinction between pleas that tend to show that the decree in question is a nullity and pleas that merely challenge the validity or the propriety of the decree on the ground that it is contrary to the provisions of law. If the plea is that the decree is a nullity and so cannot be executed, it would be open to the executing Court to entertain the plea. On the other hand, if the plea is that the decree is contrary to law in the sense that in passing the said decree certain provisions of the law have been ignored or contravened that would not necessarily make the decree a nullity and allegations about the impropriety or the illegality of the decree cannot be entertained in execution proceedings. Therefore with respect, we do not feel disposed to accept the broad proposition enunciated by Patkar, J. in his judgment that in a proceeding under Order 21, Rule 50, an issue can be so

framed as to include any appropriate defense.

8. By a coincidence, just about a week before Patkar and Murphy, JJ. delivered their judgments in Bhagwan's case, Mirza, J. had been called upon to decide the same point and the decision of Mirza, J. is reported in the same volume in *In re Malabar Forests and Rubber Co. Ltd.*<sup>4</sup>, Mirza, J. has observed that Order 21, Rule 50 of the Code should be read subject to the provisions of O. 30 of the Code. He has also held that, when an order has once been made against a firm, it is open to an individual partner, who has not been personally served, to contend in the execution proceedings that he was not a partner in the firm, but that it was not competent to him to raise an alternative plea that none of the partners was authorized to enter into the transaction in dispute. In support of his conclusion that the pleas as to liability which can be examined under Order 21, Rule 50 are confined to the question as to whether the person proceeded against is a partner or not, Mirza, J. in his turn has relied upon the observations of Stirling, L.J. in *Davis v. Hyman and Co.*, I will deal with these observations separately in a subsequent portion of this judgment. It would thus be seen that the view taken by Mirza, J. is inconsistent with the view expressed by Patkar and Murphy, JJ. on the view of Mirza, J. the enquiry permissible under Order 21, Rule 50, Sub-Rule (2) lies within a very narrow compass and the question which can be agitated in such an enquiry would always centre round the allegations of the parties that a particular person was or was not a partner of the firm at the material time.

9. The next decision which has taken the same view is reported in *Cooverji Varjang v. Coovarbai*<sup>5</sup>, This matter had gone before Beaumont, C.J. and Kama, J. in appeal against the judgment of B.J. Wadia, J. In this case the proceedings began with a chamber summons for an order that leave under Order 21, Rule 50, Sub-Rule (2), Civil Procedure

<sup>4</sup> AIR 1934 Bom 334

<sup>5</sup> AIR 1940 Bom 330

Code, be given to the applicant to execute the order dated 11-11-1937, against Cooverji Varjang and Malsy Virji as partners in the plaintiff firm and for costs. On this summons two questions arose for decision of the Court. The first point which was raised before B.J. Wadia, J. was that the summons had been improperly taken out inasmuch as it was not preceded by an application for execution under Order 21, Rule 11. This contention was negatived by the learned Judge. The learned Judge took the view that the application for leave was an ancillary application in the application for execution and that failure to make an application under Order 21, Rule 11, could not affect its validity, as it may at the worst be an irregularity but was clearly not such an irregularity as would make the proceedings invalid. The other question that was raised before the learned Judge was in respect of the pleas which could be taken by the opponents. The two earlier decisions of this Court to which I have already referred were cited before the learned Judge and the learned Judge preferred to follow the view taken by Mirza, J. Several draft issues had been proposed by the learned counsel for the alleged partners. Amongst them were issues as to estoppel and res judicata. But the learned Judge held that these issues were inappropriate and he proceeded to deal with the issues which could be properly tried in the said enquiry. These issues related to the knowledge of the defendant about the dissolution of the partnership and they

naturally were permissible having regard to the provisions of the proviso to Rule 3 of O. 30. When the matter was taken before the Court of appeal, both Beaumont, C.J. and Kania, J. agreed with the conclusions of the learned trial Judge. Beaumont, C.J. referred to the practice which had been introduced on the Original Side in the matter of taking out summonses under p. 21, Rule 50, Sub-Rule (2); he mentioned the view which had been taken by Sir Dinshaw Mulla who had introduced a change in the practice on the Original Side; and in the end he observed that he was inclined to think that the proceedings under Order 21, Rule 50, Sub-Rule (2) were in the nature of execution proceedings. Even so, the failure to make an application under Order 21, Rule 11 did not, in the opinion of the learned Chief Justice, constitute any irregularity which would vitiate the summons. The learned Chief Justice then proceeded to deal with the merits and he significantly observed that on the merits the only question which could be dealt with under Rule 50, Sub-Rule (2) was as to the liability of the appellants who were alleged to be partners to answer the decree against the firm. "The decree against the firm stands", he observed, "but the Court has to determine against whom that decree can be executed".

It would thus be noticed that the emphatic manner in which Beaumont, C.J. has expressed his view in regard to the nature of the enquiry under H. 50. Sub-Rule (2) leaves no doubt that the learned Chief Justice agreed with the view taken by B.J. Wadia, J.; and B.J. Wadia, J. has taken the said view even though the judgment of Patkar and Murphy, JJ. in *Bhagvan v. Hiraji* had been cited before him. It would, therefore, be legitimate to assume that the said judgment was before the Court of appeal when this point was argued and yet the learned Chief Justice felt disposed to express his view on the nature and limitations of the enquiry under Order 21, Rule 50, Sub-Rule (2) in emphatic terms as just indicated.

10. At this stage it may be relevant to refer to the decisions of the Calcutta High Court on which Mr. Chhatrapathi has relied. In *Chhattoo Lal Misser and Co. v. Naraindas Baijnath Prasad*<sup>6</sup>, Remfry, J. allowed the enquiry under Order 21, Rule 50, Sub-Rule (2), to cover the contention raised by the party that no execution could proceed against him because he was a ward under the U.P. Court of Wards Act, 1912, and that the Court was not competent to hear a case against him or to decree it unless the provisions of that Act had

<sup>6</sup> AIR 1930 Cal 53

been observed, and, secondly, that he was not a partner in the defendant firm.

Dealing with the provisions of Order 21, Rule 50, Sub-Rule (2), the learned Judge observed that

"the common sense of the matter is that the party sought to be charged can raise any personal defense and is generally precluded from challenging the decree, though, if that were obtained by collusion and fraud, that would not bind him, for he can only be bound, if found to be a partner, by admissions made by his partners and their conduct within the scope of their authority as such."

Unfortunately, the questions as to whether the proceedings under Order 21, Rule 50, Sub-Rule

(2) are in the nature of execution proceedings, and if yes, whether such pleas can be entertained by an executing Court, were not urged before the learned Judge and do not appear to have been considered.

11. Panckridge, J. of the Calcutta High Court, has likewise followed the view taken by Patkar, J. when he had to deal with this point in *Tolaram Nathmull v. Mahomed Valli Patel*<sup>7</sup>, Mr. Chhatrapati has also relied on similar observations made in *Jagat Chandra v. Gunny Hajee Ahmed*<sup>8</sup>. It, however, appears, that on a subsequent occasion the Calcutta High Court has taken a contrary view. In *C.M. Shahani v. Haverro Trading Co.*<sup>9</sup>, this question was considered by Das, J. exhaustively and Das, J. has held that in an enquiry under Order 21, Rule 50, Sub-Rule (2) the only point which falls for a decision is whether the person sought to be proceeded against was a partner of the firm or not. The earlier decisions of the Calcutta High Court, on which Mr. Chhatrapati has relied, were considered by Das, J. and have been dissented from. Dealing with the observations of Remfry, J. in *Chhattoo Lal Misser and Co.'s* case, which I have just cited, Das, J. remarked that the fallacy underlying the said observations was that the learned Judge took it for granted that there had been no decree against the respondent in that case. The learned Judge added that the fact, however, was that if the respondent was a partner in fact then, there was in fact a decree even against him because there was a decree against the firm. Das, J. also referred to the decisions of this Court and he agreed with the view taken by Mirza, J. and dissented from the view expressed by Patkar, J. After this matter was decided by Das, J., it went in appeal, and McNair and Gentle, JJ. agreed with the view taken by Das, J.

12. It would now be necessary to refer to two English decisions which are relevant to this point. In 1903-1 KB 854, a similar question under the corresponding provisions of Order 48A, Rule 8 of the Supreme Court Rules fell to be considered. When summons was taken under the said rule for leave to execute in decree passed against the firm on the allegation that the opponent to the summons was a partner of the firm, it was held that the order for an issue, in which the question should be whether that person was or had held himself out as a partner in the defendant firm, was rightly made. When the summons was taken out in this case, the Master had made the order that the question to be tried "shall be whether the said Sydney Maurice Hyman was or has held himself out as a partner in the defendant firm". On appeal, this order was modified and the issue was confined to the question as to

<sup>7</sup> AIR 1940 Cal 28

<sup>9</sup> 51 Cal WN 488

<sup>8</sup> AIR 1926 Cal 271

whether the Sydney Maurice Hyman was a partner of the firm at the material time. That part of the issue which referred to the plea that the said Hyman had held himself out as a partner of the firm was deleted. It was this appellate judgment that came to be considered by Vaughan Williams L.J., Stirling, L.J. and Mathew, L.J. In the result, the original order passed by the Master was restored. While dealing with this matter, 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. That is why the

learned Judge took the view that the order of the Master had properly provided for the determination of the question."

Then Stirling, L.J. proceeded to make certain observations which are always cited when the present point is judicially considered. "It is suggested", observed Stirling, L.J.

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

It is on the last two observations that Patkar, J. has relied in taking the view that, according to these observations, it would be open to a party sought to be proceeded against to raise contentions besides the principal contention that he was not a partner of the firm at the material time. It would be noticed that the observations in question are clearly obiter and even so it would not be right with respect, to construe these observations apart from their context. The only point which arose for decision was whether the Master was right in directing an enquiry to be held in respect of two matters. Was Sydney Maurice Hyman a partner of the firm at the material time or had he held himself out as a partner at the material time? It was held that both parts of the question legitimately fell to be enquired into under the summons issued under Order 48-A, Rule 8 of the Supreme Court Rules. If this context of the dispute is borne in mind, it would be realized that the somewhat general observations made by Stirling, L.J. cannot be pressed into service in support of the proposition that the enquiry permissible under Order 48-A, Rule 8, corresponding to O. 21, R. 50, Sub-Rule (2) is a much wider enquiry and that in such an enquiry any plea can be raised by the person against whom the summons is issued to show that he was not liable.

13. Whilst we are considering the observations made by Stirling, L.J., it would be necessary to refer to another English decision in *Weir and Co. v. McVicar and Co*<sup>10</sup>, in which it has been held that in an action against a firm a person who, being served as a partner, enters an appearance under protest denying that he is a partner in accordance with the provisions of Order 48-A, Rule 7 is not entitled to dispute the liability of the firm, and consequently cannot obtain an order for an issue to try the question of his partnership before the other issues in the action. When it was urged before the Court that

<sup>10</sup>1925-2 KB 127

this view might cause hardship, the argument was repelled by Bankers L.J. in these words :

"A member of a partnership on becoming a partner takes upon himself the responsibility for everything that his partners may do in the conduct of the partnership, whether it be in the ordering of goods, or failing to defend an action, or admitting, however wrongly, the

liability of the firm."

Similarly, Scrutton, L.J. observed :

"Order 48-A, Rule 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 appellant desires to invert the procedure, and to suspend the obtaining of judgment against the firm until after it has been ascertained who are the persons against whom the judgment when obtained will be enforceable. There is nothing in the rules which allows of such a proceeding,..." Therefore, in our opinion, it would not be reasonable to take the view that the observations made by Stirling, L.J. really support the view for which Mr. Chhatrapati contends. (The rest of the judgment is not material to this report.)

Appeal dismissed.