CALCUTTA HIGH COURT

Gokul Krishna Das

Vs

Shashi Mukhi Dasi

(Mookerjee, C.J. Teunon, J.)

26.08.1911

JUDGMENT

Mookerjee, C.J.

1. This appeal is directed against the preliminary decree in a suit for dissolution of a partnership-business, for adjustment of accounts, and for incidental reliefs. The claim of the plaintiff related to four firms, in respect of which she alleged that her husband, and after his death, she herself was partner with the defendants. In the original Court, the suit was dismissed on the ground that all the partners had not been joined as defendants. The District Judge, on appeal, reversed that decision, and gave the plaintiff an opportunity for the proper constitution of the suit. Upon remand, the Subordinate Judge held that the plaintiff was entitled to a decree for dissolution and gave directions as to the mode in which the business was to be dissolved and account taken. Upon appeal, the learned District Judge has affirmed this decision with two important variations, namely, first, that the plaintiff was entitled to a decree for dissolution in respect of one of the firms only from the income of which the other firms appear to have been established by the defendants, and secondly, that the plaintiff wag not entitled to interest on sums over-drawn by the defendants. The defendants have appealed to this Court, and on their behalf, the decree of the District Judge has been assailed, substantially on two grounds, namely, first, that the direction as to the mode in which the accounts are to be taken are unjust and erroneous, and secondly, that the defendants are entitled to remuneration on account of their services in the management of the firm. The plaintiff has contested the validity of these arguments, and has further urged that she is entitled to claim interest on amounts over-drawn by the defendants. We may add that when the appeal was first called on for hearing, it was argued on behalf of the defendants-appellants, that the suit was not properly constituted as parties interested in the partnership had not been served with notice, either in the primary Court or in the Court of Appeal below. We thereupon directed notices to b6 issued upon such persons. But they have not entered appearance in response to the notice; in other words, in spite of the best efforts of the plaintiff, no one has come forward to claim an interest in the partnership transactions. We are satisfied that there is no substance whatever in the contention that the suit as framed, is open to the objection on the ground of defect of parties. We shall, therefore, proceed to consider the objections urged against the decree of the District Judge.

2. The first point taken on behalf of the defendants is, that the District Judge has not given proper

directions as to the manner in which the accounts are to be taken. It has been suggested that the plaintiff is not entitled to claim any account at all by reason of her laches. The partnership was commenced on the 19th November 1883, between the husband of the plaintiff and the defendants. The husband of the plaintiff died in 1S87. It has been found that, since his death, the business has been conducted on the assumption that the plaintiff was a partner. Consequently, no question arises, whether the partnership was or was not dissolved in 1887, under Clause (10) of Section 253 of the Indian Contract Act. That Section provides that, in the absence of a contract to the contrary, the relations of partners are determined by the death of any partner. There is no direct evidence to show what was the contract between the parties in this respect at the incepsion of the partnership: but the Subordinate Judge has held, and his view does not appear to have been contested before the District Judge, that the conduct of the parties since 1887 shows that there must have been a contract between the original parties, that the partnership would not be dissolved by the death of any partner. There is no room for "the theory that, after the death of the husband of the plaintiff, a new partnership was constituted between herself and the surviving partners. The true view is that the original partnership was continued by common consent with this difference that the plaintiff re-placed her husband, and this condition of things can be explained only on the hypothesis that the contract between the founders of the partnership was that it was not to be dissolved by the death of any of the partners. The position since 1887 has, consequently, been that the defendants have managed the business and kept the accounts; the plaintiff, as a parda-nashin Hindu lady, could hardly be expected to take an active interest in the actual management of the trading concern. She might, no doubt, have employed an agent to examine the accounts from time to time. Indeed, the case for the defendants is that the accounts were settled from year to year. This, however, has been negatived by the Courts below, and in, our opinion, very properly. It is well settled that the mere balancing of an account in a book of accounts does not of itself constitute an account-stated, much less does it constitute an account settled' such as the parties would not be entitled to re-open except on special grounds. *Clancarty v. Latouche*[1]. The contention of the defendants that there has been a settled account cannot, therefore, be sustained nor can the position be maintained that there has been such acquiescence on the part of the plaintiff as to disentitle her to claim an account. No doubt, where an account has been rendered and has long been acquiesced in, unless fraud be proved, a Court will not re-open it, although the account may be shown to be erroneous, and although no final settlement was ever made: *Scott v. Milne*[2] The same principle is acted on in taking accounts, for charges long improperly made and acquiesced in or long omitted to be made and known so to be, are regarded, in the absence of fraud, as having been made or omitted by agreement: *Thornton v. Proctor*[3]. This principle has obviously no application to the present case. The defendants were fully aware that, as they were in charge of the business and kept the accounts, they were liable to render accounts to the plaintiff who, as a pardanashin Hindu lady, could not herself take part in the management, or control the accounts. As already explained, their case is that such accounts have been rendered. This defence has failed. They cannot now very well (turn round and contend that they were under the impression that the accounts, as entered by them in the books of the firm, were accepted by the plaintiff. But, although the plaintiff is not disentitled to claim an account, the question may very well arise as to the extent to which the accounts are to be taken. No question of limitation obviously arises. As the partnership had not been dissolved before suit, Article 106 of the Limitation Act, 1877, would have no application Harrison v. Delhi and London Bank 4 A. 437 in other words, as put in Foster v. Hodgson 19 Ves. 183 so long as a partnership continues, the statute of limitation does not apply at all between the partners. Article 120 would, consequently, govern the present suit. If, therefore, no question of limitation arises,

the point requires consideration, what is the period for which the accounts have to be taken. There can be no question that the time from which the account is to begin, in a general account of partnership dealings and transactions, is the commencement of the partnership, unless some account has since that time been settled by the partners, in which case the last settled account will be the point of departure: *Cook v. Collingridge Jacob*[4]. In the present case, there has been no such settled account; consequently, the accounts must be taken from the inception of the partnership. It is clear also, that the accounts must be taken of all dealings and transactions up to the date of the dissolution: *Beak v. Heak Finch 190; Jones v. Noy*[5] *I*t has been contended, however, with considerable force by the learned Vakil for the defendants appellants, that as the plaintiff was entitled to exercise her right of examining the books and accounts of the firm by an agent appointed by her for that purpose *Bevan v. Webb*[6] and as she has never chosen to exercise such a right, it would be a great hardship upon the defendants if they were called upon now to justify the purchases and sales on account of the firm at this distance of time, many years after the transactions have taken place. The learned Vakil for the plaintiff-respondent has appreciated the force of this contention and has stated that the plaintiff is not anxious to require the defendants to justify the ordinary items. Her grievance is that sums have been paid out in an obviously unauthorised manner, and that the defendants ought to be called upon to account for such sums. The payments so made have been classified under four heads, namely, -first, sums paid by way of remuneration to the defendants; secondly, sums paid to Mohesh Chandra Dey, the nephew of the husband of the plaintiff, or to creditors of Mohesh; thirdly, sums paid to Bindubashini, the widow of Mohesh Chandra, and fourthly sums paid to the defendants which they have invested in very profitable business. In so far as payments of the first of these four classes are concerned, we shall deal with the matter when we consider the second ground urged by the appellants. In so far as the second, and third classes of payments are concerned, the defendants are obviously liable to render an account. Their case throughout has been that Mohesh Chandra Dey was one of the partners of the firm and that after his death, his widow also continued to be a partner. This defence has completely failed. The payments made to Mohesh or his creditors or to his widow cannot, therefore, be justified on the ground that they were payments made to a partner. But it has been suggested on behalf of the defendants that Mohesh had rendered services to the firm, for which he was entitled to remuneration. That is a question which remains to be investigated; if it is established that Mohesh was entitled to remuneration for services rendered, a reasonable amount of remuneration may be set off against the sums paid out to him, his creditor or his widow. The remainder must be deemed as unauthorized payments for which the defendants are bound to render an account. In so far as payments of the fourth class are concerned, it is clear that the defendants are liable to render an account. If it is established that they have withdrawn sums from the partnership business and supplied them for purposes unconnected therewith, they are bound to render an account for the sums so withdrawn. It follows, consequently, that the defendants are liable to render an account from the commencement of the partnership business, that unless fraud is established, the ordinary items relating to purchases and sales in respect of the business are not to be challenged, but that the defendants must render an account with regard to the four classes of payments just mentioned.

3. The second point taken on behalf of the defendants is, that they were entitled to remuneration on account of their services in the management of the firm. We are of opinion that this contention is well-founded. It may be conceded, as put by Lord Wynford in *Thompson v. Williamson*[7] under ordinary circumstances the contract of partnership excludes any implied contract for payment of services rendered for the firm by any of its members; consequently, in the absence of any

agreement to that effect, one partner cannot charge his co-partners with any sums for compensation, whether in the shape of salary, commission or otherwise, OIL account of his own trouble in conducting the partnership business, and in this respect a managing partner is in no different position from any other partner. *Hutchson v. Smith*[8] *This* doctrine has been applied even where the amount of the services rendered by the partners is exceedingly unequal. In such a case, a remuneration to be paid to either partner for personal labour exceeding that contributed by the other is considered as left to the honour of the other, and it has been said that where that principle is wanting a,. Court of Justice cannot supply it. *Webster v. Bray*[9] where an allowance for trouble was made to the defendant, because it was offered by the plaintiff *Robinson v. Anderson*[10] where no allowance was offered and "Bone was given by the Court: where, however, it is the duty of each partner to attend to the partnership business and one partner in breach of his duty wilfully leaves the other to carry on the partnership business unaided, the Court may, upon dissolution of partnership, decree an allowance in favour of the partner who had carried on the business alone *Airey v. Borham*[11] In the case before us, the circumstances are peculiar; the plaintiff is a pardanashin lady and is unable, by reason of her station in life, to take an active interest in the management of the partnership business, the responsibility for the conduct of which has naturally been thrown upon the defendants. In view of these facts we expressed our opinion that it was just and equitable that some allowance should be made in favour of the defendants. The plaintiff thereupon offered remuneration at the rate of Rs. 150 a year. In our opinion, this is reasonable and we direct accordingly, that when the accounts are taken, the defendants be credited with remuneration at the rate of Rs. 150 a year from the time of the death of the husband of the plaintiff. If the defendants have credited themselves with any sum in excess of Rs. 150 a year by way of remuneration, they must account for the difference.

4. The point urged on behalf of the plaintiff against the decree of the District Judge raises the question whether the defendants are liable to pay interest on sums withdrawn by them from the partnership business. The learned District Judge has disallowed the claim for interest, and the learned Vakil for the defendants has sought to justify this view by reference to the case of *Meymott v. Meymott*[12] He has argued that, except where there has been fraudulent retention, as in Hutchson v. Smith 5 Ir. Eq. 117 or an improper application, as in *Evans v. Coventry*[13] a partner ought not to be charged with interest on money of the firm in his hands, *Webster v. Bray 7 Hare 159; Stevens v. Cook*[14]It may be conceded that this is a sound rule; but, in our opinion, it is of no assistance to the defendants. The case for the plaintiff is--and her allegation has been accepted by the Courts below--that the defendants have, from time to time, withdrawn large sums of money from the partnership business, and applied them to establish other firms from which they have earned large profits. Under these circumstances, it is difficult to appreciate how the defendants can resist the claim for interest. If the money had been retained and laid out judiciously or applied for the legitimate expansion of the business of the firm, the plaintiff would have been entitled to the additional profit. This is clearly a case where some of the partners have, without the assent of the other partners, wrongfully used in trade funds which were not their exclusive property. They are clearly liable to restore the property and to make the owner proper compensation. In our opinion, the plaintiff, under these circumstances, would be entitled at her option, either to take interest on the profits made by the use of the funds. Although she claimed the latter alternative in the original Court, she has not put forward any such claim before us; she has contented herself in this Court with a claim for interest. This is clearly unanswerable *Yates v. Finn*[15] *Booth v. Parke Beaty 444; Docker v. Somes*[16] When the accounts, therefore, come to be taken, not only must the defendants account for all sums over-drawn by them and applied for

purposes unconnected with the firm, but also pay interest thereon at 12 per cent, per annum, from the date when the sums were over-drawn to the date of the final decree of the lower Court.

5. The result is that the appeal and the cross-objections must both be allowed in part; the decree of the District Judge will be varied and the accounts will be taken in the manner explained in this judgment. Subject to the variations indicated, his decree will be affirmed. There will be no order as to the costs in this Court.

Cases Referred.

1(1810) 1 Ball and B. 420
25 Beav. 215, on Appeal 7 Jur. 709
31 Austr. 94 : 3 R.R. 558
4607 : 23 R.R. 155. 767 : 1 L.J. Ch. (O.S.) 74
52 Myl. and K. 125 : 39 R.R. 160 : 3 L.J. Ch. 14
6(1901) 2 Ch. 59 : 81 L.T. 609 : 70 L.J. Ch. 536 : 6 W.R. 548
77 Bligh (N.S.) 432
85 Ir. Eq. 117
97 Hare 159
1020 Beav. 98 : 7 De G.M. and G. 239
1129 Beav. 620 : 4 L.T. 391
1231 Beav. 445 : 32 L.J. Ch. 218 : 9 Jur. (N.S.) 426
138 De G. and M. and G. 835 : 26 L.J. Ch. 400 : 3 Jur. (N.S.) 1225 : 5 W.R. 436
145 Jur. (N.S.) 1415
1513 Ch. D. 839 : 28 W.R. 387 : 49 L.J. Ch. 187
162 Myl. and K. 655 : 3 L.J. Ch. 200