PRIVY COUNCIL.

P.C.*
1915

Jan. 19.

AHMED MUSAJI SALEJI
v.
HASHIM EBRAHIM SALEJI.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Appeal—Suit to wind up partnership and for accounts—Preliminary decree referring suit to Assistant Referee—Question of disputed membership of Firm—Report of Referee confirmed by final decree of Trial Judge—Omission to appeal from preliminary decree—Appeal from final decree raising question whether inquiry was rightly referred to Referee—Civil Procedure Code (Act V of 1908), s. 97—Interest, liability for, of partner of firm after dissolution using assets of firm for business for his own benefit.

In a suit to wind up a partnership and to have accounts taken, the membership of the firm was in dispute, certain persons being by the plaintiff alleged to be partners, and by the defendants to have been only employees remunerated by a share of the profits. An adjudication was made by the Trial Judge which declared that the partnership was dissolved as from 1st July 1907, and then "ordered and decreed" that "it is referred to the Assistant Referee of this Court to take the following account and make the following inquiries, that is to say, (*a*) to inquire who were the partners entitled to share in the assets and goodwill of the partnership business, (*b*) to take an account of the dealings of the parties with the assets of the partnership business." From that adjudication, though it was appealable, the appellants did not appeal. The Referee made the enquiries directed and took the account. His report as to enquiry (*a*) was adverse to the appellants, was excepted to by them, and was confirmed by the Trial Judge in his final decree. On an appeal by the appellants raising the question whether inquiry (*a*) was rightly included in the first adjudication, or whether it was not one which should have been made by the Court itself :—

Held (affirming the decision of the Courts below), that the first adjudication of the Trial Judge which included inquiry (*a*) was a preliminary decree under section 97 of the Civil Procedure Code, 1908, and that the

* *Present* : LORD DUNEDIN, LORD SUMNER, SIR JOHN EDGE AND MR. AMEER ALI

appellants not having preferred an appeal from it could not question it on appeal from the final decree.

Where, on the dissolution of a partnership, one of the partners retains assets of the firm in his hands without any settlement of account, and applies them in continuing the business for his own benefit, he may be ordered to account for such assets with interest thereon, apart from fraud or misconduct in the nature of fraud.

APPEAL 87 of 1914 from a judgment and decree (1st September 1913) of the High Court at Calcutta in its Appellate jurisdiction which affirmed with slight variation the judgment and decree (22nd April 1912) of the same Court in the exercise of its original Civil jurisdiction.

Three of the defendants, viz., Ahmed Musaji Saleji, Ismail Ahmed Mahamedi, and Mahamed Musaji Saleji, were the appellants to His Majesty in Council.

The suit in which the above decrees were passed was brought by Hashim Ebrahim Saleji, the first respondent, as one of the executors of the will of Ebrahim Soleman Saleji, who died in September 1907, for the purpose of having a partnersthip between the deceased testator, and the present appellants and respondents wound up by the Court; which partnership had been established to carry on the business of merchants and commission agents in Calcutta, and other places in the East, under the name of Ebrahim Soleman and Company. The terms of the partnership were, except as subsequently modified, defined by a deed dated 29th December 1902, the parties to which were (i) Ebrahim Soleman Saleji, (ii) Musaji Ahmed Saleji who died in April 1908, represented in this appeal by his son and executor Ahmed Musaji Saleji, the first appellant, (iii) Mamooji Musaji one of the respondents, (iv) Ismail Ahmed Mahamedi the second appellant, and (v) the said Ahmed Musaji Saleji. The duration of the partnership was to be for

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five years from 1st January 1903, but it was in fact admittedly dissolved on 1st July 1907. From the beginning of 1903, however, the terms of the partnership were varied by the addition of three other persons whom the respondents alleged to be partners, while the appellants stated them to be only assistants remunerated by a share of the profits: these were the respondents Yus-uf Musaji Saleji, and the appellant Mahamed Musaji Saleji (two other sons of Musaji Ahmed Saleji), and the respondent Ismail Ebrahim Saleji (another son of Ebrahim Soleman Saleji).

After the dissolution of the partnership on 1st July 1907, Musaji Ahmed Saleji together with the appellants started a new firm doing the same business under the name of Musaji Ahmed and Company, and since the death of Musaji Ahmed Saleji, that firm had been continued by the appellants.

Shortly after the death of Musaji Ahmed Saleji, the respondents, Hashim Ebrahim Saleji and Mamooji Saleji, as executors of Ebrahim Soleman Saleji and the latter also as one of the members of the partnership, called upon the appellant Ahmed Musaji Saleji as the surviving partner in Calcutta in charge of the partnership assets and of the winding up, to render to them an account of the dealings and transactions of the partnership and to pay what might thereon be found due. The appellant Ahmed Musaji Saleji failed to comply with their demand and it appeared that instead of winding up the affairs of the partnership and paying the various partners their respective shares, the appellants Ahmed Musaji Saleji and Ismail Ahmed Mahamedi were utilising the cash and assets of the partnership in the business of their new firm of Musaji Ahmed and Company without the same being debited to them or their father Musaji Saleji in the partnership books. In order therefore to preserve

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the assets of the partnership, and prevent loss to the estate of Ebrahim Soleman Saleji, the respondent on 30th June 1908 instituted the suit out of which the present appeal arose.

The plaint prayed (*inter alia*) for an account of the partnership business from the date of the last settled account (which the plaintiff alleged was the 31st December 1905) to the date of the dissolution, including an account of what was due to the estate of Ebrahim Soleman Saleji, and for a Receiver of the partnership assets and books.

An interim Receiver was appointed to whom the first appellant made over the sum of Rs. 4,111 odd as all the assets of the partnership in his possession.

The defendants to the suit were the three appellants, Mamooji Musaji, Ismail Ebrahim Saleji, Yusuf Musaji Saleji, and the heirs of Musaji Ahmed Saleji, for whom subsequently the executors of Musaji Ahmed Saleji were substituted.

The defences of the appellant defendants were that the five partners named in the deed of 29th December 1902 were the only members of the partnership, the others being merely assistants remunerated by certain shares of the profits; and that the shares of the partners were modified only as regarded the division of profits, their shares in the capital as assets of the firm remaining as fixed by the deed of partnership.

The suit was heard by FLETCHER J. who passed, on 30th August 1909, a preliminary decree declaring that the partnership was dissolved in 1st July 1907, and referring to the Assistant Referee of the Court (*a*) to inquire who were the partners entitled to share in the assets and goodwill of the partnership business; and (*b*) to take an account of the dealing of the parties with the partnership business without disturbing any settled account. The decree further declared

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that if the respondents Ismail Ebrahim Saleji, and Yusuf Musaji Saleji, and the appellant Mahomed Musaji Saleji should be found not entitled to share in the assets and goodwill of the partnership, they were nevertheless entitled to share in the profits of the business up to the date of the dissolution of the partnership.

The appellants did not appeal from the preliminary decree.

In due course, on 3rd July 1911, the Assistant Referee made his report in which he found (*inter alia*) that the three persons whom the appellants alleged to be "assistants" were partners in the firm of Ebrahim Soleman and Company and entitled to share in the assets and goodwill of the business; that assets of the partnership to the extent of more than Rs. seven lakhs had been appropriated by the appellants and Musaji Ahmed Saleji; and used in their new firm of Musaji Ahmed and Company, of which about half was not entered in the books of the partnership, and no record was kept by the appellants.

The appellants filed a number of exceptions to this report which were all heard by FLETCHER J., and discharged with costs, and the report was confirmed by a decree dated the 22nd April 1912 which ordered the appellants to bring into Court certain sums aggregating Rs. 7,24,373 odd (representing the assets of the partnership found to be in their hands respectively, or for which they were accountable) with interest thereon at the rate of 6 per cent. per annum from 1st July 1907, the date of the dissolution.

From that decree the appellants appealed on the grounds so far as material to this report (*a*) that it ought not to have been referred to the Assistant Referee to ascertain who were the members of the partnership, but that this question ought to have been

determined by FLETCHER J.; and (*b*) that the appellants were not liable for interest on the amount they were ordered to bring into Court.

As to the first ground the Appellate Court (SIR LAWRENCE JENKINS C. J. and WOODROFFE J.) held that no appeal having been preferred from the preliminary decree, no objection could then be taken to the form of that decree. The Appellate Court said :—

"The first ground urged on appeal is that it was erroneous to refer to the Assistant Referee the enquiry as to who were the partners entitled to share in the assets and goodwill of the partnership business, and it is maintained that the enquiry ought to have been held in Court and determined by the Judge.

"I think it was a mistake to have delegated to the Assistant Referee the decision of the complicated question involved in the first enquiry. There is no rule or established course of procedure in this Court which could justify the reference to this officer of an enquiry in these terms, nor has there been any delegation of duties to the Assistant Referee under section 128 of the Code. I am therefore of opinion that the question involved should have been determined by the learned Judge himself before the preliminary decree.

"This view is supported by the express provisions of the Code. Thus in Order XX, rule 15, it is provided that where a suit is for dissolution of partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree, declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved, or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

"In Appendix D a form (No. 21) is given for preliminary decree in such a suit and it starts with a declaration that the proportionate shares of the parties in the partnership are as follows :—Order XLVIII, rule 3, prescribes that the forms given in the appendices with such variation as the circumstances of each case may require, shall be used for the purposes herein mentioned.

"But while I think the reference should not have been directed, section 97 of the Code is a bar to the present appeal from the decree in which the direction was contained. It was a preliminary decree (section 2, explanation), and the present appellants' claim to be parties aggrieved by it; but they preferred no appeal from it within the prescribed period. Therefore they are now precluded from disputing its correctness on this

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appeal. This is just the class of case against which section 97 is directed: no objection was taken to the competence of the direction when it was given, the appellants joined in the reference without any protest, and now that the result of the reference has proved adverse to their contention they seek to attack the decree directing that reference. This case obviously comes within the provisions of section 97."

The Appellate Court on the question as to who were the partners and what were their shares in the assets, agreed generally with the conclusions come to by the Referee in his report, and by FLETCHER J., and held that the three persons subsequently added to the firm were full partners.

On ground (b) the Court of Appeal held that FLETCHER J. had a discretion to allow interest, and that having regard to the conduct of the appellants, and the circumstances under which the liability arose, that discretion ought not to be interfered with.

By reason of an error in one of the items of the account, and of there being two other items which were doubtful, the Appellate Court found that the total sum due by the appellants collectively was (apart from interest) Rs. 7,12,762 odd. Except for this and a slight variations in the order for costs made by FLETCHER J. the findings of the Referee and FLETCHER J. were confirmed.

On this appeal,

Sir R. Finlay, K. C., A. M. Dunne and *B. N. Bose*, for the appellants, contended that the question who were the members of the partnership entitled to share in the assets and goodwill of the firm was one which should properly have been determined by the Court, and was therefore wrongly referred for inquiry to the Assistant Referee by the Trial Judge. The appellants, it was submitted, were not prevented by the fact of their not having appealed from the preliminary decree, from now raising the point whether under section 97

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of the Civil Procedure Code, 1908, that reference was properly made, on appeal from the final decree: and the case of *Khadem Hossain* v. *Emdad Hossain* (1) was referred to. [MR. AMEER ALI. The decision in that case was the cause of an alteration in the Code of 1908]. But the present case was not affected by section 97, being not a case of a decision of the rights of the parties, but a case where the Court had referred a matter to the Referee which he had no jurisdiction to refer, and which ought to have been decided by the Court itself. It was a delegation by the Court of its powers which it could not rightly make. The order of reference was either an order or a decree: and it was contended it was not a decree within the definition of that word in section 2 of the Code, and the appellants were, it was submitted, entitled to raise the question of its correctness. [LORD DUNEDIN. Their Lordships are of opinion that the appellants ought to have appealed from the preliminary decree, and are precluded from appealing now. Reasons for the decision will be given later.]

It was then contended for the appellants that the amount which they had been ordered to pay into Court was excessive, and that interest upon it should not have been decreed. Interest in such a case should not be allowed unless, there was fraud, and of that there was no finding. [SIR JOHN EDGE, as to the conduct of the appellants, referred to a passage in the judgment appealed from where the High Court said: "Though a Receiver was appointed long prior to the preliminary decree, the three appellants did not hand over these assets to him, nor can we find that they even brought them to his notice. On the contrary they have resisted to the utmost all attempts to prove their

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possession of these assets, and persisted in this resistance."] Reference was made to 3 and 4, Will. IV, c. 42, section 28, which was adopted in the Indian Interest Act (XXXII of 1839); Bullen and Leake (2nd Ed.) 51, 52; *London, Chatham and Dover Railway Company* v. *South-Eastern Railway Company* (1), *Johnson* v. *The King* (2) and *Burland* v. *Earle* (3).

Upjohn, K. C., W. H. Cozens-Hardy and *G. R. Lowndes*, for the respondents, contended that no question as to the amount ordered to be paid into Court was raised in the Court below, and therefore it should not be entertained on this appeal. The right of the respondents to interest on the amount depended on the law of the Equity Courts that whereafter a partnership has been dissolved, a partner continuing the business takes assets of the late partnership and trades with them, the other partners have a right to elect whether they will take a share of any profits made, or have interest on the amount taken. Reference was made to Lindley on Partnership, Book IV, Ch. 2, Section 2 (6th Ed.) 592; (7th Ed.) 632; (8th Ed.) 673; *Clements* v. *Hall* (4), *Yates* v. *Finn* (5) and *Burland* v. *Earle* (3). The discretion of the Court is properly exercised if it decrees interest in such a case as this, and both Courts below had agreed in so exercising this discretion.

Sir R. Finlay, K. C., was called on to reply.

The judgment of their Lordships was delivered by

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LORD SUMNER. This was an action to have partnership accounts taken, and for that purpose to have various matters decided by the Court. Three questions

(1) [1893] A. C. 429, 437.
(2) [1904] A. C. 817, 821, 822.
(3) [1905] A. C. 590, 592.
(4) (1858) 2 De Gex. & J. 173, 186.
(5) (1880) L. R. 13 Ch. D. 839, 843, 844.

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only were raised before their Lordships on the present appeal.

The circumstances raising the first question were as follows. The membership of the firm was in dispute. Certain persons were alleged, on one side, to have been partners, and, on the other, to have been only employees remunerated by a share of annual profits. The suit was begun on 30th June 1908, and on 30th August 1909 the Trial Judge, Fletcher J., by his formal adjudication (to use a neutral term) "declared" that the partnership in question was dissolved as from 1st July 1907, and then "ordered and decreed" that—

"It is referred to the Assistant Referee of this Court to take the following account and to make the following enquiries, that is to say :—

"(*i*) To enquire who were the partners who were entitled to share in the assets and goodwill of the said partnership business ;

"(*ii*) To take an account of the dealings of the parties with the assets of the said partnership business ;"

and, further, certain other matters not now material.

This adjudication was immediately appealable but was not appealed. The Assistant Referee duly held the enquiries directed, and all matters were gone into at a great expenditure of time and money. His report on enquiry No. 1 was adverse to the appellants, and being excepted to by them was confirmed by Fletcher, J.

The appellants then, by memorandum of appeal dated 23rd May 1912, raised the question whether enquiry No. 1 was rightly included in the adjudication dated 30th August 1909, or whether it was not one which should have been made by the learned Judge himself. This at once and for the first time raised the question, which is the first and chief issue in the present appeal, whether the above-mentioned determination of Fletcher J. was a "decree" or an "order" within the meaning of those terms in the Civil Procedure Code, Act V of 1908. If it was a decree it was a preliminary decree within section 97, and any appeal

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was incompetent and barred thereby; if it was an order it was appealable still. Their Lordships would unfeignedly deplore a state of procedure which enabled the appellants to take their chance of success before the Assistant Referee at such a cost in time and money and then, after they had lost the day, to contend that the matter never should have gone before him at all; yet it must be so if such be the meaning of the Code.

The High Court, while thinking that the enquiry in dispute should not have been directed, decided at the same time that the adjudication of Fletcher J. which included this direction, was itself a decree and therefore being a preliminary decree could not under section 97 of the Code be questioned on the final appeal. Their Lordships are in accord with the learned Judges of the High Court.

The adjudication itself began by declaring that the partnership was dissolved as from a certain date, and thus *in limine* settled rights between the parties. This declaration was the foundation for all subsequent accounts and proceedings, which were merely incidental thereto and consequential thereon. It matters not whether the instrument of partnership fixed the dissolution at a date which had passed before the suit began, or whether the parties had agreed to a dissolution or agreed in submitting to a dissolution by the Court, or whether the Court decreed a dissolution for cause shown before it after a *litis contestatio.* The declaration when so made was what the Court's adjudication, and indeed the appellants' own case, call it, a decree. The Code makes no provision for something which is neither a decree nor an order, nor for anything which is both, neither does it provide that one adjudication by the Court can be resolved into divers elements, some of which are decrees and some orders.

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This was in substance a decree: it did not cease to be such, because a subordinate part of it, if correctly made, might have been separately as an order. It conclusively determined the rights of the parties in regard to certain, and those essential, matters, involved in the suit, and the expression "Matters in controversy" in section 2 *(2)*, the (definition of "decree") cannot, in their Lordships' opinion, be pressed so as to exclude matters which, though as it happened they were common ground, must have been actually decided, if any question had arisen and were the foundation of the whole determination. The Code, has got rid of such doubts as were debated in *Khadem Hossein* v. *Emdad Hossein* (1). Accordingly section 97 of the Code applies: the appellants took their objection too late and the High Court rightly decided against them.

The residue of the case may be shortly disposed of. The appellants were ordered to bring certain money into Court and to pay interest as from a certain date. The contention on the former point, namely that the amount was excessive, was not raised below at all and but faintly before their Lordships. In any case the amount ordered to be brought into Court was a matter of discretion and that discretion does not appear to have been exercised on any wrong principle. No more need be said as to this. The other point is equally short. It is well settled that in certain cases, when on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he may be ordered to account for these assets with interest thereon, and this apart from fraud or misconduct in the nature of fraud. The report of the Assistant Referee disclosed conduct of this sort on the appellants' part falling within the

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decided cases, even if it did not amount to fraud, as probably the Referee meant to find that it did. Both Courts below adopted this report and therefore there are concurrent findings of fact against the appellants and no question of law is raised at all.

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: *Burton, Yeates & Hart.*
Solicitors for the respondents: *Watkins & Hunter.*

J. V. W.

CIVIL RULE.

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Feb. 2

Before D. Chatterjee and Chapman JJ.

SIVAPRASAD RAM
v.
TRICOMDAS COVERJI BHOJA.*

Jurisdiction—Proceeding under s. 10, Civil Procedure Code—High Court's jurisdiction to interfere with interlocutory orders—Civil Procedure Code (Act V of 1908), s. 10.—Charter Act (24 & 25 Vict. c. 105), s. 15.

The jurisdiction of a Court in a proceeding under s. 10 of the Code of Civil Procedure is limited to stopping a new suit if the circumstances mentioned in that section as conditions precedent to the passing of the order be found by the Court to exist. Courts have no jurisdiction to decide the question of *res judicata* in such a proceeding.

Where a Court has jurisdiction to pass an order, but it has been exercised in violation of the provisions of the law and under a misapprehension

* Civil Rule No. 1302 of 1914, against the order of Beraja Chandra Mitra, Subordinate Judge of Burdwan, dated Dec. 17, 1914.