Further, it is not alleged that the senior *chela*, on whom even according to the defendants' case the succession would devolve in the absence of an appointment, is disqualified by any just cause from holding the office vacated by the old *mahant*. In these circumstances, their Lordships think that the plaintiff is entitled to the declaration made in his favour by the Subordinate Judge.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, the decree of the High Court set aside with costs, and the decree of the Subordinate Judge restored.

The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondents: *Barrow, Rogers & Nevill.*

J. V. W.

APPELLATE CIVIL.

Before Mookerjee and Roe JJ.

RAMNATH GAGOI

v.

PITAMBAR DEB GOSWAMI.*

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Aug. 24.

Partnership—Contract Act (IX of 1872) s. 180—Bailor and Bailee—Either may maintain an action against a wrong-doer—What constitutes partnership—Partner entitled to purchase partnership property—Action for settled account.

A partnership is constituted whenever the parties have agreed to carry on business or to share the profits in some way in common.

Mollwo, March v. *Court of Wards* (1), *Pooley* v. *Driver* (2) referred to.

*Appeal from Original Decree No. 59 of 1912, against the decree of A. Playfair, Subordinate Judge, Sibsagar, dated December 18, 1911.

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A partner is entitled to purchase partnership property provided there is full disclosure and the parties are at arm's length. It is only where the real truth is concealed and the facts are not disclosed that one partner has legitimate grievance against another.

Dunne v. *English* (1), *Imperial Mercantile Credit Association* v. *Coleman* (2) referred to.

An action for the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties.

Rawson v. *Samuel* (3), *Preston* v. *Strutton* (4) referred to.

Section 180 of the Contract Act provides that if a third person deprives the bailee of the use or possession of the goods bailed or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case, if no bailment had been made, and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Giles v. *Grover* (5), *Jefferies* v. *G. W. Railway Company* (6), *Manders* v *Williams* (7) referred to.

APPEAL by Ramnath Gagoi, the plaintiff.

This appeal arose out of a suit brought by the plaintiff for the recovery of seven elephants or their value which he estimates at Rs. 11,955. The plaintiff is one Ramnath Gagoi and the defendant is the Adhikar Gossain of Garamur Satra. For the years 1909-10 and 1910-11 the Garamur Gossain purchased the lease of the Sibsagar district elephant mehals, Nos. 5 and 6. He worked the first himself. It does not, therefore, concern this suit. The second, the Gossain arranged with the plaintiff that he should superintend the working of it and receive half the profits as remuneration. The plaintiff carried on the business during the hunting season 1909-10, and 67 elephants were caught. Some of these were made over to the men who built stockades and brought the wild captured animals out

(1) (1874) L. R. 18 Eq. 524.
(2) (1873) L. R. 6 H. L. 189.
(3) (1839) Cr. & Ph. 161.
(4) (1792) 1 Anst. 50.
(5) (1832) 6 Bligh N. S. 277, 452.
(6) (1856) 5 El. & Bl. 802, 807.
(7) (1849) 4 Exch. 339, 344.

of the enclosures; others were sold and some were given to the Gossain at a valuation for his share of the profits. At the end of the season ten elephants remained in the plaintiff's charge—seven said to have been purchased by him, one left in his care by a man named Purandar Barua, another by Kamal Chandra Barua and yet another belonged to the defendant Gossain. This last was shortly made over to the defendant. Eventually the plaintiff sent his elephants from a camp at Furkating near Golaghat to a place near Sibsagar named Akhoifutia. When he did this the defendant filed a petition in the Court of the Deputy Commissioner accusing the plaintiff of having removed the elephants without authority. Enquiry was made and it was found that the plaintiff's name was not registered as a lessee and, further, as he had not obtained any passes from Government for the removal of the animals, the police were directed to attach the elephants which were subsequently made over to the agents of the Gossain under an order of the Deputy Commissioner, dated 12th May 1910. Attempts at settlement proving fruitless, the plaintiff on the 1st of October 1910 commenced this action for recovery of the elephants taken away from him, or for their value. The defendant resisted the claim mainly on the ground that the plaintiff had no enforceable claim till the partnership accounts were adjusted and that if the accounts were settled, it would be found that a large sum was due from the plaintiff to the defendant. The Subordinate Judge dismissed the suit. Hence this appeal.

Babu Tarakishore Chowdhury, *Babu Braja Lal Chuckerburty*, *Babu Hirendra Nath Ganguli* and *Babu Kshitish Chandra Chackravarti*, for the appellants.

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Babu Biraj Mohan Mozumdar, *Babu N. C. Bardoloi* and *Babu Prabodh Kumar Das*, for the respondents.

Cur. adv. vult.

MOOKERJEE AND ROE JJ. This is an appeal by the plaintiff for recovery of eight elephants, or, in the alternative, of their price. The facts material for the determination of the rights of the parties lie in a narrow compass and may be briefly narrated. The defendant, the Gossain of Garamur Satra, took a lease from Government, of the Dayang Dhantiri Mahal No. 6 in the district of Sibsagar for the purpose of catching elephants during the years 1909-1910 and 1910-11. The license fee was Rs. 2,750 per annum. On the 3rd July 1909, the defendant took the plaintiff as a partner in the venture and the terms settled between them are set out in a letter of that date written by the defendant to the plaintiff. The contract was subsequently embodied in a formal deed of agreement executed on the 24th November 1909. The substance of the arrangement was that the plaintiff became a partner to the extent of a half share, and was authorised to manage the works, such as building stockades, catching elephants, etc. It was further agreed that at the time of the sale of the captured elephants, the plaintiff would give intimation to the defendant, so that the sale might be conducted in the presence of a representative of the latter. The plaintiff was made liable to pay a half share of the license fee in four equal instalments. The elephants were captured in five places during the first three months of 1910, Lengtha, Ringma, Bakajan, Hazak Ali stockade at Dipupani, Itonia stockade at Dipupani. Two methods were adopted for capture of the elephants, viz., Mela sikar or the noosing of wild elephants by

Mahuts mounted on tame elephants, and Kheda sikar, *i.e.*, the driving of wild elephants into a stockade. With regard to Mela sikar, two sets of persons had interest in the elephants captured, viz., the Mahaldars or licensees from Government who had an one-fourth share and the Kunkidars or the owners of the tame elephants who had the remaining three-fourths share. As regards Kheda sikar, three sets of persons had interest in the elephants captured, viz., the Mahaldars who had one-fourth, the Gardars or builders of the stockades, who had a half-share, and the Kunkidars or owners of the tame elephants employed to take the wild elephants out of the stockade, who had the remaining one-fourth share. It is obvious from this preliminary statement that the title to an elephant captured could be transferred only with the assent of all the persons who possessed an interest in the animal. It may also be added that it is customary to allot to the lessee of the Mahal the biggest elephant caught, if the operations are exceptionally successful, and the defendant in this case was particularly anxious to secure an elephant worthy of his position. Animals were captured, as we have said, during the first three months of 1910, and the evidence shows that they were valued and sold, some to strangers, while others were taken by one or other of the parties interested in the capture. On the 28th February 1910, a tusker 6′ 9″ high was captured, was marched down to the Gossain as worthy of his position, and was actually delivered to him in the first week in April; its value Rs. 1,500 was debited in the account against the defendant. About this time, the defendant discovered that another tusker 8′ 3″ high had been captured on the 25th March in the Hazak Ali's stockade and had been marched down to the plaintiff. The defendant resented this, and he appealed to the plaintiff and his brother to let him

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have this elephant for the sake of his dignity. This request passed unheeded, and the plaintiff removed with eight of the newly caught elephants and with others belonging to himself to Akhoy Phutia about 50 miles distant from the depôt at Yamguri, where all the captured elephants were brought. The defendant, thus baffled, sent information to the Police that the plaintiff was absconding with elephants. The result was that the Police intervened and attached the elephants; one was sold while under attachment, and seven others were made over to the agent of the defendant on the 13th May 1910. Attempts at a settlement proved abortive, and on the 1st October 1910 the plaintiff commenced this action for recovery of the elephants taken away from him or for their value. The defendant resisted the claim mainly on the ground that plaintiff had not acquired an absolute and exclusive title to the animals, that he had no enforceable claim till the partnership accounts were adjusted, and that if the accounts were settled, it would be found that a large sum was due from the plaintiff to the defendant. The Subordinate Judge has dismissed the suit. He has held that in the suit as framed, the partnership account could not be adjusted, and that till the accounts between the parties were adjusted, the plaintiff was not entitled to relief.

The plaintiff has appealed to this Court and has contested the grounds for the decision of the Subordinate Judge; he has also suggested that, if necessary, leave should be granted to amend the plaint and to convert the suit into one for partnership accounts, so that the rights and liabilities of the parties might be investigated and determined.

We may state at the outset that there is no room for controversy that the plaintiff and the defendant were partners, for as Sir Montague Smith said in

Mollwo, March v. *Court of Wards* (1), a partnership is constituted whenever the parties have agreed to carry on business or to share the profits in some way in common : *Pooley* v. *Driver* (2). What then was the position of the parties as partners in this ventnre? It is plain from the evidence that the accounts of the captures in the different places were made up separately, *i.e.*, stockade by stockade. Consequently, if it be found that the accounts of one stockade have been finally settled, it cannot be maintained that the rights of the parties in the elephant captured there remained undetermined, because the accounts of some other stockade had not been finally adjusted. Now the eight elephants in dispute, as described in schedule 8 to the plaint, were captured as follows :—Four, Nos. 1, 4, 5 and 8 at Rungma and Bakajan; three, Nos. 2, 6 and 7 in the Itonia stockade; and one, No. 3 at the Hazak Ali's stockade. As regards the Rungma and Bakajan elephants, we may state at once that the accounts were not finally settled. The oral evidence suggests that the agent of the defendant was present, made up an account and signed a book; these are not produced by the plaintiff and Malli Ram, the agent, was, indeed, not even cross-examined with regard to these accounts. There is no trustworthy evidence to show that the prices fixed by the plaintiff for the elephants caught in these stockades were ever submitted to the agent of the defendant for approval. There are, on the other hand, indications in the evidence that the Rungma and Bakajan stockades were worked solely by the plaintiff. It is impossible for us to hold that the plaintiff had acquired sole ownership to the elephants captured at Rungma and Bakajan. This portion of the claim cannot possibly be sustained and we did

(1) (1872) 10 B. L. R. 312. (2) (1876) 5 Ch. D. 458.

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not indeed think it necessary to hear the respondent on this part of the case.

We have next to deal with elephant No. 3 captured in the Hazak Ali's stockade and elephants Nos. 2, 6 and 7 in the Itonia stockade. In each of these cases, the evidence, in our opinion, prove that complete title had vested in the plaintiff. There was a sale in each instance with the concurrence of all the parties interested in the animal, and the price fixed was approved on behalf of the defendant by Gopal Bhuyan and Maliram Khatomia, who were unquestionably the representatives of the Gossain as contemplated by the deed of agreement. The only question is, whether the plaintiff is debarred of his remedy, because there had not been a complete adjustment of accounts. It is plain that a partner is entitled to purchase partnership property, provided there is full disclosure and the parties are at arm's length. It is only where the real truth is concealed and the facts are not disclosed that one partner has a legitimate grievance against the other: *Dunne* v. *English* (1), *Imperial M. C. Credit Association* v. *Coleman* (2). Indeed, if this principle were not adopted, the transaction might not only be fruitless, but end in loss to the parties. Elephants captured cannot be forthwith sold to strangers, and there is no reason why each partner should not be allowed to take some of the animals, if the transaction is perfectly fair, and they are agreed as to the prices. We are of opinion that the title of the plaintiff cannot be assailed merely on the ground that he has purchased partnership properties. He did so with the assent of all the persons interested in the animals, and his purchase was in no sense in contravention of the terms of the deed of agreement. Is there then any reason why the plaintiff should be denied relief, because all the

(1) (1874) L. R. 18 Eq. 524. (2) (1873) L. R. 6 H. L. 189.

accounts had not been adjusted? The acquisition of an absolute title to the four elephants mentioned was not contingent upon the adjustment of all the accounts of the partnership. In this situation, the principle formulated by Lord Cottenham in *Rawson* v. *Samuel* (1) applies, viz., that an action for the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties. In the present case, there are not even cross-demands; the defendant has not chosen to sue the plaintiff for adjustment of the partnership accounts, and he cannot invite the Court to assume that the balance of that account would be found to be in his favour. Reference may be made to the earlier decision in *Preston* v. *Strutton* (2), where the pendency of an unsettled partnership account, upon which the balance was in dispute, was held to be no ground for an injunction to restrain execution upon a judgment which had been obtained upon a note given for a balance upon a former settlement. In the present case, the plaintiff had acquired a complete and indefeasible title to the elephants mentioned; he was in lawful possession of them; he was deprived of that possession, because the defendant set the police authorities in motion on untrue information and thus obtained possession of the animals. We may observe that at least as regards one of the elephants, it was argued that the evidence showed that the plaintiff was not himself the owner, as he had made the purchase for the benefit of another person. The contention in substance is that the suit in respect of such elephant could be maintained only by the person for whose benefit the purchase had been made. There is no foundation for this argument, as section 180 of the Indian Contract Act provides that if a third person

(1) (1839) Cr. & Ph. 161. (2) (1792) 1 Anst. 50.

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deprives the bailee of the use or possession of the goods bailed or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case, if no bailment had been made, and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury. This is good sense and conforms to what is now well-settled law in England: Story on Bailments section 93 F; *Giles* v. *Grover* (1), *Jefferies* v. *G. W. Railway Co.* (2). As was said by Baron Parke in *Manders* v. *Willims* (3), no proposition can be more clear than that either the bailor or bailee of a chattle may maintain an action in respect of it against a wrong-doer, the latter by virtue of his possession, the former by reason of his property. We hold accordingly that the plaintiff is entitled to the value of the four elephants Nos. 2, 3, 6 and 7. But we are not prepared to allow him a decree for the sums claimed as expenditure for tending and training the animals: there is no satisfactory evidence in support of this claim.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge modified. The plaintiff will be awarded a decree for Rs. 4,600; this sum will carry interest at 6 per cent. per annum from the date of the institution of the suit to the date of realisation. We observe that the plaint does not include a claim for interest antecedent to the suit. Each party will receive and pay costs proportionate to his success and defeat in both the Courts.

S. K. B. *Decree modified.*

(1) (1832) 6 Bligh N. S. 277, 452. (2) (1856) 5 El. & Bl. 802.
(3) (1849) 4 Exch. 339, 344.