

## ORIGINAL CIVIL.

Before *Buckland A. C. J.*

LALCHAND AMONMAL

v.

M. C. BOID & Co.\*

1934

May 17.

*Firm—Joint Hindu family business, if a firm—Suit in such firm name, if maintainable—Code of Civil Procedure (Act V of 1908), O. XXX.*

A Hindu undivided family carrying on business is not entitled to file a suit as a firm under the provisions of Order XXX of the Code of Civil Procedure.

## ORIGINAL SUIT.

This suit was instituted under Order XXX of the Code of Civil Procedure in the name of Messrs. Lalchand Amonmal, a firm carrying on business at No. 4, Raja Woodmunt Street, Calcutta, against the defendant firm. The plaintiff firm was a joint Hindu family business. The suit was for recovery of Rs. 8,312-8 for the price of goods sold, or for delivery of two bills of lading (regarding the goods sold) alleged to have been delivered by the plaintiff firm to the defendant firm, and for Rs. 2,000 for compensation for detention of the goods.

*A. K. Roy*, Advocate-General, and *P. N. Sen* for the plaintiffs.

*Page* and *S. Chaudhuri* for the defendants.

BUCKLAND A. C. J. The hearing of this suit began on the 2nd January last, on which day several witnesses were examined on behalf of the plaintiffs. The learned Advocate-General, who appeared on behalf of the plaintiffs, on the 3rd January applied for an adjournment of the hearing in order to make an application to amend the plaint.

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In allowing that application I delivered a short judgment for reasons which I gave. On the 16th January next ensuing an application to amend the plaint was made by the learned Advocate-General, and again I delivered a judgment, to which reference also can be made for information as to the earlier history of the suit. The effect of the amendment has been to change to a considerable extent the nature of the suit, which observation is introductory only.

Among the witnesses called on the 2nd January was one called Bhramarmal, who said he was a partner in the plaintiff firm. No other witness so describing himself was called until to-day, when a young man of the name of Pushraj was put into the witness box. It occurred to me to enquire whether the business carried on by the plaintiffs was a joint family business or whether the business was a contractual partnership. From what Pushraj said it was clear that it was a joint family business. But, he being a youth and probably having less knowledge of the matter than Bhramarmal, a man of more mature years, I directed Bhramarmal to re-enter the witness box and put to him some questions on the point. The learned Advocate-General then questioned him and he was cross-examined by Mr. Page on behalf of the defendants. On the evidence given by these two witnesses I am satisfied and hold that the business carried on by the plaintiffs is a joint family business and not a contractual partnership.

The suit has been brought under Order XXX of the Code of Civil Procedure, in the name of Messrs. Lalchand Amonmal, a firm carrying on business, *etc.*, and the question arises whether that is permissible. The Partnership Act, which came into force on the 1st October, 1932, makes it quite clear that members of a Hindu undivided family, carrying on a family business as such, are not partners. But that Act does not apply to this suit, though I may quote from section 5, which states no new principle when it

enunciates that the relation of partnership arises from contract and not from status.

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I had occasion to consider the point in *Shivaprasad & Sons v. Ormerods (India), Ltd.* (1), when I decided that a Hindu undivided family, carrying on business, was not entitled to sue as a firm under Order XXX of the Code of Civil Procedure. On appeal (Appeal No. 101 of 1927) the judgment dismissing the suit was affirmed, but on the merits, and the learned Judges, therefore, had no occasion to and did not consider this point, which is regrettable, for I have known it arise on several occasions, though, to avoid risk, steps have been taken to cure the defect before the hearing. As my former judgment is not reported and I have nothing further to add to what I stated on that occasion I will reproduce the material portion in full :

A point has been taken on behalf of the defendant company that the suit is not maintainable in the form in which it has been brought. It has been brought by Sivaprasad & Sons as a firm carrying on business in Cawnpore and in Calcutta. That is clearly a suit by a firm instituted under Order XXX of the Civil Procedure Code. In the course of his evidence the plaintiff said that the partners were himself and his sons, the eldest of whom was about 18 years of age and the others were minors. He said that they were partners by virtue of the fact that they were all members of a joint Hindu *Mitákshará* family ; he said there was no agreement between them which would be necessary to make contractual partnership. The objection is that in these circumstances the suit cannot be brought under Order XXX of the Code of Civil Procedure.

This is a question which is not covered by authority so far as experience goes ; it has been touched upon but never decided. Order XXX, as is well known, is taken from the rules of the Supreme Court in England and it is in terms of Order XLVIII A. There can be no question that when Order XLVIII A was introduced into the rules of the Supreme Court in England, it was not in the mind of anybody that it would or could be applied to Hindu joint family business, and I think one may say without the slightest fear of contradiction that the only form of partnership or firm which was present to the minds of those responsible for the rule was a contractual partnership such as is well understood. I have also no doubt that when it was introduced into the Code of Civil Procedure in 1908, it was also in the contemplation of the legislature at that time that it was to such a firm that it would apply. There is nothing in it to suggest that *prima facie* it is applicable or intended to be applicable to any association or persons other than a contractual partnership firm. The words in the heading " Persons carrying on business . . . . . other than their own " only have reference to rule 10 under which a single individual may be sued, though he cannot sue

(1) (1927) O. C. 1207 of 1925, decided on 4th Aug.

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if he carries on business under a name other than his own. The question stated in concrete form is,—Is a *Mitāksharā* joint family carrying on business as such a firm within the meaning of Order XXX ?

A firm may not be an entity known to the law as a company or a statutory corporation is known to the law, but nevertheless the term "firm" has been defined by section 239 of the Indian Contract Act, which by a definition of the word "partnership" makes it clear that agreement is necessary and says: "Persons who have entered into partnership with one another are called collectively a firm." There may be, and no doubt are, certain elements common to a joint family business and to a partnership firm as so defined but there are also very important distinctions. For instance, a joint family business does not involve agreement at its inception, children are born into it; nor is it dissolved by death as is the case with a contractual partnership. Another point to which my attention has been directed is that a *kartā* of a joint family business may sue alone in his own name on behalf of the business which is not permissible in the case of a partnership, for no one partner may sue. Either all may sue in their individual names or they may sue collectively in the name of the firm as prescribed by Order XXX.

The fact that a Hindu joint family business is referred to as a firm and called a partnership does not advance matters, it is merely begging the question and it is no argument to say that for that reason it is within Order XXX.

Reference has been made to the fact that no attempt was made by the defendant company to obtain the names of the "plaintiff firm." That is neither here nor there, for as long as the "plaintiff firm" purported to sue under Order XXX they need only give the names of the father and the sons and this question would not then have arisen. It arose at the time when only it could arise and that was in the course of the cross-examination of the plaintiff when the facts were elicited. It is, therefore, no answer to say the point is not taken in the written statement.

Though not directly in point, I have been referred to *Motilal Jasraj v. Chandmal Hindumal* (1) but this does not decide the question. *Vadilal Lallubhai v. Shah Khushal Dalpatram* (2) to which reference has also been made was decided before the Code of Civil Procedure of 1908; for which reason, though the learned Judge's observations as to the essentials of a partnership are of value, it is not authoritative on this point.

Though, after giving the matter my best consideration, it seems to me that a Hindu joint family cannot be considered a firm nor that the members of it can properly be described as partners within the meaning of Order XXX, my decision on the facts is sufficient to dispose of the suit.

For these reasons, the plaintiffs, in my judgment, were not entitled to institute the suit under Order XXX of the Code of Civil Procedure in the name of their so-called firm and it is bound to be dismissed upon that ground.

Learned counsel for the plaintiffs was disposed, nevertheless, to go on with the case and conclude his evidence. Mr. Page, on behalf of the defendants, applied that unless more evidence was to be called

(1) (1923) 25 Bom. L. R. 1081.

(2) (1902) I. L. R. 27 Bom. 157.

upon this point, which the learned Advocate-General told me that he did not propose to do, the suit should be dismissed forthwith, for, as he rightly observed, it would be sheer waste of time and money to hear the remaining witnesses for the plaintiffs, to allow the defendants' witnesses to be called and to occupy many hours of the time of Court when the suit was bound to fail in the end. I agree that when a fatal point such as this comes to light, the only proper course is to dispose of the suit forthwith upon such basis and it will be dismissed with costs.

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Attorney for plaintiffs: *P. Bose.*

Attorneys for defendant: *Orr, Dignam & Co.*

*Suit dismissed.*

A. K. D.