APPELLATE CIVIL.

Before Mr. Justice Pontifex and Mr. Justice Field.

1881 *May* 30.

RAM CHUNDER SHAHA AND OTHERS (PLAINTIFFS) *v.* MANICK CHUNDER BANIKYA AND ANOTHER (DEFENDANTS).*

Partnership—Accounts—Frame of Suit—Procedure in Partnership Suit—Civil Procedure Code (Act X of 1877), sched. iv, forms 113, 132, 133—Costs.

In a suit for an account of partnership transactions, the Subordinate Judge, in whose Court the suit was instituted, framed certain issues with the object of ascertaining who managed the business; with whom the partnership property was; whether the defendants ought to account; what was the capital, and what the expenditure and profits of the firm; and after taking evidence on these points, dismissed the suit.

Held, that the Subordinate Judge should have followed the course pointed out in forms 132 and 133 of sched. iv of the Civil Procedure Code, and at the first hearing should have determined whether there had been a partnership; what were its conditions; was it dissolved, or ought it to be dissolved; and who were the parties interested, and in what shares; and upon determining these questions, should have directed accounts to be taken; and after the accounts had been taken, should have made a final decree.

Held also, that the suit should not have been instituted in the Court of the Subordinate Judge, and the case was transferred to the Court of the District Judge.

The plaint in a partnership suit ought to be framed on the lines of form 113 in sched. iv of the Code, and the accounts should be taken as prayed in that form.

Under ordinary circumstances, the costs of a partnership suit should be paid out of the assets of the partnership, or, in default of assets, by the partners in proportion to their respective shares, unless any partner denies the fact of a partnership, or opposes obstacles to the taking of the accounts, and so renders a suit necessary, when he is usually made to pay the costs up to the hearing.

THIS was a suit to recover an eight-anna share of the capital money and profits of a partnership business. The plaintiffs alleged that their ancestor, one Sorup Chunder Shaha, and one Ram Kristo Banikya, the father of the defendants,

Appeal from Original Decree, No. 275 of 1879, against the decree of Baboo Gungachurn Sircar, Subordinate Judge of Dacca, dated the 26th June 1879.

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started a joint karbar in 1251 (1844), which was carried on after the death of the original partners by the plaintiffs and defendants until Kartic 1280 (1873), when the partnership was dissolved. Disputes arose between the partners, and the matters in dispute were referred to arbitration; but no award was made. The plaintiffs then instituted a suit in the Court of the Subordinate Judge of Dacca, alleging that large sums were due to them from the defendants, and praying for an account. The defendants, by their written statement, on the other hand, contended, that the plaintiffs were indebted to them. The Subordinate Judge framed the following, among other, issues:

"By whom the principal karbar, &c., the branch karbars in respect of which the plaintiffs sue for a nikas, were managed?

"With whom the money, papers, and stock appertaining thereto were kept, and in whose possession they are now?

"If it be proved that the karbar was managed by the defendants, and that the defendants used to keep the money and papers relating thereto, should they not be bound to render an account to the plaintiffs?

"What sums of money were supplied, and by whom, as capital money and as jogan money; and what was the amount of expenditure, as also the amount of profits down to the date of the dissolution of the partnership business?

"What sum has been appropriated by each of the parties from the fund of the karbar?

"Has there been a loss, and to what amount, and through whose fault?

"Agreeably to the findings on the above issues, which of the parties should be held liable to the other party, and to what amount?"

The Subordinate Judge found that the karbar was managed by both parties, and not by the defendants alone; that the khatas of the karbar were neither kept by the defendants, nor taken possession of by them at the time the partnership business was dissolved, and holding that the plaintiffs could not call upon the defendants to submit a nikas, or to pay them any sum, dismissed the suit.

From this decision the plaintiffs appealed.

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Mr. *Branson*, Baboo *Srinath Doss*, Baboo *Mohiny Mohun Roy*, and Baboo *Lall Mohun Doss* for the appellants.

Baboo *Chunder Madhub Ghose* and Baboo *Srinath Banerjee* for the respondents.

The judgment of the Court (PONTIFEX and FIELD, JJ.) was delivered by

PONTIFEX, J.—In this case the parties, or their respective ancestors, joined together in carrying on a joint karbar, or partnership, which continued for many years down to the year 1280. The plaintiffs, on the 15th September 1876, within three months after the termination of the business, instituted a suit in the Court of the Subordinate Judge of Dacca, whereby they claimed that, on an adjustment of accounts between the parties, they would be entitled to a very considerable sum. The defendants, by their written statement, insisted, on the other hand, that, on an adjustment of accounts, they would be entitled to a still more considerable balance. The parties being thus at issue, the Subordinate Judge, who tried the case, framed seven issues, to be found in his judgment. Now, assuming for a moment that the Subordinate Judge had jurisdiction to try the case, the course which he ought to have pursued is clearly pointed out in Forms Nos. 132 and 133 of sched. iv of the Code of Civil Procedure. At the first hearing of the suit, really what the Court had to determine was, whether there had been a partnership; and what were its conditions; was it dissolved, or ought it to be dissolved; and who were the parties interested in the partnership, and in what shares; and upon determining these questions, it ought, in the first instance, to have directed that accounts should be taken as set forth in Form No. 132, subject, of course, to any such alterations as the nature of the case might require. It is only after taking these accounts and obtaining the report of the officer of the Court, or, if there is no such officer, when the Judge himself has arrived at a decision on the accounts, that a final decree should be made according to Form No. 133 of the 4th schedule of the Code. Instead of following this procedure, the Subordinate Judge has dealt

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with the case as if the whole matter was to be completed at the first hearing; and has, as I have said, raised, at the first hearing, issues which ought more properly to have been raised after the first hearing. He has dealt with the third and fourth issues raised by him. The plaintiffs, who also carried on a separate business, in their plaint tried to make a case that the defendants were in fact the managing partners in this business, to which the suit relates; and that the plaintiffs were only concerned in making advances, for the purposes of the business, whenever they were required. Their case also was, that the defendants were, as compared to them, in a much poorer condition of life, and that they never made advances, or were able to make advances, for the purposes of this business. The Subordinate Judge, therefore, raised the issues for the purpose of ascertaining by whom the business was in fact carried on, and by whom the advances were made; and he seems to have determined, upon the result of his view of the evidence, that the defendants were not alone the managers of the business, and that the plaintiffs were not the persons who alone made the advances. Having arrived at that conclusion, he held that the plaintiffs were not entitled to call upon the defendants to submit a nikas in respect of the business, and dismissed their suit. Now, whether the plaintiffs were right or not in the allegations made in the plaint, and if it were proved that they were joint managers, or even the sole managers, of the business, they were, nevertheless, entitled, after the dissolution of the partnership, to have the accounts taken; and even if upon those accounts it should appear that the plaintiffs were, contrary to these allegations, under liability to the defendants, yet they would be entitled to have a decree of Court determining the amount of their liability and to get the indemnity of the Court from further litigation, or future demands by the defendants in respect of the accounts. We think, therefore, that even if the view of the evidence taken by the Subordinate Judge was a correct view, as to which we express no opinion, he was, notwithstanding, bound to proceed with the accounts in the manner shown in Form No. 132 of the 4th schedule, and to have the matter settled. Now, a considerable part of the evidence

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that was taken before the Subordinate Judge was addressed to the question who occupied the principal guddi, where the business of this partnership was carried on; and the Subordinate Judge seems to have come to the conclusion, that it was the defendants who continuously occupied that guddi, and that they not only joined in the management with the plaintiffs in the partnership business there, but also did their own separate business in that guddi. It also appears that the account books of the joint partnership are no longer forthcoming, or if forthcoming, are in such a condition that it would be difficult or impossible for the Court to utilize them for the purpose of settling an account between the parties. Now, if it were the fact that the defendants were the principal occupants of the guddi, it might be inferred that they would be at least as equally responsible for the books as the plaintiffs. But assuming that the books cannot be obtained or utilized, still an account must be taken of the partnership and of the property if any, still belonging to the partnership, in the best manner the Court can arrive at it. For example, if no books are forthcoming, the Court must call upon each party to furnish a statement of facts in respect of the business and its transactions, and to support such statement by evidence; and upon these statements of facts, as supported or contradicted by the evidence bearing thereupon, the Court must come to a conclusion and shape its decree accordingly. It is of great importance that, in suits for account and administration, the proper procedure should be followed, and it may be useful to refer to the observations of Phear, J., in *Syud Shah Alaiahmad* v. *M. S. Bibee Nusibun* (1), though in that case his observations were addressed to an account to be taken against one accounting party only, whereas in a partnership, all the partners are, of course, accounting parties. The plaint in a partnership suit ought to be framed on the lines of Form 113, sched. iv of the Procedure Code, and the accounts should be taken as prayed in that form. Now, we have considerable doubt whether this partnership suit should have been instituted in the Court of the Subordinate Judge. Under s. 265 of the Contract Act, it is enacted that

(1) 24 W. R., 70.

where parties wish to apply to the Court to wind up the business of a partnership firm, to provide for the payment of its debts, and to distribute the surplus according to the shares of the partners respectively, the Court to which they must apply, is the Court of the District Judge. That appears in the explanation to the section, and there has been a case in this Court, decided by McDonell and Field, JJ., *Prosad Doss Mullick* v. *Russick Lall Mullick* (1), in which they held that such a suit could only be brought in the Court of the District Judge. Under the circumstances in which this case comes before us, we think the proper course will be to direct that the District Judge proceed with the further trial of the case, and we shall now order that an enquiry be made as to the conditions on which the parties carried on the partnership, and as to the shares in which they were respectively interested. That an account be taken first of the credits, property, and effects now belonging to the partnership; and secondly, an account of the debts and liabilities of the partnership; and thirdly, an account of all dealings and transactions between the plaintiffs and the defendants with respect to the partnership. In taking these accounts, the parties will have to show what advances have been made by either of them from time to time, and also what monies have been drawn out by either of them from time to time; and they will have to prove whether any and what interest is payable upon the advances made by them, and the Court will make orders in accordance with the form of the prayer, to Form No. 113 of sched. iv to the Procedure Code. Upon the evidence taken, the Court will frame its decree in accordance with Form No. 133 of the 4th schedule in favour of the plaintiffs or defendants according as it decides on which side the balance is due.

We had some little doubt at first as to how we should deal with the costs of the suit up to this hearing. It is true that the plaint is not very artistically framed, but it is also clear that the defendants, by their written statement, asked that an account should be taken, and claimed that, upon the taking of such account, they would be entitled to a balance; but so far

(1) *Ante*, p. 157.

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as we can see, it appears to us that the defendants have really thrown every obstacle they could in the way of the plaintiffs having this account taken. In the examination of the principal defendant himself, a question in cross-examination was put by the plaintiffs—a very pertinent question as it seems to us—with respect to property alleged to be now belonging to this partnership, *viz.*, "which of the talooks was purchased with joint funds?" That question was objected to by the defendants, and was disallowed. Under ordinary circumstances, the costs of a partnership suit should be paid out of the assets of the partnership, or in default of assets, by the partners in proportion to their respective shares in the partnership business. But when one of the partners either denies the fact of a partnership, or opposes obstacles to the taking of the accounts, and so renders a suit necessary, it is usual to make such partner pay the costs up to the hearing. However, under the circumstances of this case, we think that the costs of the proceedings up to this time must be dealt with as costs are ordinarily dealt with in a partnership suit: accordingly we leave them to be dealt with by the District Judge, and we make no other order concerning costs. In taking the accounts before the District Judge, the parties will be at liberty to use any part of the evidence adduced by them before the Subordinate Judge, and also to adduce further evidence. This course is consented to by the parties before us. Neither party will be bound by the conclusions arrived at by the Subordinate Judge, but the whole case will be open for decision by the District Judge.

Case remanded.

ORIGINAL CIVIL.

Before Mr. Justice Cunningham.

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July 26.

IN THE MATTER OF HOSSEINI BEGUM, AN INFANT, AND IN THE MATTER OF ACT X OF 1875.

Mahomedan Law—Shiah School—Minors—Custody—Mother.

According to the Shiah School of the Mahomedan law, a mother is entitled to the custody of her female children, unless she has been guilty of unchastity.