MILLER AND PINHEY, JJ.

GOVINDASAMY PILLAI v. RAMASAWMY PILLAI.

fraud article 91 of the Limitation Act should not be applied. If the sale is not avoided it stands good and the title passes by it. It is necessary therefore for any one seeking to recover the property on the vendor's title to get the sale avoided before he can recover. Compare *Janki Kunwar* v. *Ajit Singh*(1).

The only case of all those cited for the respondent which supports him seems to be, *Nabab Mir Sayad Alam Khan* v. *Yasin Khan*(2) which followed the case of *Bhagvant Govind* v. *Kandi Valad Mahadu*(3). The latter case was however practically overruled by the Privy Council in *Malkarjun* v. *Narhari*(4), A suit to set aside the sale in the present case is now barred by limitation.

The decree of the Subordinate Judge is reversed and that of the District Munsif restored with costs here and in the lower Appellate Court.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1908 September 14, 18. October 8.

KARRI VENKATA REDDI (PLAINTIFF), APPELLANT,

v.

KOLLU NARASAYYA (DEFENDANT), RESPONDENT.*

Partners—Suit by one partner against another, without asking for general account when maintainable—Suit for specific performance of one term of partnership or for partial account—Waiver of grounds in lower Appellate Court.

Where under the terms of a partnership, terminable at will, between *A* and *B*, *A* is bound to hand over to *B* who furnished all the capital, all moneys or cheques received by him in the course of the partnership business, irrespective of the state of the general accounts and *A* omits to deliver to *B* one of the cheques so received, *B* can maintain a suit against *A* to compel *A* to deliver such cheque or to pay him the amount of such cheque, whether such payment be regarded as a claim for damages or for partial account.

In regard to suits by one partner against another for a partial account, the general rule, as applied in India, is that if the account is sought in

(1) (1883) I.L.R., 15 Calc., 58 at p. 65. (2) (1893) I.L.R., 17 Bom., 755.
(3) (1890) I.L.R., 14 Bom., 279. (4) (1901) I.L.R., 25 Bom., 337.

* Second Appeal No. 1262 of 1905.

respect of a matter, which, though arising out of partnership business, or connected with it does not involve the taking of general accounts, the Court will as a rule give the relief applied for. It will be for the Court to determine under what circumstances it will be equitable to order a partial account, having regard to the rights of the parties under the contract. There is no rule of law now in force that a partial account can be ordered only under exceptional circumstances.

Fairthorne v. *Weston*, (67 Eng. Rep., 432), followed.

Golla Nagabhushanam v. *Kanakala Gangayya*, (1864-5, 2 M.H.C.R. 28), not followed.

Although the Court will not, as a rule, enforce a contract to enter into partnership while it remains executory, it will, when the partnership has been constituted and when the ends of justice require it, enforce by injunction the performance of particular terms, though it may be incompetent to enforce all the terms, and the partnership is terminable at will.

The development of the law in England on the point considered.

Subbarayudu v. *Adinarayudu*, (1895, I.L.R., 18 Mad., 134), referred to.

Durga Prosonno Bose v. *Raghu Nath Dass*, (1899, I.L.R., 26 Calc., 254), referred to.

A party who, in appealing from the decree of the Court of First Instance, confines himself to one only of several grounds on which such Court had decided against him, cannot, in second appeal, be heard on any of the grounds so abandoned.

SECOND APPEAL against the decree of T. Varada Rao, Additional Subordinate Judge of Gódávari at Rajahmundry, in Appeal Suit No. 325 of 1904, presented against the decree of T. A. Narasimha Chariar, District Munsif of Bhimavaram, in Original Suit No. 235 of 1904.

The plaintiff and the defendant entered into a registered agreement of partnership, dated 1st December 1901. Under this agreement, the plaintiff agreed to advance all the necessary money required by the defendant for railway contract work and to recoup himself for such advances, with interest at 1 per cent. per mensen and the defendant agreed to surrender all the cheques, etc., which he received from the Railway Company, to the plaintiff. Plaintiff alleged that the defendant received a cheque for Rs. 936 from the Madras Railway Company on 1st September 1902 and that he failed to deliver the same to the plaintiff although called upon to do so.

The plaintiff brought this suit for the recovery of the cheque or, in the alternative for the recovery of the amount thereof.

The further facts necessary for the report are set out in the judgment.

WHITE, C.J., AND ABDUR RAHIM, J.

KARRI VENKATA REDDI v. KOLLU NARASAYYA.

K. Srinivasa Ayyangar for the Hon. Mr. *V. Krishnaswami Ayyar*, *V. Ramesam*, and *P. Narayanamurthi* for appellant.

T. V. Seshagiri Ayyar for respondent.

JUDGMENT.—The parties to the suit out of which this appeal has arisen carried on business in partnership as contractors for the execution of earthworks and similar works for the Madras Railway Company under a registered deed of partnership, dated the 1st December 1901. Under the partnership articles the plaintiff Karri Venkata Reddi, who is now the appellant, was to supply the funds for carrying out any work that might be undertaken, and it was the duty of the respondent Kollu Narasayya to supervise and manage all such undertakings. The latter as the active partner would, in the first instance, receive all moneys payable to the partnership, and it is provided in paragraph 4 of the deed that whatever cheques and cash were received by him were to be immediately made over to the plaintiff, and, in the case of cheques, after they had been duly endorsed by the defendant to the plaintiff. Under no circumstances were such cheques and sums of money to be withheld from the plaintiff, and the defendant was not to cash any cheque or spend any money so received. The plaintiff instituted the suit to enforce this article in the partnership deed in respect of a cheque for Rs. 936 which the defendant received from the Madras Railway Company on account of certain work done for them by the partnership and which the defendant failed to make over to the plaintiff after making the necessary endorsement. The plaintiff's prayer was that the Court might direct the defendant to endorse the cheque in his favour and to deliver it to him or in the alternative to pay to him the amount of the cheque. One of the defendant's answers to the action was that it could not be maintained because dissolution and general accounts were not sought, and this is the question with which we are now concerned. It was further pleaded as a fact that the plaintiff, after he received the cheque, agreed that its amount should be set off against what was then due to him in respect of his share of the profits of the business, and also that as the plaintiff failed to supply funds for some other partnership undertaking as required by the agreement he was not entitled to the assistance of the Court. The last two pleas have been held to be unfounded by the Court of First Instance upon the evidence taken in the case

and as that Court was of opinion that the action was maintainable it gave a decree to the plaintiff. The defendant thereupon appealed, but in the Appellate Court satisfied himself with questioning the decision of the Munsif only on the last mentioned point and did not object to the Munsif's findings on the other pleas. The Subordinate Judge allowed the defendant's appeal holding that the action was not maintainable and dimissed it.

Mr. K. Srinivasa Ayyangar, who appeared for the plaintiff in the second appeal, has addressed to us an able argument in its support urging that such an action as that of his client was always entertained and that at all events even if there be some doubt as to whether it could be sustained under the old technical rule of English procedure the Courts have in modern times taken a much more reasonable attitude towards all disputes between partners so that the old rule has for some time been absolete. He also contends that there is no reason why the Indian courts which are not hampered by the technicalities of old English procedure should not at the instance of one partner compel the other partner to conform to the partnership articles or relieve the injured partner against a breach of such articles. We may point out here that in this case the primary relief asked for is by way of specific performance, and the alternative relief is practically a claim for damages.

The history of the development of the English law on the point is so fully set forth in Lord Justice Lindley's work on partnership that it would be superfluous to recapitulate it here. The general rules that may be deduced from the authorities as well established may be thus stated :—

In the first place the Court will not enforce the specific performence of an executory contract to carry on business in partnership. If the partnership was meant to be determinable at will a decree to enforce the agreement would obviously be futile and if the partnership was to be for a term of years it would not be for the benefit of persons who cannot agree that they should be compelled to do business together. The second rule is that the Court generally speaking will not undertake to carry on by its own officers a business which the parties to the contract cannot themselves carry on. The reasons for this rule are as apparent as those for the first rule The third general rule is that the Court will not order a partial account to be taken of the partnership business

WHITE, C.J., AND ABDUR RAHIM, J.

KARRI VENKATA REDDI v. KOLLU NARASAYYA.

if the rights of all the partners, cannot properly be adjusted without taking a general account with a view to dissolution. Even to the first and the second rule exceptions have been admitted. For instance an agreement of partnership will be specifically enforced by ordering the execution of certain formal instruments, if otherwise the injured partner would be deprived of his legal rights. So also the Court will appoint a receiver to carry on a partnership business with a view to the winding up of its affairs. The third rule as applied now-a-days leaves it to the Court to determine under what circumstances it would be equitable to order a partial account having regard to the rights of the parties under the contract (see *Jagadisa Aiyar* v. *Kuppusamy*(1), *Subbarayudu* v. *Adinarayudu*(2), *Durga Prosonno Bose* v. *Raghu Nath Dass*(3)). It may be taken generally that if the account sought is in respect of a matter which though arising out of the partnership business or connected with it does not involve the taking of general accounts the Court will as a rule give the relief asked for, and will now-a-days refuse to interfere only in those cases in which a partial account would work injustice to the other partner.

It has never been a hard and fast rule that the Court will not interfere in a dispute between the partners, simply because the dispute relates to a matter connected with the partnership business; and, apart from any technical rules relating to the form of action, the grounds for non-interference would seem to be co-extensive with the inability of the Court to give any effective relief, or the inexpediency of giving the relief sought having regard to the essential characteristics of a contract of partnership and the justice of the case.

As regards the specific relief which the plaintiff seeks in this suit the law on the point is thus laid down in Lord Justice Fry's book on Specific Performance on page 363 of the 4th Edition:—

"The Court will not, generally speaking, enforce a contract to enter into a partnership whilst it remains executory; but nevertheless, when the partnership has been constituted, the Court will by injunction enforce the performance of particular terms, though it may be incompetent to enforce all the terms: *this is the common course of practice in the Court.*" The only objection that can be

(1) (1905) 15 M.L.J., 142. (2) (1895) I.L.R. 18 Mad., 134.
(3) (1899) I.L.R., 26 Calc., 254.

urged to the practice is that it would involve the Court's interference on every occasion when one partner refuses to conform to a partnership article, but the answer to that is best given in the words of Sir John Leach, M.R., in *Richards* v. *Davies*(1), when he was pressed with the same argument on behalf of a partner who refused to render account of a certain partnership transaction, because dissolution was not asked for:—"What right has the defendant to complain of such new bill if he repeats the injustice of withholding what is due to the plaintiff?" It need hardly be pointed out that to enforce a particular term of a partnership or to restrain its breach is not substantially open to the same objections as enforcing the performance of a contract to carry on a partnership business. We were at first inclined to think that there was a serious objection to the enforcement of a particular article in case of a partnership terminable at will as is the case here. But, after consideration, we think the following observations of Lord Justice Lindley are applicable to the present case. He says in his book at page 570:—"Where the partnership is determinable at will, there is, it is said, more difficulty in interfering if a dissolution is not sought; for, supposing the Court to interfere, the defendant may immediately dissolve the partnership. But supposing him to do so, an injunction will not necessarily be futile, inasmuch as so long as it continues in force the defendant is rendered powerless for evil, and a notice by him to dissolve the partnership cannot *per se*, operate as a dissolution of the injunction." In view of what has been said as to the plaintiff's right to specific performance it becomes hardly necessary to say anything about the alternative prayer, because, as appears from the record, the cheque for Rs. 936 has not been cashed by the defendant. But as the question has been exhaustively argued at the bar it seems advisable to deal with it. Whether the alternative remedy be regarded as a claim for damages or for a partial account as contended for by the learned vakil for the respondent, in either view there appears to be no reason why the Court should not grant the relief asked for. Under the partnership deed the defendant was in any event bound to hand over the cheque to the plaintiff without reference to the state of the partnership accounts. The plaintiff supplied all the funds with which the business was carried on and

(1) 39, Eng. Rep., 427 at p. 428.

WHITE, C.J., AND ABDUR RAHIM, J.

KARRI VENKATA REDDI v. KOLLU NARASAYYA.

it is quite reasonable that he should have provided for the safe guarding of his money as he has done in clear and explicit terms. In a case like this if the Court were to refuse to interfere until the partnership was dissolved the plaintiff might be subjected to serious loss, as the effect might be that the plaintiff would remain under an obligation according to the terms of the contract to go on supplying funds in order to complete the works already undertaken, whilst the defendant who did not bring in any capital would be able to appropriate to his own use all the moneys coming in—may be large sums—and it may turn out that he has no means to repay them in case the accounts are found to be against him. It is certainly equitable, perhaps necessary, in this case that the plaintiff should be given the relief he wants, unless there is a rule of law which stands in the way of granting such relief. We have already indicated that there is no such rule of law now in force, and the statement of Wigram, V.C , in *Fairthorne* v. *Weston*(1) leaves no doubt on the point. He says at page 434 that there is no such universal rule of law at the present day, and he adds that it is essential to justice that no such universal rule should be sustained.. The authority of Holloway, J., in *Golla Nagabhushanam* v. *Kanakala Gangayya*(2) has however been relied on to the contrary. No doubt that learned Judge seemed to think that the old rule was still in force and that a partial account could be ordered only in exceptional circumstances. With the greatest respect due to so distinguished a Judge we are inclined to adopt *Wigram, V.C.'s* proposition as more correctly stating the law. If there be no such rule, then Holloway, J.'s *dictum* that the exceptions to the rule should not be extended, has obviously no force. But we fail to see why further exceptions should not be admitted to the rule, supposing one to exist, if the exigencies of a particular case require it. The cases of *Musumat Soonder Bebee* v. *Khilloo Mull* and *another*(3), *Virdachala Nattan* v. *Ramaswami Nayakkan*(4) and *Chunder Sikhur Biswas* v. *Ram Buksh Chetlungee*(5) are all practically open to the same criticism.

We would therefore reverse the judgment of the lower Appellate Court and restore that of the Munsif. It has been

(1) 67 Eng. Rep., 432. (2) (1864-65) 2 M.H.C.R., 287
(3) (1870) 2 N.-W.P.H. Ct. Rep., 90. (4) (1862-63) 1 M.H.C.R., 341.
(5) (1878) 1 C.L.R., 545.

suggested by Mr. Seshagiri Aiyar who appeared for the respondent that in case we should hold that the suit is maintainable we should give him an opportunity of meeting the appellant's case on the other pleas on which the lower Appellate Court has come to no finding. But the findings on these points of the Original Court were not challenged, and the defendant chose to rest his case in appeal on the question of law which was argued before us. We do not think we ought to accede to the respondent's prayer.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

PALANI CHETTY (PLAINTIFF), APPELLANT,

v.

RANGIADOSS NAIDU (DEFENDANT), RESPONDENT.*

1908. September 8, 9, 29.

Civil Procedure Code—Act XIV of 1882, ss. 562, 578—Remand contrary to the provision of s. 562 illegal and not merely irregular—Failure to appeal against an illegal order of remand not a waiver of the illegality.

The Court of First Instance passed a decree in favour of plaintiff on the strength of a plan which was not disputed by the defendant. On appeal, the Appellate Court held that the plan was unsatisfactory and that a proper plan was necessary for a right decision of the suit and remanded the suit for re-trial under section 562 of the Code of Civil Procedure. No appeal was preferred by plaintiff under section 588, Civil Procedure Code, against the order of remand and the lower Court again passed a decree in favour of the plaintiff which was reversed on appeal. Plaintiff preferred a second appeal to the High Court:

Held: (1) That the original order of remand was contrary to the provisions of section 562 of the Code of Civil Procedure, as the Court of First Instance had not decided the suit on a preliminary point within the meaning of the section.

(2) That such order was not merely irregular but illegal, and could not be validated by section 578 of the Code of Civil Procedure.

(3) That even if such illegal order might be validated by consent or waiver, neither the omission of the plaintiff to appeal under section 588 nor his acquiescing in the trial on remand amounted to such consent or waiver.

Subramania Ayyar v. *King-Emperor*, [(1902) I.L.R., 25 Mad., 61] referred to.

Manager of the Court of Wards, Kalahasti Estate v. *Ramasawmi Reddi*, [(1905) I.L.R., 28 Mad., 437], referred to.

* Second Appeal No. 971 of 1905.