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March 22.

CIVIL REVISIONAL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

GOBIND PRASAD (PLAINTIFF) *v.* CHANDAR SEKHAR (DEFENDANT.)*

Joinder of parties—Plaintiffs—Partnership debt—Suit by sole surviving partner—Representatives of deceased partner not joined—Act IX of 1872 *(Contract Act) s.* 45*—Civil Procedure Code, s.* 26*—Plaint not stating debt to be partnership debt or that plaintiff sues as surviving partner—Practice—High Court's powers of revision—Civil Procedure Code, s.* 622.

The rule of English law that, in trading partnerships, although the right of a deceased partner devolves on his representative, the remedy survives to his co-partner, who alone must enforce the right by action, and is liable on recovery to account to the representative for the deceased's share, should be applied in India, in the absence of statutory authority to the contrary.

The effect of s. 45 of the Contract Act (IX of 1872) is to extend the English law applicable to trading partnerships to all cases of partnership. There is nothing either in that section nor in s. 26 of the Civil Procedure Code, read with it, to show that the representatives of a deceased partner must be joined in an action for a partnership debt brought by the surviving partner though it may be that they might be joined in such an action.

A Court of Small Causes, without considering the merits, dismissed a suit brought by a sole surviving partner to recover a partnership debt, on the ground that the plaintiff was not competent to maintain the suit without joining the representatives of the deceased partner as co-plaintiffs.

Held that it was the Judge's duty to hear and determine the suit, which was brought by the person legally entitled to bring it alone in his Court, and in declining to entertain it on the merits, he had failed to exercise his jurisdiction, and had acted with material irregularity, within the meaning of s. 622 of the Civil Procedure Code. *Muhammad Suleman Khan* v. *Fatima* (1) and *Dhan Singh* v. *Basant Singh* (2) referred to.

Held also that in such a suit, the plaint, if properly framed, ought to have alleged that the debt of which recovery was prayed was a partnership debt, that the deceased partner had died before the suit, and that the suit was brought by the plaintiff as surviving partner for his own benefit and that of the estate; but the suit should not be dismissed merely because the plaint did not contain these averments. *Jell* v. *Douglas* (3) referred to.

A suit should not be dismissed on merely technical grounds when the merits are proved, and no injustice by surprise or otherwise will be done.

THIS was an application for revision, under s. 622 of the Civil Procedure Code, of a decree of the Court of Small Causes at Benares. The suit was for the balance of an account stated by the

* Application, No. 23 of 1887, for the revision of an order of Babu Mritonjoy Mukerji, Judge of the Court of Small Causes at Benares, dated the 14th January, 1887.

(1) *Ante*, p. 104. (2) I. L. R., 8 All. 519. (3) 4 B. and Ald. 374.

defendant, who had purchased cloth from a shop in which the plaintiff Gobind Prasad and one Moti Chand, deceased, had been partners. The cloth was purchased by the defendant Chandar Sekhar during the lifetime of Moti Chand. The suit was instituted after Moti Chand's death by Gobind Prasad alone. The plaint contained no reference to the partnership, or to the interest of Moti Chand or his representatives in the debt recovery of which was sought; but claimed the amount in suit as due exclusively to the plaintiff.

The judgment of the Court of Small Causes was as follows :—"The plaintiff and Moti Chand (late) were partners of the shop from which the cloth was purchased. The former alone is not therefore competent to maintain the suit. Suit dismissed. I would allow no costs to the defendant, as he falsely stated that the debt was due to Moti Chand alone. The claim is dismissed without prejudice to the plaintiff's right to bring a proper suit by joining all the necessary parties."

The plaintiff applied for revision of the Small Cause Court's decree on the ground that, as sole surviving partner, he was competent to sue alone for the partnership debt due to himself and Moti Chand, and that in dismissing the suit without trial on the merits, the Court had failed to exercise a jurisdiction vested in it by law.

Munshi *Kashi Prasad*, for the appellant.

Mr. *A. Strachey*, for the respondent.

A preliminary objection was taken on behalf of the respondent that the application was not entertainable under the provisions of s. 622 of the Civil Procedure Code.

[MAHMOOD, J.—The Judge declined to entertain the suit on the merits. If he was wrong, he failed to exercise a jurisdiction vested in him by law. He refused to try the case.]

He did not decline jurisdiction : what he did was to dismiss the suit on the ground of variance between the contract alleged in the plaint, which was a debt due to the plaintiff alone, and that which (if any) had been made, which was a debt due to the plaintiff and Moti Chand's representatives jointly. If he was wrong, he made a mistake in law, but he did not refuse to exercise his jurisdiction. There is no such refusal where a Judge disposes of a suit or other matter brought before him, by a decree or order which may

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be executed; but only where he declines to dispose of it, as in *Badami Kuar* v. *Dinu Rai* (1), or *Huxley* v. *The West London Extension Railway Company* (2). The determination of a case upon a preliminary point, and without considering the merits, is not a refusal to try the case: trial does not necessarily involve consideration of the merits. It has been held that the erroneous dismissal of a suit as barred by limitation and without considering the merits, is not a refusal to exercise jurisdiction, but is merely an error in law. (3) That is precisely analogous to this case. The trial of a suit usually requires an investigation of the merits by hearing evidence on both sides: this is the normal state of things. In other cases the trial requires evidence to be taken on one side only: as where at the close of the plaintiff's case it is held that there is nothing to go to the jury. Again, there are cases in which no evidence at all need be taken, but the suit is tried and decided upon the determination of a preliminary question of law. In each class of cases, error may be made: in the first, the verdict may be against the weight of evidence; in the second, the plaintiff may have raised a presumption in his favour which required rebutting; in the third, the preliminary point of law may have been wrongly decided against the plaintiff, and he should have been allowed to give evidence. But in each case jurisdiction is exercised and not declined, and the suit is tried and decided; and in each case if error is made it is error in fact or law, and not refusal of jurisdiction.

The objection was overruled.

EDGE, C. J.—This is an application to the Court to exercise its powers of revision under s. 622 of the Civil Procedure Code. It appears from the judgment of the Judge of the Small Cause Court of Benares that the plaintiff and one Moti Chand carried on the business of shopkeepers in co-partnership. Before the action Moti Chand died, and the plaintiff, without joining the representatives of Moti Chand, brought this action, in which he alleged that he had kept a shop, and that goods were sold to the defendant, and that the defendant had stated an account. The plaintiff sued for the balance, with interest. The Judge below dismissed the suit on the ground that the plaintiff, suing alone, could not

(1) I. L. R., 8 All. 111.
(2) L. R. 17 Q. B. D. 373; 55 L. J., N. S. 506.
(3) *Ali Mazhar* v. *Sheo Bakhsh* (Weekly Notes, 1885, p. 32), per Oldfield and Mahmood, JJ.

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maintain the action. Mr. *Strachey*, for the defendant, contended that the plaintiff could not maintain this action unless he joined the representatives of Moti Chand as co-plaintiffs, or, in case of their objecting to be co-plaintiffs, then as co-defendants. He contended that where a debt is due to two or more persons jointly, all the persons jointly interested must be made parties to the action, either as plaintiffs or as defendants. In support of that contention he relied on the judgment of Lord Blackburn in *Kendall* v. *Hamilton* (1) and on Dicey *On the parties to an action*, pp. 11, 104, 105, 106, 148-150, 153, 154, 230, 231, 502, 503 and 506, and on the note to p. 227 of Bullen and Leake's *Precedents of Pleadings* (3rd ed.), *Jell* v. *Douglas* (2), Story's *Equity Pleadings*, 8th ed., ss. 159 and 167, Story *On the Law of Contracts*, 5th ed., vol. 1, p. 44, and *Kandhiya Lal* v. *Chandar* (3). Basing his argument on the propositions of law enunciated in those authorities, he contended that under s. 45 of the Indian Contract Act, taken with s. 26 of the Code of Civil Procedure, a sole surviving partner could not sue alone for a debt due to the firm, and the rule of English law by which the right to maintain an action for a trading partnership debt survived to a surviving partner, did not apply. In support of that contention he referred to the following authorities, which I shall now consider. The case of *Kalidas Kevaldas* v. *Nathu Bhagvan* (4). That was a case in which one of three sons sued alone for a debt which had become due to his father, himself, and his two brothers, as members of a joint Hindu family. That case does not, I think, support Mr. *Strachey's* contention. It is only an authority for saying that one of three partners cannot maintain an action for a partnership debt. The case of *Ramsebuk* v. *Ramlall Koondoo* (5) was a case in which one member of a joint Hindu family sued alone for a debt due to the family. The case of *Uma Sundari Dasi* v. *Ramji Haldar* (6), only decided that in that particular case, which was an action for rent, all the co-sharers should join as plaintiffs, or, if they objected, then those objecting to join as plaintiffs should be made defendants. The judgment of Sir Charles Turner, in the case of *Patinharipat Krishnan* v. *Chekur Manakkal* (7), no doubt

(1) L. R., 4 App. Cas. at p. 543.
(2) 4 B. and Ald. 374.
(3) I. L. R. 7 All. at pp. 326 and 327.
(4) I. L. R. 7 Bom. 217.
(5) I. L. R., 6 Calc. 815.
(6) I. L. R., 7 Calc. 242 ; 9 Calc. L. R. 13.
(7) I. L. R., 4 Mad., 141.

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decided that the practice in India was to make those persons defendants who ought to be plaintiffs, but objected to be such. The case of *Gopal Chunder Gooho* v. *Juggodumba Dossia* (1) only decides that one joint landlord cannot sue for rent unless he makes his co-landlord a plaintiff or a defendant. *Mr. Strachey* also relied on Domat's *Civil Law*, Part I, Book III, Title iii, ss. 1 and 2, p. 712, and the note to s. 26 in O'Kinealy's Code of Civil Procedure, 2nd ed., which says that all persons that are interested in the case should be before the Court, either as plaintiffs or defendants. Mr. *Strachey* also contended that the present case was not within s. 622 of the Code of Civil Procedure.

Now, notwithstanding the very careful and able argument which has been addressed to us, I have come to the conclusion that s. 45 of the Contract Act, read with s. 26 of the Code of Civil Procedure, has not the effect which Mr. *Strachey* contends it has. The general rule of English law, which is to be found in Williams *On Executors*, 8th edn., at p. 850, that, in trading partnerships, "although the right of the deceased partner devolves on his executor, it is now fully settled that the remedy survives to his co-partner, who alone must enforce the right by action, and will be liable on recovery to account to the executors or administrators for the share of the deceased," is, I think, based on a principle of sound common sense. This rule of law is referred to by Lord Justice Mellish in *McClean* v. *Kennard* (2). It is obvious to my mind that it would lead in many cases to difficulties and confusion in the getting in of the assets of a firm on the death of a partner, if it were held that a surviving partner could not sue for such assets unless he joined in the action the representatives of the deceased partner. It might be difficult, if not impossible, for the surviving partner to ascertain who was the legal representative of the deceased partner. The period of limitation for the bringing of the action might almost have run, and by the time the surviving partner had ascertained who the representatives were, the action might be barred by limitation. Again, if it were necessary to make the representative a party, the defendant, who might be clearly liable, would be entitled to defend the action, and

(1) 10 W. R. 411. (2) L. R., 9 Ch. App. at pp. 346, 347.

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possibly successfully in that event, on the ground that the person that was added as representative was not the legal representative of the deceased partner. Now, as I have said, the principle of English law is based on common sense, and it is a rule which, in my opinion, we should apply here unless there is statutory provision or authority to prevent us.

What is the effect of s. 45 of the Contract Act? It appears to me that s. 45 extends the English law applicable to trading partnerships to all cases of partnership. There is nothing in s. 45 which says that the representatives of a deceased partner must be joined in an action for a partnership debt. It may be that the legal representatives of a deceased partner might under s. 45 be joined in a suit by the surviving partner for a debt due to the partnership, but I see nothing which prohibits the rule of English law in the case of trading partnerships being applied in India. It may be doubted whether those who framed that section had a case of this kind in view. The legal representative in this case would not be entitled necessarily to a moiety of the amount recovered in the action: his share of the amount recovered would depend on a settlement of accounts on the realization of the partnership assets, and it would, in my judgment, be highly inconvenient and possibly mischievous to allow him to interfere in the realization of the assets unless through the intervention of the Court, by the appointment of a receiver in cases in which such interference by the Court might be necessary.

Now s. 26 of the Code of Civil Procedure enables all persons to be joined as plaintiffs in whom the right to any relief claimed is alleged to exist. That section is similar to the rule to be found in the rules under the Judicature Act in England (1) and no doubt was introduced to prevent a miscarriage of justice from want of parties, and to enable persons who claimed somewhat different reliefs to be joined as plaintiffs in one action. But that section does not say that all persons who may be interested in the result of an action must necessarily be parties, nor does it say that an action by a surviving partner cannot be maintained unless the representatives of the deceased partner are made parties. For these reasons I am of opinion that the representatives of Moti Chand were not neces-

(1) Order XVI, Rule 1.

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sary parties to the action, and that the plaintiff was entitled to require the Court to proceed and try the action on the merits.

In my opinion the Judge of the Small Cause Court failed to exercise his jurisdiction, and probably acted with material irregularity in dismissing this suit on the ground that the representatives of Moti Chand had not been made a party. S. 622 of the Code of Civil Procedure has been considered by a Full Bench of this Court in *Muhammad Suleman Khan* v. *Fatima* (1), and was also fully considered by my brother Mahmood in the case of *Dhan Singh* v. *Basant Singh* (2). I adhere to what I said in the Full Bench case, and approve of what was said by my brother Mahmood. This suit was one within the jurisdiction of the Small Cause Court Judge, and it was his duty to hear and determine the suit, which was brought by the person legally entitled to bring it alone in his Court, and in declining to entertain the suit on the merits he brought the case, in my judgment, within the scope of s. 622 of the Code of Civil Procedure.

There is only one other observation I have to make. If this was a partnership debt, which does not appear to have been proved, though it appears to have been assumed by the Judge, the plaint, if properly framed, ought, I think, to have alleged that fact, and that Moti Chand had died before the action, and that the action was brought by the plaintiff as surviving partner for his own benefit and the benefit of the estate. The case of *Jell* v. *Douglas*, (3) cited by Mr. *Strachey*, shows, I think, that according to English procedure at that date in force, at any rate, the claim should have contained some such averments. Although I say this, I would not dismiss the action merely because the claim did not contain those averments. In this case the plaintiff not only relied on proof of the original liability by showing a sale of the goods to the defendant, but he also relied upon an account stated with the defendant, and on part payment of the amount of the original debt. It may be that the account was stated between the plaintiff and the defendant. In my opinion an action should not be dismissed on merely technical grounds when the merits are proved, and no injustice by surprise or otherwise will be done. In this case I think we ought to exercise the

(1) *Ante*, p. 104.
(2) I. L. R., 8 All., 519.
(3) 4 B. and Ald. 374

power of revision conferred on us by s. 622 of the Code of Civil Procedure, and make an order allowing the application, and directing the Judge to enter the action on his list of pending cases, and dispose of it according to law. Costs to abide the result.

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MAHMOOD, J.—I concur.

Application granted.

APPELLATE CIVIL.

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Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

JAMNA AND OTHERS (PLAINTIFFS) *v.* NAIN SUKH AND OTHERS (DEFENDANTS).*

Hindu Law—Joint Hindu family—Mortgage by father—Suit to enforce the mortgage against sons' shares—Legal necessity—Burden of proof.

As a general rule, a creditor endeavouring to enforce his claim under a hypothecation bond given by a Hindu father against the estate of a joint Hindu family in respect of money lent or advanced to the father having only a limited interest, should, if the question is raised, prove either that the money was obtained by the father for a legal necessity, or that he made such reasonable inquiries as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt, or for the other legal necessities of the family.

There is a distinction between such cases as this and cases in which a decree has been obtained against the father and the property sold, or cases in which the sons come into Court to ask for relief against a sale effected by their father for an antecedent debt. Where a decree was obtained against the father, and a sale effected, the presumption is that the decree was properly made. Where a son comes into Court to ask for relief against a sale effected by his father for an antecedent debt, it is for the son to make out a case for the relief asked for.

In a suit against the members of a joint Hindu family upon a bond given by their father, and in which family property was hypothecated, no evidence was given on either side as to the circumstances in which the bond was given. There was no evidence to show that any inquiry had been made by the plaintiff as to the objects for which the bond was executed by the father.

Held that the burden of proof was upon the plaintiff to show either that the money was obtained for a legal necessity, or that he had made reasonable inquiries and obtained such information as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt or for the other legal necessities of the family; and that, no evidence having been given, the suit must be dismissed.

THE facts of this case are stated in the judgment of Edge, C. J.

* Second Appeal, No. 738 of 1886, from a decree of Maulvi Saiyyid Muhammad, Subordinate Judge of Aligarh, dated the 30th March, 1886, confirming a decree of Babu Ganga Prasad, Munsif of Aligarh, dated the 30th September, 1885.