1886
November 27.

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

KASSA MAL (DEFENDANT) *v.* GOPI (PLAINTIFF).*

Partnership—Partners—Accounting—Suit by partner to recover from co-partner share of losses and advances.

It is only in exceptional cases that a suit can be brought by one partner against another, which involves the taking of partnership accounts prior to dissolution.

A suit was brought by the widow of a partner in an indigo concern against her deceased husband's co-partner in respect of certain alleged losses of the concern, and to recover a moiety of moneys expended by her husband in advances made to indigo cultivators on behalf of the partnership. At the time when the suit was brought, the partnership had not been dissolved.

Held that, the partnership not having been dissolved, the plaintiff was not entitled to an account, and the suit must therefore fail. *Brown* v. *Tapscott* (1) and *Helme* v. *Smith* (2) distinguished.

THE plaintiff in this case was one Musammat Gopi, the widow of one Nanak Chand, who, on the 4th July, 1881, had entered into partnership with one Kassa Mal in respect of an indigo factory. The material portion of the deed of partnership was as follows :—

"The factory business shall be carried on in partnership, and we shall share equally in the profit and loss. As I, Kassa Mal, have no means to expend money on account of my share, I execute this deed of partnership, and agree that Nanak Chand shall in future lay out his money in respect of the factory ; that the indigo cakes shall remain in the possession of Nanak Chand when ready ; that Nanak Chand shall have power to sell the indigo either in this district or in Calcutta, or elsewhere as he pleases ; that he shall have power to deduct the amount spent by him, with interest at 10 annas per cent. per mensem, from the amount of the price of the half share ; that he shall pay the surplus of the profits of my share to me, if there is any surplus, and take the loss to the extent of my share from me ; that he shall manage the factory and employ servants according to his will and choice; that if any shareholder wishes to sell his share, then he shall not sell it to any stranger, if another sharer purchases it for proper price ; that he shall keep accounts of the expenses, the price, and of other expen-

*Second Appeal No. 1923 of 1885, from a decree of C. J. Daniell, Esq., District Judge of Fatehgarh, dated the 17th November, 1885, affirming a decree of Rai Cheda Lal, Subordinate Judge of Farukhabad, dated the 8th June, 1885.

(1) 6 M. and W., 119. (2) 7 Bing., 709.

ses in each year, and the account of loss and profit shall be made according to it; that this deed of partnership shall remain with Nanak Chand; that if there arises ill-feeling on account of partnership between us, and I and the said Lala wish to separate the shares, then the separation will be effected in the month of November, and no separation shall be effected after the month of November."

The present suit was brought by Musammat Gopi in January, 1885, against Kassa Mal for a sum of Rs. 3,900-11-9, which represented one-half of the alleged losses of the partnership concern, and one-half of moneys advanced by Nanak Chand to indigo cultivators on behalf of the partnership.

The Court of first instance (Subordinate Judge of Farukhabad) gave the plaintiff a decree for Rs. 2,808-0-10½, being Rs. 1,738-9-7½ in respect of losses of the partnership concern, and Rs. 1,069-7-3 in respect of advances made by Nanak Chand to cultivators. On appeal by the defendant, the District Judge of Farukhabad affirmed the Subordinate Judge's decree.

The defendant presented a second appeal to the High Court. It was contended on his behalf that the suit as brought would not lie.

Mr. *G. E. A. Ross* and the Hon. Pandit *Ajudhia Nath*, for the appellant.

The Hon. *T. Conlan* and Babu *Jogindro Nath Chaudhri*, for the respondent.

EDGE, C.J.—In this case the plaintiff, who is the widow of one Nanak Chand, sued the defendant in respect of certain alleged losses of a partnership concern, and to recover a moiety of moneys expended in advances made to indigo cultivators by Nanak Chand on behalf of the partnership. Now, it is only under exceptional circumstances that partners can bring such actions against their co-partners, except when the action is for a dissolution of partnership, in which case they may claim an account and payment over of moneys that may be found to be due to them on the account being taken. So far as I am aware, actions between partners, which involve the taking of partnership accounts prior to dissolution, are almost unheard of.

1886

KASSA MAL v. GOPI.

Our attention has been directed by Mr. *Conlan* to two cases, the first of which is *Brown* v. *Tapscott* (1). I have not seen the report of that case, but it is cited in *Lindley on Partnership*, vol. ii., p. 913. In that case "several persons agreed to share the profits arising from running a steamer between London and Ramsgate. One of them was to charter and have the management of the boat, and each agreed to pay £10 per cent. on the amount of his subscription, and such further instalments, in proportion to their respective subscriptions, as might be necessary if the earnings of the boat were not sufficient to defray her expenses, which, in fact, they were not. The partner to whom the management of the boat was entrusted paid all the expenses incurred by running her, and sued one of his co-partners for the share which he ought to have contributed towards paying such expenses. The plaintiff obtained a verdict, and the Court refused to disturb it, although the Court was of opinion that the plaintiff and the defendant were partners: for it considered that an action would clearly lie on the promise by the defendant to contribute to a common fund for defraying the expenses of the boat." In that case there was a specific agreement that if the earnings were not sufficient to cover the expenses, each partner should provide the necessary funds in definite proportionate shares. Also there was appointed as manager a person who sued really for money expended by him as the agent of his co-partners. It was held that an action lay for breach of the promise to provide contributions. With regard to that case, it is not necessary for me to say more than that, in my opinion, the principle of it does not apply to the present case. The suit there was for breach of an undertaking to provide definite funds for the carrying on of the partnership.

The second case referred to by Mr. *Conlan* was *Helme* v. *Smith* (2) where it was held that a part owner and managing owner of a ship, who, as ship's husband, had incurred the expense of the outfit of the ship for several voyages, could maintain an action against his co-owner for a proportionate contribution due to him in respect of the management of the vessel. I do not think that cases relating to the managing owners of a ship have any bearing on the question whether one partner is competent to sue another. The

(1) 6 M. and W., 179. (2) 7 Bing, 709.

part owners of a ship are not, properly speaking, partners at all. They are partners only in the sense that they have certain undivided shares in a specific chattel. It may or may not be that they are partners *quoad* a particular adventure which the ship undertakes upon a particular voyage, and as such liable to the public. This would depend upon the facts in each case; but it has never been suggested, so far as I am aware, that a part owner, who is also the managing owner, could not maintain an action for contribution in respect of the money necessarily expended by him as such managing owner. He is the person appointed by the co-owners to have the management for the benefit of all concerned. Under these circumstances I am of opinion that the cases which I have referred to do not apply.

Mr. *Conlan* has asked us to put upon this contract a construction which, in my opinion, it does not bear. He says that the contract, dated the 4th July, 1881, was one by which, so long as this business continued, there were to be definite partnerships between these persons only for the period ending at each November. In other words, that there was to be a partnership for one year certain—so far I agree with him—and at the end of that year another partnership ending at the next November, and again another ending at the November following. He has asked us to regard this action in this way, so as to avoid the difficulty he would have in contending that his client can bring this action for an account, and recover a share of the losses and expenses without asking for a dissolution, because his contention is that in each year there has been an actual dissolution of partnership. This appears to me to be a most violent construction to put upon the agreement, and one to which the agreement, upon the face of it, is diametrically opposed. It is true that it is provided that there is to be a contract of partnership for a year certain, but the contract was not to be determined at the end of the year unless the partners then wished to separate their shares; so that the partnership was only one which could be determined in any November upon the parties then agreeing to a dissolution. It comes to this, that the parties agree there shall be no dissolution before November year, and if in the future any dissolution is desired, it shall take place only in the November of the year.

1886

KASSA MAL v. GOPI.

I therefore place a different construction upon the contract from that contended for by Mr. *Conlan*. The learned counsel then says, it is peculiar that under this contract his client should have to provide the whole of the working capital. The explanation of this appears to me to be that this property belonged to Kassa Mal, who was owner of the concern, whatever it was worth, and it was agreed that Nanak Chand should become a partner, and be entitled to a moiety of the assets at the time of starting the partnership. Then Mr. *Conlan* says the case is an exceptional one, because Nanak Chand was to have all the indigo and the management of the business. I think that this is not by any means an exceptional state of things, but one to be expected in cases where one partner has no interest except a share in the original plant; and that it is only natural that the man who is to provide the working capital should keep in his own hands the power of making the contracts out of which profit or loss to the concern may arise. This is what it was agreed Nanak Chand might do. Then Mr. *Conlan* argues that the words "and take the loss to the extent of my share from me" amount to a covenant, on behalf of Kassa Mal, to pay at the periodical settlements his amount of the loss. I do not think that the words mean this. In the first place, I do not think that the part of the agreement providing for the taking of the account was intended to be read as providing for the taking of the accounts for the purpose of Kassa Mal paying up any losses which might then be ascertained. The stipulation is of a kind which is usual in partnership contracts, namely, that accounts are to be taken periodically, and that these accounts are to form the basis of the profit and loss account between the partners themselves. That is all that was meant by this provision in the contract before us. Again, Mr. *Conlan* contended that the words "take the loss to the extent of my share from me" mean that Kassa Mal was to pay over in such circumstances that an action might be brought during the pendency of the partnership for any loss. I do not agree with this. I think the words mean this: One man was to provide the capital of the concern. By way of extra precaution he thought it should be made apparent that if the expenses exceeded the profits, he should not bear the whole loss, and when an ultimate settlement was arrived at these expenses should be taken into account. The

1886

KASSA MAL v. GOPI.

provision only expresses what is implied in every partnership agreement, namely, that the partners must contribute to payment of the losses of the concern. I have never heard of an action being held maintainable between partners upon an implied agreement that the partners are to contribute to the losses where dissolution of partnership is not claimed.

Under these circumstances I am of opinion that the plaintiff is not entitled to an account, and therefore that this part of his claim must be dismissed and the appeal allowed.

There is one other observation I have to make regarding the claim as to the outstanding loans to cultivators. It appears to me that upon this point Mr. *Conlan* is in this difficulty. If he argues that these loans should be regarded as capital, then that is what his client agreed to provide, because Kassa Mal had no money with which to furnish capital as appears by the agreement. If he argues that they should be taken into the profit and loss account, it is obvious that there is no November in which there could be taken an account of profit and loss including them.

For these reasons I am of opinion that the action must be dismissed, and this appeal allowed with costs.

BRODHURST, J.—I concur.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

1886
December 4.

MUHAMMAD SAMI-UD-DIN (DEFENDANT) *v.* MAN SINGH (PLAINTIFF).*

Mortgage—First and second mortgages—Second mortgagee not made party to suit by first mortgagee for sale of mortgaged property—Effect of decree—Act IV of 1882 (Transfer of Property Act), s. 85—Notice.

Certain immoveable property was mortgaged in 1865 to *H*, in 1871 to *G*, and in 1873 again to *H*. In 1883 the property was purchased by *M*, the representative of *G*, in execution of a decree obtained in 1877 by *G* in a suit for sale brought by him upon the mortgage of 1871. To this suit and decree the mortgagee under the deeds of 1865 and 1873 was not a party. In 1885 *M* sued the representatives of *H* for redemption of the mortgage of 1865. One of the defendants pleaded that as he was a puisne incumbrancer in the property in suit at the time of the plaintiff's suit against the mortgagors in 1877, he ought to have been made a party to

* First Appeal No. 197 of 1885, from a decree of Maulvi Muhammad Abdul Rasit Khan, Subordinate Judge of Mainpuri, dated the 9th June, 1885.