

order of discharge, but they furnish no grounds for dismissing an insolvency petition and consequently no grounds for annulling an adjudication. The ruling of the Judicial Committee in *Chhatrapat Singh Dugar v. Kharag Singh Lachmiram* (1) may be referred to in support of our view.

We therefore allow the appeal and set aside the order of the court below annulling the adjudication. The District Judge should now proceed to pass orders on the application for discharge. The appellant will get his costs of this appeal.

Before Mr. Justice Banerji and Mr. Justice King.
LACHMI NARAIN (PLAINTIFF) v. BENI RAM
(DEFENDANT)*

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MOHAN LAL
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Partnership—Death of one of two partners—Minor son left as heir—Business continued by surviving partner—Liability to heir of deceased partner for share of profits made—Trusts Act (II of 1882), section 88, illustration (f)—Contract Act (IX of 1872), sections 241, 247.

Upon the death of one of two partners in a business, leaving a minor son as his heir, the business was not wound up but was carried on by the surviving partner, all the assets being retained and employed in the business. *Held*, that in view of the provisions of section 88, illustration (f), of the Trusts Act, the survivor carrying on the business was liable to account to the heir of the deceased partner for his share of the profits made by the survivor.

Section 247 of the Contract Act could not apply to the case, as upon the death of one of two partners, there remained no partnership in existence, to the benefits of which the minor could be deemed to have been admitted.

Section 241 of the Contract Act had no application to the facts of the case, in which the minor had sued for accounts and share of profits.

Messrs. *S. N. Seth* and *Damodar Prasad Saxena*, for the appellant.

Dr. K. N. Katju and Messrs. *U. S. Bajpai*, *M. N. Kaul* and *G. S. Pathak*, for the respondent.

*First Appeal No. 30 of 1929, from a decree of Raja Ram, Subordinate Judge of Cawnpore, dated the 18th of September, 1928.

(1) (1916) I.L.R., 44 Cal., 535.

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BANERJI and KING, JJ.:—This is a plaintiff's appeal in a suit for dissolution of partnership and rendition of accounts.

The plaintiff came into court on the allegation that his father Hoti Lal and the defendant Beni Ram entered into a partnership to carry on a confectionery business in Cawnpore and opened a shop styled Beni Ram Hoti Lal about the year 1900. The defendant, he alleged, was taken by Hoti Lal as a partner in consideration of his services and invested no capital, and that they were partners in equal shares. Hoti Lal died in 1920 but the firm continued to work as before in partnership of the plaintiff and the defendant. The plaintiff, finding that a considerable sum was due to him which the defendant would not pay and the defendant refusing to render accounts, seeks dissolution of partnership and a decree for the sum that may be found due upon accounting.

The defendant in his written statement controverted the facts as to the constitution of the partnership and stated that Hoti Lal invested no funds in it and was given a four anna share which was subsequently increased to a two-fifth share in consideration of his services, that after the death of Hoti Lal in 1920 an account was settled of the partnership, and no partnership was entered into between the plaintiff and the defendant.

Various issues were raised in the court below. The Subordinate Judge passed a decree in favour of the plaintiff, declaring that the partnership between Hoti Lal and the defendant was dissolved on the death of the father of the plaintiff, and that the share of Hoti Lal was one half. He directed accounts to be taken for one year previous to the death of Hoti Lal, and if any money was found due to the plaintiff he was entitled to that amount as if it were a loan, in accor-

dance with section 241 of the Contract Act, with interest at six per cent.

The plaintiff has challenged the findings of the court below and the defendant has filed cross-objections under order XLI, rule 22, against the decree passed by the learned Subordinate Judge in favour of the plaintiff.

It is contended by the learned advocate for the appellant that under the provisions of section 247 of the Indian Contract Act a person could be admitted to the benefits of a partnership and that the plaintiff had been admitted to the benefit of the partnership business known as Beni Ram Hoti Lal, after the death of Hoti Lal, when the partnership was dissolved by the death of Hoti Lal. We are of opinion that the learned Subordinate Judge was right in holding that the plaintiff, who was a minor at the date of the death of his father, was not admitted as a partner, nor could he, under the provisions of section 247, be admitted to the benefit of the partnership as no partnership existed after the death of Hoti Lal. The plaintiff, being a minor, could not enter into a contract with Beni Ram to form a partnership. There being no partnership in existence, the provisions of section 247 of the Indian Contract Act cannot apply to a case like the present.

We have been taken through the whole of the evidence in the case by the learned advocates for the parties. It is unnecessary to discuss that evidence as we have come to the conclusion that the findings arrived at by the learned Subordinate Judge are correct. We hold that the evidence in the case does not prove that there was any complete accounting between the parties to the suit after the death of Hoti Lal, nor was there a fresh agreement between the parties to continue the partnership. We further hold that on the evidence the plaintiff is entitled to call for accounts for the period of one year before his father's death in respect

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of which no proper accounting had been done between the plaintiff's father Hoti Lal and Beni Ram. There only remains the question whether the decree passed by the learned Subordinate Judge directing the accounting for one year only should be affirmed.

The learned advocate for the plaintiff contends that the accounting should not be confined to one year before the death of Hoti Lal but that the plaintiff was entitled to ask the defendant to give him a share in the profits of the business which may have accrued subsequent to the death of Hoti Lal. We may note that the name of the firm continued as Beni Ram Hoti Lal until about two years before suit and that even now there are some plates in the shop of the defendant in which the name of Hoti Lal is engraved. The firm was a firm for the manufacture of confectionery and must have had a reputation to be a successful confectionery shop, if it was successful, and further must have depended upon the personal skill of the person who was conducting the business, namely the defendant, after the death of Hoti Lal.

The contention of the learned advocate for the appellant is that the plaintiff being a minor at the date of the death of his father, and as the defendant instead of winding up the affairs of the partnership retained all the assets in the business, the defendant must account to the plaintiff for the profits arising from Hoti Lal's share of the capital. He has referred to the provisions of section 88 of the Indian Trusts Act (II of 1882) and illustration (f). He has further referred to the case of *Haji Hedayetullah v. Mahomed Kamil* (1), where their Lordships of the Privy Council have accepted the principle contended for by him. The judgment of the Calcutta High Court in the above case is to be found in I. L. R., 48 Cal., 906. MOOKERJEE, J., at page 909 says as follows: "The

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plaintiffs have argued that as the business has been carried on since the death of Fazil, the defendant who has carried on the business is bound to account for the profits made and to share them with the plaintiffs. In support of this position reliance has been placed upon the judgment of the Judicial Committee in *Ahmed Musaji Salehji v. Hashim Ebrahim Saleji* (1). In our opinion the plaintiffs are entitled to share in the profits made out of the business since the death of Fazil. The principle applicable to cases of this character was enunciated by Lord ELDON in *Brown v. D. Tastet* (2). There, on the death of one partner, the surviving partner retained the capital and employed it in the trade. He was ordered to account for the profits derived from it and to make proper allowance for the management of the business. A similar view was adopted by HALL, V. C., in *Yates v. Finn* (3), where he stated the correct principle to be applied (in the absence of special circumstances affecting the rights of the deceased partner on the one hand and the surviving partner on the other) in the following terms: "The representatives of the deceased partner are entitled to say to the surviving partner, 'you have been using our testator's money in trade, and making profits by the use of it, and we are therefore entitled to an account of the profits you have made by continuing that money in the concern and trading with it'. The profits may well be regarded as accretions to the property which has yielded them and ought to belong to the owner of such property, in accordance with the maxim *accessorium secuitur suum principale*, the accessory right follows the principal: see *Crawshay v. Collins* (4) and *Heathcote v. Hulme*" (5). It may be observed that the rule thus laid down has been incorporated in section 42 of the Partnership Act,

(1) (1915) I.L.R., 42 Cal., 914 (925) (2) (1821) Jacob, 284.

(3) (1880) 13 Ch. D., 839.

(4) (1820) 15 Ves., 218.

(5) (1819) 1. Jac. and Wa., 122.

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1890. The provisions of that Act are not applicable in this country; but the rule itself is manifestly consistent with the principles of justice, equity and good conscience”.

We are of opinion that in view of the provisions of the Trusts Act and in view of the ruling of their Lordships in the case of *Haji Hedayetulla v. Mahomed Kamil* (1) the plaintiff is entitled to an account of the profits of the business since the death of Hoti Lal up to the date when the final decree is made. Section 241 of the Indian Contract Act has in our opinion no application to the facts of this case.

We allow the appeal in part and vary the decree of the court below and direct that the commissioner should take accounts as if the partnership had never been dissolved. The plaintiff is entitled to the profits in respect of the share of Hoti Lal, namely, one half, after making fair allowance to the defendant for managing and carrying on the business, due credit being given to the defendant's bringing in any fresh capital. Costs of this appeal and the cross-objection will abide the result.

Before Justice Sir Shah Muhammad Sulaiman and
Mr. Justice Young.

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December,
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MUHAMMAD JALIL KHAN AND OTHERS (DEFENDANTS)
v. RAM NATH KATUA AND OTHERS (PLAINTIFFS)*

Public street—Religious processions with music—Music before mosques—Reservations and restrictions—Public rights—Nuisance—Compromise by leaders how far binding on members of communities—Suit for declaration.

There is a right in every community to take out a religious procession, with its appropriate observances, along a highway. This is an inherent right and does not depend on the proof of any custom or long established practice. An

*First Appeal No. 245 of 1927, from a decree of Krishna Das, Subordinate Judge of Ghazipur, dated the 2nd of April, 1927.

(1) (1923) 22 A.L.J., 382.