

certainly be exercised with due care and strictness, but this in my judgment is a case in which a decree for dissolution of marriage should not be refused upon the ground of the petitioner's misconduct. There is nothing to suggest that the petitioner is a man of loose and profligate character. He met Mrs. Nugent after she had left her husband and at a later time she lived with him in Lucknow as his wife.

This is a case not dissimilar from that of *Wilson v. Wilson* (1) in which the English Courts exercised discretion in favour of the husband. In view of the fact that the parties were living apart and that the respondent gave birth to an illegitimate child I have no doubt that there has been no collusion or connivance between them. I therefore pass a decree *nisi* in favour of the petitioner for the dissolution of his marriage with the respondent.

APPELLATE CIVIL

Before Mr. Justice Sir Edward Bennet and Mr. Justice Verma

SRIMATI DROPADI (PLAINTIFF) *v.* BANKEY LAL AND
OTHERS (DEFENDANTS)*

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Partnership Act (IX of 1932), sections 11, 44—Right to sue for dissolution of partnership—Controlled by terms of agreement between the partners—"Subject to the provisions of the Act"—Section 44(c) and (d) are subject to the terms of agreement—"Protection of court"—Other relief, e.g. retirement, available—Discretion of court to refuse dissolution.

A partner's right to sue for dissolution of partnership may be controlled or negatived by the terms of the agreement among the partners; and the court may, in view of the terms of agreement and of other remedies provided therein like retirement or sale of his share or settlement of disputes by arbitration, refuse to entertain a partner's suit for dissolution, although the grounds alleged may come within section 44 of the Partnership Act.

*First Appeal No. 257 of 1937, from a decree of S. Nasir-ud-din Alvi, Civil Judge of Aligarh, dated the 10th of February, 1937.

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The opening words of section 11 of the Act, "Subject to the provisions of this Act", mean that the relations of partners shall be governed by contract unless the contract that they enter into is one which is prohibited by any provision of the Act; they cannot be interpreted to mean "subject to section 44 of this Act" in the sense that section 44 must in all cases override all contracts between the partners.

A deed of partnership contained the following agreements, among others: (1) that when a partner desired to sell his share he must notify the firm, which would either itself purchase the share or allow any other partner to do so or get it sold in any other way, the price being determined according to certain rules; (2) that when a partner desired to withdraw from the firm he must sell his share in the manner aforesaid, and if the firm failed to purchase the share or to get it sold he would have power to have the partnership dissolved and thus withdraw himself from the partnership; (3) that no partner should have power to sell his share or to withdraw from the partnership except as mentioned above; (4) that the partnership should not be dissolved on account of the death of any partner and that no partner had power to have the partnership dissolved through the court on the ground of insolvency, insanity, etc. of any partner; (5) that if any dispute arose it should be settled by arbitration by certain named arbitrators, and a suit, if filed, should be dismissed. Some years later, one of the partners filed a suit for dissolution of partnership, alleging the existence of grounds falling under clauses (c) and (d) of section 44 of the Partnership Act. The court, without entering into the merits of the plaintiff's allegations, dismissed the suit on the ground that the plaintiff had not a right to sue for dissolution: *Held*, that under the agreement of partnership the plaintiff had no right to bring a suit for dissolution; that this was not a case in which the protection of the court was necessary to be given on equitable grounds to the plaintiff by ordering dissolution inasmuch as adequate relief was available under the deed of partnership by way of withdrawal or sale of his share; that the matters alleged by the plaintiff were such as were agreed upon in the deed to be decided by reference to arbitration and so the suit did not lie; and that in the circumstances of the case the trial court had exercised a sound discretion in dismissing the plaintiff's suit.

Sir *Tej Bahadur Sapru*, Dr. *S. N. Sen*, Messrs. *Panna Lal* and *Jawahir Lal*, for the appellant.

Sir Wazir Hasan, Messrs. P. L. Banerji, S. K. Dar, Haribans Sahai, M. A. Aziz, S. B. L. Gaur, Bankey Lal, Shiva Charan Lal, Mansur Alam and Miss S. K. Nehru, for the respondents.

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BENNET and VERMA, JJ.:—This is a plaintiff's appeal. The suit as originally framed asked for the following relief:

“(a) The partnership of the firm known as Lallu Mal Hardeo Das Cotton Spinning Mills, Hathras, may be dissolved and the accounts may be taken from the defendants manager from the beginning of the partnership and whatever amount may be found due to the plaintiff the same may be awarded to her . . .”

At a subsequent stage, the plaintiff applied for the amendment of the plaint by the addition of what now appears as relief (b), which is as follows:

“(b) If the court holds the partnership between the parties to have been dissolved, defendant No. 1 be ordered to render the accounts of the partnership from 1921 up to this day to the plaintiff and a decree for the amount and property which may be found as belonging to the plaintiff on account of her share may be passed in her favour.”

Her application was granted and that relief was added. The court below has dismissed the suit.

The suit relates to a firm styled Lalla Mal Hardeo Das Cotton Spinning Mills Company, Hathras. It appears that a partnership was entered into some time in the year 1920 and business was started. Subsequently it was considered desirable to reduce the terms of the contract of partnership to writing and a deed was executed on the 4th of April, 1923. We shall presently have occasion to refer to some of the relevant provisions of this deed. The reasons for seeking the dissolution of this firm are given by the plaintiff in paragraphs 10 and 11 of the plaint, the main plea being that the

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defendant No. 1, Bankey Lal, who is the manager of the firm, does not manage the business in a manner which may be profitable to the partners and does not maintain proper accounts. The plaintiff impleaded 24 persons as defendants to the suit. Of these 24 defendants, seven filed written statements contesting the suit, while five filed written statements in effect supporting the plaintiff. Various pleas were taken in defence by the defendants who opposed the plaintiff's claim and a number of issues were framed. The main ground on which the court below has dismissed the suit is that the plaintiff has not got a right to sue for dissolution, which is the only ground with which we are concerned in this appeal.

The deed, after reciting the history of the business, lays down a number of terms by which the executants agreed to be bound. The following paragraphs are important and we consider it necessary to quote them *in extenso*.

"16. No partner or his heir or representative shall have power to sell his share or to withdraw from the partnership in any way other than that mentioned below.

"17. It shall be the duty of the partner desiring to withdraw himself from the partnership of the factory, to sell his share in the manner given below. In case the company is not in a position to purchase the said share or to have it sold in any way, the partner desiring separation shall have power to have the partnership dissolved and thus withdraw himself from the partnership.

"18. The partner desiring to transfer his share shall have to give a registered notice to the company allowing three months' time, so that it may either purchase his share itself at the price fixed by it according to paragraph No. 28 or may get the same sold in any other way. On receipt of the notice an emergent meeting of the company will be held within thirty days in which it will be decided whether the company is ready to purchase the share or not. If it is decided by opinion of the majority that the company should purchase the share, it shall purchase it itself, otherwise it shall allow those partners to purchase it who might be willing to do so, at the price mentioned above. If no partner is ready to

purchase the said share, the company shall get it sold in any way it thinks proper. If the company fails to have it sold within three months, the partner seeking separation or the partner making the sale shall have power to transfer his share to any one.

"19. If any partner, contrary to the conditions of this agreement, shall transfer his share to any person who is a partner or a stranger, the company and its partners shall have the right of pre-emption and the price fixed according to paragraph No. 28 of this agreement shall be paid.

"21. The partnership shall not be dissolved on account of the death of any person. On the ground of insolvency, insanity, etc., of any person, no partner shall have power to have the partnership dissolved through court.

"22. The partners shall not be authorised to remove any one from partnership, but if the partnership of any partner is found prejudicial to the company's rights or if there is loss or apprehension of any loss to the company by his remaining a partner, the partners shall be authorised to remove him from partnership by holding an ordinary or emergent meeting, but the defaulting partner shall be given full opportunity to set up a defence in the meeting. In case of separation of his share, his money, according to the rate fixed in paragraph No. 28, shall be paid to him, after which he shall cease to have any right."

Paragraph 34 provides that Lala Bankey Lal shall be the manager and Lala Ganpat Lal the assistant manager. It lays down further provisions as to the appointment of a manager in the future. Paragraph 35 provides for the remuneration of the managers and paragraph 38 deals with their powers. Then we have paragraph 49 which also may be quoted *in extenso*.

"49. All the partners shall work amicably and with co-operation. If, God forbid, any dispute arises, it shall be settled by a panchayat out of court and Lala Lallu Mal, Lala Ram Dayal and Lala Ganpat Lal shall be appointed as arbitrators and no suit shall be filed. In case any suit is filed, it shall be fit to be dismissed. If any of the said arbitrators is not able to act as an arbitrator in respect of anything on account of some proper reason, some other proper arbitrator shall be appointed in his place."

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It seems to us that it is not necessary to consider all the grounds which the court below has taken against the plaintiff and that this appeal can be disposed of on the short ground that under the contract entered into by the plaintiff with the other partners she has no right to bring a suit for dissolution of the partnership. It seems to us that on a true interpretation of this document there can be no doubt that the predominant intention of the executants of the deed was that this firm shall continue to carry on business without running the risk of being brought to an end at the instance of one of the partners who did not agree with the rest. It may also be mentioned here that there are provisions in this deed for business being conducted according to the advice of the majority of the partners, e.g., paragraphs 12 and 14. It is further clear that this is not a case in which a partner who is dissatisfied with the conduct of the business or apprehends loss has no other remedy than dissolution. The paragraphs which we have quoted above, namely 16 to 20, provide for a machinery by which such a partner can obtain adequate relief. It is common ground that the plaintiff never expressed any desire to withdraw from the partnership and never gave any notice as provided in paragraph 18. It seems to us clear that it was the intention of the executants of this document that the partnership shall not be dissolved on the happening of the contingencies mentioned in the Indian Partnership Act. It is further important to note that paragraph 49 quoted above makes a clear provision for the settlement of any disputes that may arise by arbitration. That such a contract is not against law is made clear by the first exception to section 28 of the Indian Contract Act.

Learned counsel for the plaintiff appellant has relied on section 44 of the Indian Partnership Act (IX of 1932) and has argued that whenever any of the circumstances mentioned in the section exists a partner is entitled to

bring a suit for dissolution. His contention is that according to the allegations in the plaint the circumstances specified in clauses (c) and (d) of the section exist in this case, and he complains that the court below was not justified in dismissing the suit on the preliminary ground that the plaintiff had not the right to claim dissolution for the enforcement of which she could bring the suit, and urges that the court below should have taken evidence and should have recorded findings as to the truth or otherwise of the allegations of fact made by the plaintiff in paragraph 10 of the plaint and should have passed a decree for dissolution of the partnership if those allegations were found to be true. He further contends that the opening words of section 11 of the Act, "Subject to the provisions of this Act", should be interpreted to mean "subject to section 44 of this Act". It seems to us however, that those words mean that the relations of partners shall be governed by contract unless the contract that they enter into is one which is prohibited by any provision in the Act. Learned counsel has further relied on the case of *Rehmatunnissa Begum v. Price* (1). The defendants in that case, a firm of contractors, had undertaken the construction of the New Alexandra Dock in the island of Bombay and they entered into an agreement of partnership with Nawab Kamal Khan. The partnership was for the purpose of quarrying and supplying the requisite granite and other stone. Clause (4) of the deed of partnership provided that "the working of the quarries and the partnership should continue until the supply of granite or other stone for the construction of the dock was completed and that the partnership should then terminate and be wound up." It was common ground that the business resulted in a considerable loss from the very start. It was in these circumstances that the Nawab filed the suit giving rise to the appeal for a dissolution of the partnership and for accounts, alleging that he was entitled to sue for the reliefs claimed in accordance with

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the provisions of section 254(6) of the Indian Contract Act (IX of 1872), which provided that at the suit of a partner the court may dissolve the partnership when the business of the partnership can only be carried on at a loss. The defendants pleaded that in view of the terms embodied in clause (4) of the deed of partnership the suit was premature and that the partnership could not be dissolved until the supply of granite and other stone for the construction of the dock was completed, and section 252 of the Indian Contract Act was relied upon. As already stated, it was a matter of admission that the business had resulted in a loss from the very beginning and that on the 30th of June, 1910, the loss amounted to upwards of Rs.3 lakhs. The court of first instance decided in the Nawab's favour and decreed the suit for dissolution and for an account to be taken from 11th March, 1908, to 14th October, 1910. On appeal, the Appellate Bench of the High Court of Bombay differed from the trial Judge as to the effect of clause (4) of the deed of partnership and held that the suit when instituted was premature and that the plaintiff was not entitled to have the partnership dissolved when the suit was brought, as the work had not been completed at that time. Finding, however, that the work had been completed since, it held that no useful purpose would be served by dismissing the suit on that ground. In the result, it varied the decree of the trial court by directing that the account should be taken from the 11th March, 1908, down to the date when the work was completed. Their Lordships of the Judicial Committee held that the Appellate Bench was not right in the view that it had taken of the effect of clause (4) and of section 252 of the Contract Act. It was observed: "Their Lordships are unable to agree with the High Court's view that there is anything in section 252 that constitutes a bar; it appears to them to be directed to something wholly different." Their Lordships then observed that a partner's claim to a decree for dissolution rests,

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in its origin, not on contract, but on his inherent right to invoke the court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract, and that no man can exclude himself from the protection of the courts. It was further held by their Lordships that in all the circumstances of that case, which were considered in detail by their Lordships, the trial Judge had exercised a sound discretion and that the appellate court had no sufficient grounds for interfering with the discretion of the trial Judge. It seems to us that that is a wholly different case. The essential feature of the case was that the undertaking had been carried on with the one and unvarying result of annual loss from the very commencement. It may also be pointed out that the provisions contained in section 252 of the Indian Contract Act were different from those contained in section 11 of the Indian Partnership Act of 1932. Section 252 of the Contract Act lays down: "Where partners have by contract regulated and defined, as between themselves, their rights and obligations, such contract can be annulled or altered only by consent of all of them, which consent must either be expressed, or be implied from a uniform course of dealing." Whereas section 11 of the Partnership Act provides: "Subject to the provisions of this Act, the mutual rights and duties of the partners of a firm may be determined by contract between the partners, and such contract may be express or may be implied by a course of dealing." It seems to us that it was in view of the language of section 252 of the Contract Act that their Lordships observed that it appeared to be directed to something wholly different. In our opinion, section 11 of the Partnership Act has deliberately been so worded by the legislature as to make it clear that the relationship of the partners shall be determined by the contract between them, subject of course to the provisions of the Act. As to the meaning of these words in

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section 11, we have already expressed our view above. It seems to us that the case before us is governed by the decision of their Lordships of the Privy Council in *Cowasjee Nanabhoy v. Lallbhoy Vullubhoy* (1), where their Lordships have laid down that it is open to partners to enter into an agreement by which they renounce their right of dissolution. We may also point out that in their judgment in *Rehmatunnissa Begum's case* (2) their Lordships observed that in the circumstances of that case a decree for dissolution was the appropriate protection which could be given by the court to the plaintiff. That is not the case before us. As we have pointed out above, the deed of agreement enables the plaintiff to withdraw from the partnership if she feels that it is no longer profitable for her to continue to be a partner. It may also be pointed out that it has not been alleged in the plaint that the business of the partnership has ever resulted in loss so far. On the contrary, there are the reports of the Commissioner appointed by the court below which show that the concern was working at considerable profit. The Commissioner gives the result of his examination of the books of the partnership and finds that the profits for the three years, 1933 to 1935, amounted to Rs.1,92,209-11-2. He has worked out the shares of the partners in these profits and according to his calculations the amount to which the plaintiff, Mst. Dropadi, was entitled came to Rs.2,283-6-2. This represents a return of about 24 per cent. per annum on the capital invested by the plaintiff. All that the plaintiff complains of is what she describes as certain irregularities and certain acts of the manager of which she does not approve, and an apprehension is expressed in the plaint that loss is likely to result in the future. Furthermore, it may be pointed out that the deed of partnership in the case before us by paragraph 49 provides for arbitration. No argument has been addressed to us to show that this term of the agreement is in any

(1) (1876) L.R. 3 I.A. 200.

(2) (1917) I.L.R. 42 Bom. 330.

way illegal or invalid. We have already expressed our view that it is legal. That being so it seems to us that the plaintiff was not entitled to bring a suit for dissolution. If there were any disputes that she desired to be settled, she ought to have resorted to arbitration as laid down in the deed of agreement. This is clearly not a case in which the plaintiff needed any protection of the court; and further it is not a case in which the appropriate protection was a decree for dissolution. In view of the circumstances of this case we have come to the conclusion that the plaintiff's suit is not a *bona fide* one. In our opinion the court below exercised a sound discretion in dismissing the plaintiff's suit and there are no grounds whatsoever which can justify an interference with that discretion.

For the reasons given above we dismiss this appeal with costs.

REVISIONAL CIVIL

Before Mr. Justice Mulla

CHHITTAR (APPLICANT) *v.* JAI SINGH AND OTHERS (OPPOSITE PARTIES)*

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March, 9

U. P. Encumbered Estates Act (Local Act XXV of 1934), section 9—Notice to creditors upon landlord's application under the Act—Minor creditor—Duty of court to appoint guardian—Civil Procedure Code, section 141; order XXXII, rule 3—U. P. Encumbered Estates Act, rule 6—Guardian not appointed by court—Proceedings void as against minor—Extension of time to the minor to file statement of claim.

A proceeding under the U. P. Encumbered Estates Act is a proceeding in the nature of a suit, to which the provisions of order XXXII, rule 3 of the Civil Procedure Code are applicable by virtue of rule 6 of the Rules framed under that Act and of section 141 of the Civil Procedure Code. The failure to follow the mandatory provisions of order XXXII, rule 3 necessarily vitiates the whole proceeding so far as the minor is concerned and such proceeding cannot affect the minor's rights in any way.

The presumption, that when a thing is published in the Government Gazette every one concerned in the matter has