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THE COLLECTOR OF SHAHJAHANPUR v. SURJAN SINGH.

plain terms of s. 231 of the Civil Procedure Code and cl. (4), art. 179, sch. ii of the Limitation Act of 1877, leave us no alternative but to uphold his judgment. Neither the application of the Collector of the 27th April, 1880, nor that of Bhajan of the 30th of the same month, was an application made in accordance with law; because the decree which they sought to execute, having been passed jointly in favour of more persons than one, could only be executed by one or more of such persons as a whole for the benefit of all, and not partially to the extent of the interest of each individual decree-holder. These proceedings, therefore, in their inception being wholly irregular and ineffectual, could not be cured by any subsequent amendment such as that applied for to the Subordinate Judge on the 30th July. We may add that the view expressed by the Judge, of which we approve, is recognised and acted upon in the case of *Ram Autar* v. *Ajudhia Singh* (1) The appeal must accordingly be dismissed with costs.

Appeal dismissed.

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July 14,

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

BHAGGU LAL (PLAINTIFF) *v.* DEGRUYTHER (DEFENDANT).*

Partnership—Loan of money—Act IX. of 1872 (*Contract Act*), *ss.* 239, 240.

Held, on the construction of the agreement in this case, that such agreement did not create a "partnership" between the parties thereto, as defined in s. 239 of Act IX. of 1872, but was an agreement of the kind mentioned in s. 240 of that Act.

THE plaintiff in this suit stated that it had been agreed by and between him and the defendant, that he should advance to the defendant the money required by him to carry out a contract entered into by him with Government for the supply of metal for certain portions of the 5th and 6th miles of a road called the Chilla road; that he (plaintiff) should receive one half of the profits made by the defendant on such contract; that he should advance the money required by the defendant to carry out any other contracts into which he might enter, and should receive one half of the profits

* Second Appeal, No. 1288 of 1880, from a decree of G. E. Knox, Esq., Judge of Bánda, dated the 23rd September, 1880, modifying a decree of Kazi Wajeh-ul-lah Khan, Subordinate Judge of Bánda, dated the 3rd July, 1880.

made by the defendant on such contracts; that the defendant had promised to pay him interest on sums so advanced at the rate of one per cent. per mensem; that the defendant had entered into other contracts with Government, *viz.*, for the supply of metal for the 8th mile of the Chilla road, for the 42nd and 43rd miles of a road called the Manikpur road, for the 57th mile of the said Manikpur road, and for the construction of a bridge called the Kahli bridge, and into a contract with the Municipality of Bánda for the construction of a latrine; that the money required by the defendant to carry out such contracts had been advanced to him by the plaintiff; and that the defendant had made profits on all such contracts. The plaintiff accordingly claimed to recover the money he had advanced to the defendant with interest at one per cent. per mensem, and a moiety of the profits made by the defendant on such contracts. He also claimed to recover money which he had advanced to the defendant on his private account. He based the suit upon an instrument executed by the parties, bearing date the 10th February, 1879, the terms of which were as follows:—

"I Mr. DeGruyther, contractor between miles 5 and 6 on the Chilla road, pargana Sillahbi, son of William DeGruyther, an Englishman, resident of Bánda: whereas I have taken a contract from the Engineer of the Chilla Road for the collection and supply of stone ballast as following, *viz.*, 7920 feet at the 5th mile-stone and 15,840 feet at the 6th mile-stone on the Chilla road leading to Fatehpur, aggregating a total quantity of 23,760 feet to be supplied at both mile-stones by the 26th March, 1879, this is to witness that of my own free will and accord I take as a partner to the extent of one half share Bhaggu Lal, son of Lallu, caste Unar Bania, resident of Bánda, on the following conditions:—(i) That whatever monies may be needed to start the business shall be provided by Bhaggu Lal: (ii) that whatever orders for *bajri* (gravel) I may get from the Engineer I shall make Bhaggu Lal a partner also in the said business, he supplying the capital necessary for the collection and delivery of the said *bajri*; (iii) that whenever I get payment for supplies of material from the Engineer by cheque, I shall after getting the same signed by him hand the said cheque to Bhaggu Lal for realization from the Treasury; (iv) that whenever the whole work shall have

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been finished it shall be competent to Bhaggu Lal to deduct Re. 1 per cent. interest on all the money he may have laid out and all necessary expenses for carrying on the work, and out of the net profits remaining I shall be entitled to share in the same to the extent of one moiety and Bhaggu Lal to the extent of the other: (v) that a *gomashta* on Rs. 10 a month and a *mistri* on Rs. 10 a month shall be employed in the business of the partnership, and their wages shall be charged to the partnership account: (vi) that the said *gomashta* and *mistri* shall on the evening or morning of each day render an account of monies expended in the said business, and whatever monies may be spent shall be expended through Bhaggu Lal, and whatever sums seem requisite to carry on the business shall be laid out in consultation between the two partners, and neither shall be at liberty to incur such outlay without the consent of the other: (vii) that when the whole of the work shall have been completed and the Engineer shall have passed the same, should I make default in payment of the interest stipulated to be paid to Bhaggu Lal, or in case I fail to pay the half share of profits agreed on, then in such case it shall be competent to Bhaggu Lal to realize the said interest and profits of his half share; (viii) that this condition hath also been agreed upon between the aforesaid parties that any work which may hereafter be obtained by either of us, commencing from the 1st April, 1879, both I and Bhaggu Lal bind ourselves to let the other share therein to the extent of one-half, and neither I nor my heirs shall object to any of the above conditions. In witness whereof we have this day signed the aforesaid partnership agreement. *N.B.* Supplementary clause.—Should Bhaggu Lal not spend the monies as stipulated herein, it will be open to me to sue him for damages arising from breach of this agreement". The plaintiff claimed altogether Rs. 2,682-5-0 according to accounts produced by him. The defendant set up as a defence to the suit which raised the issues, amongst others, as to the amount actually due to the plaintiff for money advanced and for a moiety of the profits made on his contracts by the defendant. The Court of first instance held it to be proved that a sum of Rs. 1,365-14-3 was due to the plaintiff for money advanced to the defendant for his contracts and privately, and Rs. 297-13-9 for a moiety of the profits of the

contracts; and gave the plaintiff a decree accordingly. On appeal by the defendant the lower appellate Court, treating the instrument of the 10th February, 1879, as one of partnership, held generally, as regards the claim for a moiety of the profits of the contracts, that the suit was not maintainable, inasmuch as a partnership existed between the parties, and this being the case one partner could not sue the other for profits which had accrued up to a particular date, but should sue for an account. As regards the claim for a moiety of the profits on the contract for the supply of metal for the Chilla road, the lower appellate Court held that the cause of action in respect of such claim had not arisen, as the defendant had not completed such contract. The lower appellate Court accordingly reversed the decree of the Court of first instance, in so far as it related to the claims for money advanced to the defendant for his contracts and for a moiety of the profits on the contracts. The plaintiff appealed to the High Court, contending that the instrument of the 10th February, 1879, was not an instrument of partnership, and the plaintiff was entitled to sue on its basis to recover the money advanced by him to the defendant and his share of the profits of the contracts entered into by the defendant.

Mr. *Howard*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondent.

The High Court (STUART, C. J., and TYRRELL, J.,) delivered the following judgment:—

STUART, C. J.—This case appears to have been misunderstood by both the Courts below, and also by the parties. The Subordinate Judge appears to have had some kind of vague apprehension of the nature of the plaintiff's claim, but his language is so loose and inartificial that it is difficult to understand what his meaning really is. He was no doubt labouring under the disadvantage of trying the case on issues prepared not by himself but by his predecessor. His judgment, however, is in many respects not irrelevant to the causes of action embraced in the suit, for, as we shall presently explain, there is, from the nature of the case, more than one cause of action. But the Judge appears to have altogether

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misapprehended the case, dealing with it as one of partnership, plaintiff and defendant being in his view parties in a venture of that character. In so regarding the suit the Judge was altogether mistaken. The suit is not of that nature, although the words "partner" and "partnership" occur in a somewhat careless manner in the document relied on. Nor is it very clear that the plaintiff and defendant themselves understood in the lower Courts what their relative position towards each other really and legally was. The claim made by the plaint is based primarily on an agreement between the plaintiff and defendant dated 10th February, 1879; there is also a claim in respect of an alleged advance of Rs. 96-10-0 to the defendant for his private use. It would further appear from the last of the issues laid down before the first Subordinate Judge that the case, as so far heard and considered by him, included another claim for Rs. 341-8-0 on account of certain tools supplied by the plaintiff to the defendant. These three claims might all have afforded separate causes of action, in so many separate suits, but by s. 45 of the Procedure Code they may be united in one and the same suit, and they certainly can conveniently be so entertained. There might also have been a fourth cause of action under art. 8 of the agreement of February, 1879, by which any work, *i.e.*, of course the profits of any such work, other than the immediate subject-matter of the agreement, which either of them might thereafter obtain, should be equally divided between them. The last stipulation appears to be the only circumstance in the case favouring the idea of a partnership between the parties, but there are no facts stated in connection with it, and it may be left out of consideration. Its introduction into the agreement does not in the least affect the legal character of the transaction which was the subject of the agreement of February, 1879, entered into by them, or give any colour to the view that a valid partnership had for all the purposes mentioned in that agreement, and within the meaning of the law, been made by them.

It would appear that the defendant DeGruyther had obtained a Government contract from the District Engineer of Bánda for the collection and suppy of a certain material for metalling roads called *bajri*, but that not having sufficient funds of his own for working the

contract he applied to the plaintiff, who is a *bania* or money-lender in Bánda, for advances to enable him to carry on the work. This the plaintiff agreed to on certain conditions, which were embodied in the agreement to which we have already adverted, dated the 10th February, 1879, and which agreement was in the following terms: (After setting out the terms of the agreement of the 10th February, 1879, the judgment continued): Now it is quite clear to us that this agreement does not on the face of it show a contract of partnership, but that it is merely a subsidiary arrangement on the condition stated to enable the defendant to carry out the work given to him on behalf of the Government. This contract with the Government was one in regard to which the plaintiff had no responsibility, and with which he has no concern other than that shown by his private and subsidiary agreement with the defendant, and he has no sort of connection, and held no relation, with the Engineer of Bánda, or with any other person representing the Government's interests in the metalling of the roads referred to. The sole responsibility to the Government was with the defendant, and if he chose or found it necessary to seek the help of the plaintiff, that was a circumstance entirely *inter se*, and it could not create any partnership between them.

The Judge would seem to have received some legal impressions from his reading of English law-books on the law of partnership, and, assuming that there was a contract of that nature between the parties in this case, chiefly if not mainly from the presence in it of art. 8,—which we have already pointed out does not in the least affect the character of the agreement of February, 1879,—he discusses the question of the dissolution of a partnership with the intention of demonstrating that there was no dissolution here, and that in fact the partnership was subsisting at the time the present suit was brought, and was still subsisting. But as we have already said there was no partnership, and if the Judge had only looked into the Indian Contract Act, IX of 1872, and with which he ought to have been familiar, he would have seen that there was no such contract. By s. 239 of the Indian Contract Act partnership is defined to be "the relation which subsists between persons who have agreed to combine their property, labor or skill in

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some business and to share the profits thereof between them", and a partnership so created is called collectively a "firm". Now having regard to the facts of the present case it is idle to attempt to show that the state of things upon which such a partnership depends ever had any existence: there was no combination of property, labor or skill; for the property, such as it was, that is the Government contract, and the labor or skill were all on the side of the defendant, the plaintiff simply supplying the defendant with certain sums of money. Again, to place the matter beyond the reach of doubt, s. 240 of the Contract Act provides that:—"A loan to a person engaged or about to engage in any trade or undertaking, upon a contract with such person that the lender shall receive interest at a rate varying with the profits, *or that he shall receive a share of the profits*, does not, of itself, constitute the lender a partner, or render him responsible as such." This to our mind as nearly as possible describes the agreement between the plaintiff and defendant of February, 1879, and puts an end to the contention that the plaintiff was partner of the defendant, even although he is ignorantly called so in the agreement itself and loosely and vaguely referred to as such in the pleadings and in the judgments of both the lower Courts. Not as a partner then, but as a party to the agreement of 1879, the plaintiff is entitled to recover from the defendant all advances and payments made by him, as well as all other sums in name of interest or otherwise on foot of it, and also any money lent to the defendant for his private use, and any other sum or sums his right to which he can substantiate. There is also the question much dwelt upon by the Judge, in fact it is the immediate cause of his order decreeing the appeal, whether when the suit was brought the condition of the agreement of 1879 relating to the completion of the work on the roads had been finally complied with. The Judge states, on the authority of one Nadir Lal a witness, that all the money due to the defendant under his engineering contract had been paid upon a promise by him that he would finish up certain bits of work which were not properly carried out. And this is a question which ought to be carefully considered and ascertained, and its effect upon the plaintiff's claim determined.

With reference to such considerations and in order to ascertain the relative position of the parties with respect to liability and

indebtedness, an account must be taken, and the case must go back to the Judge for that purpose.

We therefore allow the present appeal, set aside the order of the Judge, and remand the case to him under s. 562, with directions to try and determine the issue what sum of money, if any, remains due by the defendant to the plaintiff on foot of the agreement of the 10th February, 1879, and otherwise; and for such purpose to have an accurate and detailed account of all pecuniary transactions between the parties taken before himself, a balance struck, and the merits of the case decided by him accordingly. The appellant is entitled to the costs of this appeal.

Cause remanded.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Duthoit.

1881 *July* 13.

DURGA BIBI AND ANOTHER (DEFENDANT) *v.* CHANCHAL RAM (PLAINTIFF).*

Religious endowment—Right to officiate in Temple—Alienation—Execution of decree.

The right of managing a temple, which is a religious endowment, of officiating at the worship conducted in it, and of receiving the offerings at the shrine, cannot, in default of proof to the contrary, pass outside the family of the trustee, until absolute failure of succession in his family, and such rights are therefore not saleable in execution of decree. The principle laid down by the Privy Council in *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha* (1) followed.

THIS was a suit for a declaration that certain property was liable to attachment and sale in execution of a decree held by the plaintiff, as the property of one Saktidat, deceased. One Sital Misr, son of Sadhu Misr, priest of the temple of Sankata Debi at Benares, died leaving two sons, Sukhdeo and Saktidat, and two daughters, Durga Bibi and Sohni Bibi, defendants in this suit. Saktidat died leaving no issue, but a widow named Sobhni Kuar. On the 1st May, 1878, the plaintiff in this suit, Chanchal Ram, obtained a decree in the Court of the Subordinate Judge of Benares against Sobhni Bibi as the legal representative of her deceased husband, Saktidat, for Rs. 3,500. Chanchal Ram subsequently assigned a moiety of this decree to a person represented by one Ganga Ram. In execution of this decree the decree-holders caused a moiety of a certain buil-

* First Appeal, No. 10 of 1881, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Benares, dated the 18th September, 1880.

(1) L. R., 4 Ind. App. 76.