APPELLATE CIVIL.

Before Mr. Justice Abdul Raoof and Mr. Justice Moti Sagar.

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Jan. 4.

MOOL CHAND AND OTHERS (DEFENDANTS)—Appellants,

versus

MUL CHAND, ETC. (PLAINTIFFS)
BUDHA MAL, ETC. (DEFENDANTS)—Respondents.

Civil Appeal No. 1818 of 1917.

Civil Procedure Code, Act V of 1908, *Order XXII rule* 4, *and Order XXX rule* 4—*Abatement—Suit for recovery of a partnership debt—Death of one of the partners during pendency of the suit—Decree in favour of representative of deceased partner and the surviving partners—Death of the representative during pendency of appeal—Indian Contract Act, IX of* 1872, *section* 45—*whether applicable to trading partnerships.*

The proprietors of the Firm Sobha Ram-Mul Chand brought the present suit for recovery of a partnership debt from the defendants. During the pendency of the suit in the lower Court two of the plaintiffs, Sobha Ram and Malawa Ram, died and the two sons of Sobha Ram and *Mussammat* Mal Kaur, widow of Malawa Mal, were brought on the record as their representatives. The plaintiffs' suit was eventually decreed, and in the decree sheet the names of four plaintiffs were given as proprietors of the Firm of Sobha Ram-Mul Chand, but not that of *Mussammat* Mal Kaur. During the pendency of the present appeal to which *Mussammat* Mal Kaur was made a party, the latter died, but no application was made to implead her legal representative. It was urged for the respondents that the appeal had abated *in toto* as the decree was in favour of all the plaintiffs jointly.

Held, that section 45 of the Indian Contract Act has no application to debts due to trading partnerships and it is not obligatory upon a surviving partner to implead the representative of a deceased partner in an action for a partnership debt.

McClean v. *Kennard* (1), *Gobind Prasad* v. *Chandar Sekhar* (2), *Debi Das* v. *Nirpat* (3), *Ugar Sen* v. *Lakhmi Chand* (4), *Moti Lal-Bechar Das* v. *Ghellabhai-Hariram* (5), *Vaidyanatha* v. *Chinnasmi* (6), *Mulk Raj* v. *George Knight* (7), *Oodayappa Chetty* v. *Ramasawmy Chetty* (8), and Williams, On Executors, 8th Edition, page 850, followed; also Order XXX rule 4, Civil Procedure Code.

(1) (1874) L. R. 9 Ch. Ap. 336, 346.
(2) (1887) I. L. R. 9 All. 486.
(3) (1898) I. L. R. 20 All. 365.
(4) (1910) I. L. R. 32 All. 636.
(5) (1892) I. L. R. 17 Bom. 6.
(6) (1893) I. L. R. 17 Mad. 108.
(7) 10 P. R. 1906.
(8) (1914) 24 Indian Cases, 268.

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Bal Kishen Dass v. *Kanhaya Lal* (1), referred to.

Manmohan Panday v. *Bidhu Bhusin* (2), distinguished.

Ram Narain v. *Ram Chander* (3), dissented from.

Held consequently, that *Mussammat* Mal Kaur was not a necessary party, and that the non-impleadment of her heirs does not result in the abatement of the appeal.

First appeal from the decree of H. B. Anderson, Esquire, Subordinate Judge, 1st Class, Rawalpindi, dated the 26th of March 1917, *decreeing plaintiffs' suit.*

CARDEN NOAD and OBEDULLA, for Appellants.

M. S. BHAGAT and MUHAMMAD RAFI, for Respondents.

The judgment of the Court was delivered by—

MOTI SAGAR J.—This and Civil Appeal No. 1854 of 1917 are by different sets of defendants in the same suit, and may conveniently be disposed of in one judgment. The suit was against three separate sets of defendants, and was brought by one Sobha Ram and his three sons, Mul Chand, Malawa Ram and Shankar Das, proprietors of the firm of Sobha Ram-Mul Chand at Rawalpindi. The first set of defendants consisted of Budha Mal, defendant No. 1, Lekh Raj, defendant No. 2, and Chandi Ram, defendant No. 3, proprietors of the firm of Budha Mal-Lekh Raj at Gojra in the district of Lyallpur. The second set consisted of two persons, Pissu Mal and Jetha Mal, who were residents of Khairpur Mir State in Hyderabad Sindh, and were described as defendants Nos. 4 and 5 in the plaint. The third set was composed of three persons, Radha Kishen, defendant No. 6, Parma Nand, defendant No. 7, and Sawan Mal, defendant No. 8, proprietors of the firm of Radha Kishen-Parma Nand carrying on business as commission agents at Karachi. The suit was one for the recovery of Rs. 8,000 on the basis of certain dishonoured *hundis*, or in the alternative for the price of goods alleged to have been supplied to all the defendants in partnership. The facts as alleged in the plaint were briefly these :—

In *Sawan, Sambat* 1964, Pissu Mal and Jodha Mal, defendants Nos. 4 and 5, came to the plaintiffs' shop and told them that they were partners in the firm of

(1) (1913) 17 Cal. L. J. 648. (2) (1918) 48 Indian Cases 309.
(3) (1890) I. L. R. 18 Cal. 86.

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Budha Mal-Lekh Raj, who had started business in all kinds of grain in partnership with Messrs. Radha Kishen-Parma Nand of Karachi. They asked them to despatch goods to the Karachi firm on the joint responsibility of all the defendants, and to recover the price of the goods so despatched by means of *hundis* drawn on that firm. The plaintiffs alleged that in compliance with this request they despatched goods to the value of Rs. 29,811-13-0 to Messrs. Radha Kishen-Parma Nand at Karachi between the 9th August and the 14th September 1907, and received in payment thereof 24 *hundis* drawn in their favour by defendants Nos. 4 and 5 in the name of Budha Mal-Lekh Raj on the Karachi firm. The total value of the *hundis* thus drawn was Rs. 31,200, out of which the consignees honoured 9 *hundis* to the value of Rs. 13,500, but dishonoured the remaining 15 *hundis*. The plaintiffs, when they came to know that the *hundis* had been dishonoured, wired to the Railway authorities to stop delivery of further goods to defendants Nos. 6, 7 and 8 and also wired to the defendant-consignees to refrain from taking any more deliveries, and from selling any goods that they may have in their hands belonging to the plaintiffs. It was further alleged that the said defendants, in spite of the receipt of the wire and after refusal to pay the *hundis* on presentation, continued taking delivery of and selling the goods sent by the plaintiffs. The goods, which had been stopped in transit, were eventually sold by the plaintiffs for Rs. 8,500, and the sale-proceeds duly credited to the account of the defendants. On these facts the plaintiffs contended that not only the first three defendants, the actual purchasers of the goods, were liable for the payment of Rs. 8,000, the balance due on account of the price of the goods sold, but that the other two sets of defendants were also liable, firstly, because they were partners in the firm of Budha Mal-Lekh Raj, and secondly, because they had, by their conduct, led the plaintiffs to believe that they were all purchasing the goods in partnership. It was urged that both sets of defendants were bound in equity to indemnify the plaintiffs for the loss the latter had sustained on account of the false representations of the one and the unfair and dishonest dealings of the other.

Defendants Nos. 1—5 failed to put in appearance, and *ex-parte* proceedings were taken against them. The third set of defendants, proprietors of the firm of Radha Kishen-Parma Nand, denied all the material allegations in the plaint, repelled the suggestion that they were partners in the firm of Budha Mal-Lekh Raj or with defendants Nos. 4 and 5 and disclaimed all knowledge of the transactions that might have taken place between the plaintiffs and those defendants. They admitted that they were commission agents at Karachi ; that the firm of Budha Mal-Lekh Raj used to send goods to their shop from different stations for sale, and that they used to honour their *hundis* to the extent of the goods, and the funds at their credit. They also admitted the receipt of the telegram, dated the 14th September 1907, but pleaded that, after the receipt of that telegram, they did not take delivery of any goods, and had, in fact, closed their accounts with that firm even prior to the receipt of the telegram. They entirely repudiated their liability for payment of anything that may be due to the plaintiffs whether on *hundis*, or for the price of goods that the latter may have consigned to their address under instructions from defendants Nos. 1 to 5. It was further contended that the cause of action arose at Karachi, and that the suit was not triable at Rawalpindi.

On these pleadings nine issues were framed by the Court of first instance, and set down for trial. The first issue related to the question of jurisdiction, and was decided by the District Judge on the 18th October 1910. The District Judge held that the breach of contract having taken place at Karachi where the *hundis* had been dishonoured, the Rawalpindi Court had no jurisdiction to hear the suit, and returned the plaint for presentation to the proper Court. The Chief Court on appeal set aside the order of the learned District Judge on the question of jurisdiction, and remanded the case to the Subordinate Judge for determination on the merits. After remand defendants Nos. 4 and 5, against whom *ex-parte* proceedings had been ordered, appeared in Court and made an application for the setting aside of the *ex-parte* proceedings. The *ex-parte* proceedings were set aside and the defendants filed their pleas in which practically the same points were raised as those urged by

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defendants Nos. 6, 7 and 8. In addition, however, it was urged that they were the servants of defendants Nos. 1 to 3, and had ordered the goods and executed the *hundis* in that capacity on behalf of the firm of Budha Mal-Lekh Raj, and not in the capacity of partners. In fact, they entirely repudiated the allegation that they were partners with the firm of Budha Mal-Lekh Raj, or that they ever led the plaintiffs to believe that they were partners with either of the two firms at Gojra and Karachi. The Court added two more issues on their pleadings as to their liability under the claim, and proceeded to the hearing of the suit.

After a protracted trial lasting for about two years the Subordinate Judge found that it had not been fully established that defendants Nos. 4 and 5 were actually partners with defendants Nos. 1 to 3 and defendants Nos. 6 to 8, but that there was ample evidence on the record to show that they had led the plaintiffs to believe that they were partners in the said firms. He further found that it had not been established that defendants Nos. 1 to 3 and defendants Nos. 6 to 8 were partners in these transactions, but that the conduct of defendants Nos. 6 to 8 was not *bonâ fide* in respect of their refusal to pay the *hundis*, and that they were consequently liable in equity to make good the loss which the plaintiffs had sustained. As a result of these findings the plaintiffs' suit was decreed in its entirety against all the three sets of defendants with costs. Two appeals have been preferred against this decree; one by defendants 4 and 5 and the other by defendants Nos. 6, 7 and 8—in both of which the findings of the Court below on the question of their respective liabilities under the claim are vehemently challenged.

Lengthy arguments have been addressed to us by Mr. M. S. Bhagat on the question of abatement which arose under the following circumstances. Sobha Ram and Malawa Ram, two of the plaintiffs, died during the pendency of the suit in the Court below. On the 12th January 1910, the Court passed an order that Mul Chand and Shankar Das, sons of Sobha Ram, who were already on the record as plaintiffs, should be appointed representatives of Sobha Ram, and that *Mussammat* Mal Kaur, widow of Malawa Ram, should

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be brought on the record as a plaintiff in place of her deceased husband. In the decree sheet prepared under the orders of the Court below the names of the plaintiffs were shown as Sobha Ram, Mul Chand, Wadhawa Ram and Shankar Das, proprietors of the firm of Sobha Ram-Mul Chand at Rawalpindi, and *Mussammat* Mal Kaur's name was entirely omitted from the decree. In the appeal preferred to this Court by defendants Nos. 6, 7 and 8, and which was registered as Appeal No. 1818 of 1917 *Mussammat* Mal Kaur was impleaded as a respondent along with Mul Chand and Shankar Das, all of whom were described as proprietors of the firm of Sobha Ram-Mul Chand. In the other Appeal, No. 1854 of 1917, preferred by defendants Nos. 4 and 5 the following persons were named as respondents to the appeal :—(1) Sobha Ram, (2) Mul Chand, (3) Wadhawa Ram and (4) Shankar Das, sons of Sobha Ram, proprietors of the firm of Sobha Ram-Mul Chand at Rawalpindi.

Mussammat Mal Kaur died during the pendency of the appeal leaving her surviving a daughter, *Mussammat* Rani, and no application to implead her legal representatives appears to have ever been made to the Court by the appellants. The contention of Mr. Bhagat in Appeal No. 1818 of 1917 is that the decree being joint in favour of all the plaintiffs and no steps having been taken by the appellants to bring the legal representatives of the deceased respondent on the record the appeal abates not only against *Mussammat* Mal Kaur, but in its entirety under Order XXII, rule 4 of the Code of Civil Procedure. A large number of authorities have been cited in support of the contention that when on the death of some of the respondents the cause of action did not survive against the remaining respondents alone, but against the remaining respondents *plus* the representatives of the deceased respondent, the entire appeal abated. Section 45 of the Indian Contract Act as to the devolution of joint rights is also relied on in this connection, and it is conceded that the right to sue, and the right to claim performance of the decree in this case was a joint right devolving on the death of *Mussammat* Mal Kaur on her daughter, and on the surviving plaintiffs or decree-holders, and that if the

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defendants wanted to question this right or the correctness of the decree it was incumbent upon them to bring before the Court all the parties on whom the right had devolved, or who were affected by the decree. This contention, in our opinion, though ordinarily correct, has no force when the suit relates to a debt owing to a partnership firm, as it undoubtedly does in the present case. There is ample authority for holding that section 45 of the Contract Act has no application to debts due to trading partnerships, and that such cases must be governed by the rule of the English Law which provides that—

"Although the right of the deceased partner devolves on his executors, the *remedy* survives to his co-partner who alone must enforce the remedy by action, and who will be liable on recovery to account to the executors or administrators for the share of the deceased."

Williams, On Executors, 8th edition, page 850, referred to in *Maclean* v *Kennard* (1). This rule which is based on sound common sense and expediency, has now been adopted by almost all the High Courts in India. The whole subject was elaborately considered by Edge, C. J. and Mahmood J. in the case of *Gobind Prasad* v. *Chandar Sekha* (2) where the learned Chief Justice, while discussing the question of the applicability of section 45 to the case of trading partnerships observed—

"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 possibly successfully in that event, on the ground that the person that was added as representative was not the legal representative of the deceased person."

Taking all these difficulties and inconveniences into consideration the learned Judges held that in trad-

(1) (1874) L. R. 9 Ch. Ap. 336, 346. (2) (1887) I. L. R. 9 All 486.

ing partnerships the principles of English law should be applied unless there was a statutory provision to the contrary, and were further of opinion that there was nothing in section 45 which made it obligatory upon a surviving partner to implead the representative of a deceased partner in an action for a partnership debt. An opposite view was taken by the Calcutta High Court in the case of *Ram Narain* v. *Ram Chander* (1) but this view has not found favour with any of the other High Courts in India, and has not been followed even by that High Court itself in a subsequent ruling reported as *Bal Kissen Dass* v. *Kanhaya Lal* (2). Mr. Bhagat has, however, drawn our attention to another Calcutta case reported as *Manmohan Panday* v. *Bidhu Bhusan* (3) in which also a contrary view appears to have been taken but the facts of that case were different, and as appears from the report itself the decree in that case was in favour of certain individuals and not in the name of a firm. Moreover, none of the previous authorities were brought to the notice of the Court, and we do not think that the learned Judges intended to lay down a rule of universal applicability in that case. In *Debi Das* v. *Nirpat* (4) and *Ugar Sen* v. *Lakhmi Chand* (5) the rule laid down in the earlier ruling was followed, and it was held that the representatives of a deceased partner were not necessary parties to a suit for the recovery of a debt which had accrued due during the lifetime of the deceased partner, and that section 45 of the Indian Contract Act did not apply to such a suit. In the case of *Moti Lal-Bechar Das* v. *Ghellabhai Hariram* (6), the same question was considered, and the conflicting rulings of the Calcutta and the Allahabad High Courts were discussed at considerable length. The learned Judges, Bayley and Farran J. J., held that the view of the Allahabad High Court was correct. The same view was upheld in a Madras case reported as *Vaidyanatha* v. *Chinnasmi* (7), where a Division Bench consisting of Mattasami Ayyar and Best J. J. laid it down that a surviving partner could sue alone for the recovery of a partnership debt. The Punjab Chief Court in a case

(1) (1890) I. L. R. 18 Cal. 86.
(2) (1913) 17 Cal. L. J. 648.
(3) (1918) 48 Indian Cases 309.
(4) (1898) I. L. R. 20 All. 365.
(5) (1910) I. L. R. 32 All. 638.
(6) (1892) I. L. R. 17 Bom. 6.
(7) (1893) I. L. R. 17 Mad. 108.

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reported as *Mulk Raj* v. *George Knight* (1) considered all the various rulings bearing on the subject, and expressly dissented from the view taken by the Calcutta High Court in *Ram Narain* v. *Ram Chander* (2), and followed the rulings of the three other High Courts The same principle was recently reiterated by the Lower Burma Chief Court in *Oodayappa Chetty* v. *Ramasawmy Chetty* (3).

The view of the majority of the High Courts has now been adopted in Order XXX, rule 4, Civil Procedure Code, 1908, which declares that the legal representatives of the deceased partner are not necessary parties to suits brought in the name of the firm.

The rule of law now seems to be firmly established that debts due to trading partnerships stand on a different footing from debts due under ordinary contracts, and that when one of the partners in a firm dies, the surviving partners can sue for the recovery of debts due to the firm without making the legal representatives of the deceased partners parties to the suit. In this view of the law it is clear that *Mussammat* Mal Kaur was not a necessary party, and that the non-impleadment of her heirs does not result in the partial, much less in the total, abatement of the appeal.

In Appeal No. 1854 of 1917 Mr. Jai Gopal Sethi raises four preliminary objections, *viz.*, (*i*) that Sobha Ram died during the pendency of the suit and that no appeal should have been lodged against a dead person; (*ii*) that *Mussammat* Mal Kaur has not been joined as a party in place of her deceased husband, who died during the pendency of the suit; (*iii*) that the legal representatives of *Mussammat* Mal Kaur have not been brought on the record after her death, and (*iv*) that Wadhawa Ram was no party to the suit and could not therefore be joined as a party to the appeal.

The first three objections are disposed of by our decision on the preliminary objection in the connected Appeal No. 1818 of 1917. As to the fourth objection, it is clear that the name of Wadhawa Ram is a clerical mistake for Malawa Ram, who died during the pendency

(1) 10 P. R. 1906. (2) (1890) I. L. R. 18 Cal. 86.
(3) (1914) 24 Indian Cases 268

of the suit in the Court below. If the legal representatives of a deceased partner are not necessary parties to a suit or an appeal, it is obvious that the appeal is a perfectly valid appeal and can proceed, the surviving partners being already on the record as respondents. We do not see any force in these preliminary objections, and we overrule them.

[The remainder of this judgment is not required for the purposes of this report—Ed.]

A. R. *Appeal accepted in part.*

APPELLATE CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Moti Sagar.

RAHMAT ALI-MUHAMMAD FAIZI
(DEFENDANTS)—Appellants,

versus

DEWA SINGH-MAN SINGH (PLAINTIFFS),—
Respondents.

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Civil Appeal No. 24 of 1920.

Cause of action—Suit on a hundi *improperly stamped given in lieu of a prior* hundi—*Whether plaintiff can fall back upon the prior* hundi—*Indian Contract Act, IX of* 1872, *section* 62.

Held, that where a *hundi* insufficiently stamped is given in renewal of a prior *hundi* and a suit on the basis of the subsequent *hundi* is not maintainable owing to its not being properly stamped the creditor can fall back upon the prior *hundi*. Section 62 of the Indian Contract Act is no bar to his doing so. The second *hundi* would have operated as a discharge of the previous *hundi* only if the second *hundi* was legally enforceable.

Udho Shah v. *Hira Shah* (1), *Sundar Das* v. *Puran Singh* (2), and *Kuttayan* v. *Palaniappa* (3), followed.

Held also, that the cancellation of the stamp on the prior *hundi* and the endorsement on it that the defendants had executed another *hundi* in its stead, having been made under a mistake, would not discharge the defendant from liability on that *hundi*.

There is nothing in the present case to rebut the presumption that the giving of the second *hundi* only operated as a conditional satisfaction of the debt and not as a real discharge.

(1) 71 P. R. 1897. (2) (1922) 67 Indian Cases 856.
(3) (1904) I. L. R. 27 Mad. 540.