

APPELLATE CIVIL.

Before Mr. Justice Carr and Justice Mr. Cunniffe.

1928

Jan. 25.

A. KHORASANY

v.

C. ACHA AND FOUR.*

Mahomedan Law—Widow cannot make a partnership contract on behalf of her minor children—Contract Act (IX of 1872), ss. 11, 247—Business carried on with partnership property involving share of minor heirs of deceased partner, effect of—Suit for dissolution of existing partnership governed by Art. 120 and not 106 of the Limitation Act (IX of 1908).

Held, that a Mahomedan widow is not competent (except for herself) to enter into a partnership contract with her deceased husband's partner to continue the business so as to bind her minor children. Their share in the assets of the firm cannot be made liable for losses incurred after the death of their father, if the surviving partner and their mother agree to continue the business. The minor heirs would be entitled to their share of the assets of the firm at the time of their father's death, as well as to their share of the nett profits made since their father's death, in calculating which reasonable remuneration must be allowed to the surviving partner for solely managing the business since the death of their father. A suit for dissolution of an existing partnership (e.g. one made between an adult heir of a deceased partner and the surviving partner) is governed by Art. 120 and not by Art. 106 (or Art. 114) of the Limitation Act.

Imambandi v. Mutsaddi, 45 Cal. 878 (P.C.)—referred to.

Foucar for the appellant.

Shaffee for the respondents.

CARR, J.—The plaintiffs in this suit are the widow and the minor children of Musaji Hashim Acha, who died in May, 1919. He was at that time a partner of the defendant, A. M. A. Khorasany, in a rice milling business carried on in a mill which belonged to the firm. It is alleged by the plaintiffs that shortly after Hashim Acha's death it was agreed between the defendant and the first plaintiff, Amina Bi, on behalf of herself and the minors, that the partnership should be carried on as before. Hashim Acha's place as

* Civil First Appeals Nos. 118 and 165 of 1927 from the judgment of the District Court of Bassein in Civil Regular Suit No. 21 of 1925.

partner being taken by his widow and children. They sue now for dissolution of partnership and for an account.

The defence was a denial of the alleged new partnership and a contention that the plaintiffs were entitled only to a half share of the mill as it was at the time of Hashim Acha's death and to reasonable compensation for the use of the mill since that time.

Alternatively the plaintiffs claimed, as heirs of Hashim Acha, their one half share of the property and an account of and their share in the profits made from it since his death. The first plaintiff claimed a share of the profits only for three years before the suit while the other plaintiffs claimed for the whole of the period.

The defendant's reply to that was that the plaintiffs could not join such an alternative claim with their claim based on partnership and that there was a misjoinder of parties in that the first plaintiff, Amina Bi, as administratrix of the estate, was the only person who could sue as representative of Hashim Acha.

The District Judge found the new partnership proved and held that it was valid. He gave the plaintiffs 2 to 6 a decree for dissolution of partnership and an account, as prayed, but dismissed the suit of the first plaintiff as time-barred under Article 114 of the Limitation Act, Schedule 1.

Both the defendant and the first plaintiff appeal. Their appeals have been heard together and will be dealt with together in this judgment.

[On the evidence his Lordship found that it was agreed to carry on the partnership business as before and continued as follows] :—

No definite period for such continuance seems to have been fixed, and in my opinion defendant's contention that the arrangement was to continue only

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till Letters of Administration were taken out is as an after-thought.

But I am unable to agree with the District Judge in his finding that this agreement constituted a valid contract of partnership, so far, at any rate, as the minors are concerned. It is made quite clear by the decision of their Lordships of the Privy Council in *Imambandi v. Mutsaddi* (1), that a Mahomedan widow as such is not competent to enter into a contract binding on her minor children and therefore in this case the agreement could not bind the minor plaintiffs.

It has been urged that section 247 of the Contract Act is sufficient to make the agreement a binding contract. I do not think that it is. That section lays down that when a minor is admitted to the benefits of partnership he is not personally liable for the obligations of the firm, but that "his share of the property of the firm" is so liable. The question then arises—how can the minor's share be made so liable? Certainly not by the agreement of the minor himself or of any person not qualified to contract on his behalf. The necessary conditions which might have made liable the share of the minors in the mill and the other capital (if any) of the former firm were not present in this case and therefore the general rule laid down in section 11 applies fully and the agreement was not a contract binding on the minors and therefore it was not a contract at all, but a mere void agreement. I have no doubt that both the first plaintiff and the defendant at the time of making the agreement were not aware of the legal difficulty and believed that were entering into a valid contract and as between the first plaintiff, Amina Bi, and the

(1) (1918) 45 Cal. 873.

defendant I think that a partnership was validly created by the agreement.

But the position as regards the minors seems to me to be very much the same as if there had been a valid partnership except only that their share in the property of the firm could not be made liable for any losses that were incurred. Fortunately there seems in fact to have been a substantial profit. The defendant has in fact carried on the business with the partnership property and in my opinion he is bound to account to the representatives of his deceased partner for one-half of the profits made as well as for their share of the assets of the firm at the time of that partner's death. So far as the interest of the minors is concerned, therefore, I see no ground for interference with the decree of the District Court directing an account to be taken, except that the defendant should be allowed to deduct a reasonable amount as remuneration for his management of the business before the nett profits are calculated.

As regards the objection that there was misjoinder, I do not think that there is any objection to the joinder of the alternative claims put forward. And I do not think that any misjoinder of parties that there may be is more than a mere technical error not affecting the merits of the case in any way. In my view there is no such misjoinder as would justify interference in any sense.

Coming to the appeal of the first plaintiff, Amina Bi, the District Judge held that her suit for dissolution was time-barred under Article 114 of the Limitation Act. I am unable to agree that that article applies. The dissolution of a partnership is not a rescission of a contract. There appears to be no article specifically dealing with a suit for dissolution. That being so, I think that Article 120 would apply,

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thus giving a period of six years. And the starting point would be the time when the defendant refused to give the plaintiff any of the profits of the business—that is from 1922, or at the earliest November 1921. On that basis the suit was in time. I do not consider that Article 106 can apply, because there has never been a dissolution of the partnership between Amina Bi and the defendant. The latter's declaration in November 1921, could not amount to a dissolution, since he remained in possession of the firm's assets and continued to carry on its business.

The District Judge further said that, as a Mahomedan widow, Amina Bi could have no share in the mill itself. I know of no authority for this proposition, which has not been supported.

Amina Bi asked only for her share of the profits for three years before the suit and in my view she is clearly entitled to that.

I would therefore amend the decree of the District Court by declaring that the plaintiffs collectively are entitled to one-half of the assets of the firm at the time of the death of Musaji Hashim Acha, that the minor plaintiffs are entitled to seven-eighths of one-half of the nett profits since the death of Musaji Hashim Acha, and that the first plaintiff, Amina Bi, is entitled to one-eighth of one-half of the nett profits since a date three years before the institution of the suit, the nett profits being in each case calculated after deduction of reasonable remuneration for the defendant's management of the business; and would direct that an account be taken accordingly and a final decree passed in accordance with the account.

Essentially the defendant fails in both appeals. He must therefore pay the costs of the plaintiffs in both appeals and in the District Court.

CUNLIFFE, J.—I concur.