APPELLATE CIVIL.

Before Mr. Justice Zafar Ali and Mr. Justice Jai Lal.

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Jan. 25.

ABDULLAH AND OTHERS (DEFENDANTS) Appellants

versus

ALLAH DIYA (PLAINTIFF) Respondent.

Civil Appeal No. 2018 of 1922

Indian Contract Act, IX of 1872, section 239—Partnership—what constitutes—Agreement—to share produce (but not profits) under a contract—Suit for return of money paid under—form of—Section 23: Agreement—admitting a co-sharer—whether void as being opposed to a specific condition that no shikmi *contractors can be allowed—Evidence of payment—where no receipt was taken though the agreement expressly says receipts should be taken—Damages—Interest awarded as.*

The plaintiff and two defendants tendered separately for a contract to cut and remove bamboos from the jungles of an Indian State, and meanwhile executed amongst themselves an agreement in three parts, described as a partnership deed, but under it each of the parties was entitled to take a certain share of the bamboos collected by the person who should be granted the State contract. The defendants having succeeded in obtaining the contract, repudiated the plaintiff's rights under the agreement and pleaded that the plaintiff's suit for recovery of money paid thereunder and for profits or interest in lieu was incompetent, his only remedy being to sue for dissolution of partnership and accounts; and, secondly, that the agreement was void, being in violation of the conditions imposed by the State upon the persons to whom the contract was granted.

Held that as each party under the agreement was to get and deal with his share of the bamboos as his own personal concern, irrespective of the consequences which might accrue by sale thereof in the market, the transaction did not constitute a partnership under section 239 of the Contract Act, of which a dissolution could be claimed.

And, that the nature of the transaction could not be altered by the mere use of the word 'partnership' in the

plaint, an agreement to share profits being essential to the constitution of a partnership.

Held further, that although the State might have refused to recognise the partners under the agreement, the mere fact that the State had *for administrative purposes* imposed a condition that its contractors should not take co-sharers or *shikmi* contractors, did not render the agreement unlawful so as to be void under section 23 of the Contract Act, no specific penalty having been attached by the State to the transaction in question.

Bhikanbhai v. *Hiralal* (1), followed.

Abdulla v. *Mammod* (2), and *Gauri Shankar* v. *Mumtaz Ali Khan* (3), relied on.

Held also, that neither the failure by the plaintiff to produce a receipt (which according to the *postcript* to the agreement he should have obtained) for the amount claimed, nor his inability to give the precise date of payment, was sufficient to over-ride the strong oral evidence (accepted by the trial Court) that the money had in fact been paid.

And, the defendants, having dishonestly refused to carry out the contract under which they received the money, were liable not only to return that sum, but also to pay damages for the breach of the contract, *or* for their wrongful use of the plaintiff's money; and the mere fact that the plaintiff had claimed "profits" (to which he was held not entitled) did not debar the Court from awarding damages on the basis of interest at the market rate.

First appeal from the decree of Maulvi *Barkat Ali Khan, Senior Subordinate Judge, Ambala, dated the 1st July 1922, directing the defendants to pay to the plaintiff the sum of Rs. 4,050.*

TEK CHAND, JAGAN NATH BHANDARI and HEM RAJ, for Appellants.

G. C. NARANG and D. R. NARANG, for Respondent.

(1) (1900) I. L. R. 24 Bom 622. (2) (1902) I. L. R. 26 Mad. 156.
(3) (1879) I. L. R. 2 All. 411 (F.B.).

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The judgment of the Court was delivered by :—

ZAFAR ALI J.—This first appeal has arisen out of an action brought by Allah Diya, Khoja, of Ambala City, against Abdullah and his son and son-in-law of the same city for the recovery of Rs. 7,000.

The facts are briefly as below :—

On the 7th October 1920 Allah Diya, plaintiff, Abdullah, defendant, and one Rahmat Ullah executed an agreement in three parts with the object of obtaining contracts for cutting and removing bamboos from the jungles of the Rewah State. It appears that the State had invited tenders for the purpose, and tenders had already been submitted separately by the three contracting parties as well as by certain relations or partisans of Abdullah and Allah Diya, respectively. The agreement that Allah Diya, plaintiff, Abdullah, defendant, and Rahmat Ullah made was to the effect that whosoever from among them or their partisans should succeed in obtaining contracts they would all participate therein in certain shares. It so happened that the tenders of Habib Ullah and Ibrahim, the son and son-in-law of Abdullah, were accepted. A sum of Rs. 1,000 had already been deposited by them with their tenders, and Rs. 5,000 more were paid into the treasury of the State to obtain the necessary permits. The plaintiff's case was that Rs. 2,700 out of the said sum of Rs. 5,000 were contributed by him, but that the defendants subsequently refused to recognise him as their partner and denied the receipt of the said amount of Rs. 2,700 from him. He therefore sued to recover Rs. 2,700 *plus* Rs. 4,300 stating that he would have made a profit of Rs. 4,300 if the defendants had allowed him to take bamboos of his share. The defence was that the plaintiff himself had resiled from the agreement and had refused to work

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as a partner, that he never made the alleged payment of Rs. 2,700, and that the agreement was void as one of the conditions on which the State granted the contract was that the contractors would take no co-partners or *shikmi* contractors. The trial Court came to the conclusion that the defendants did receive from the plaintiff the sum of Rs. 2,700 and did subsequently break their part of the contract, and that the plaintiff was entitled to recover that sum with Rs. 1,350 as interest by way of damages but that his claim to profits was premature, and could not be allowed. A decree for Rs. 4,050 was accordingly granted to the plaintiff with costs in proportion to that amount. The defendants have appealed through Mr. Tek Chand.

The plea of jurisdiction which the trial Court overruled was again raised in the memorandum of appeal, but Mr. Tek Chand ultimately abandoned it before us as it was clearly untenable. The parties being residents of Ambala they were decidedly subject to the jurisdiction of the Civil Courts of that place for the purpose of this suit.

Mr. Tek Chand has, however, raised another law point, *viz.*, that the suit was incompetent inasmuch as the only remedy open to the plaintiff was to sue for dissolution of partnership and accounts. This objection also which has for the first time been taken in this Court is untenable because there was no partnership as defined in section 239 of the Indian Contract Act and the parties to the agreement were not partners within the purview of that section. The agreement gave each party a certain share in the bamboos that were to be obtained from the jungles of the State, and if the agreement had been carried out each would have got a certain quantity of bamboos irrespective

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of the consequences that might have accrued by sale thereof in the market. Thus no business was contemplated entitling the contracting parties to share the profits thereof, if any. On the other hand, each party was to get and deal with his share of the bamboos as his own personal concern. In the plaint no doubt the written agreement is described as a deed of partnership and the bargain too is referred to as "partnership"; but by the use of the word "partnership" the nature of the transaction could not be altered. The illustrations to section 239 clearly indicate that an agreement to share profits is essential to the constitution of a partnership, and as in the present case there was no such agreement there was no partnership of which a dissolution could be claimed.

Another law point which Mr. Tek Chand argued before us was that the agreement was void being in violation of one of the conditions on which the contract was obtained from the State and according to which the contractor was precluded from taking anybody as his partner without the sanction of the State. But there is nothing to indicate that the agreement in question was forbidden by law. All that can be said of the condition is that it was imposed for administrative purposes. The State might have refused to recognise the partners under the agreement, but none of them was competent to wriggle out of it on that ground. The principles of English Law on this point which are followed in India have been stated by Pollock and Mulla thus:—

"When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context that the object of the

Legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed; but they are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, *e.g.*, the convenient collection of the revenue ."

The above principles were followed in *Bhikanbhai* v. *Hiralal* (1), where the question arose as to whether an agreement by a lessee of tolls from Government under the Bombay Tolls Act, 1875, to sublet the tolls was valid and binding between the lessee and sub-lessee. Section 10 of the Act empowered the Government to lease the levy of tolls on such terms and conditions as the Government deemed desirable. One of the conditions of the lease was that the lessee should not sublet the tolls without the permission of the Collector previously obtained, and another condition empowered the Collector to impose a fine of Rs. 200 for a breach of the condition. The lessee sublet the tolls to the defendant without the permission of the Collector, and then sued him to recover the amount which he had promised to pay for the sublease. It was contended on behalf of the defendant that the sublease was unlawful as it was made without the permission of the Collector, and that the lessee was not therefore entitled to recover the amount claimed by him. But this contention was overruled, and it was held that the plaintiff was entitled to succeed. Parsons, J., after citing the passage set forth above, said: "In our opinion this case falls within the latter class, because the statute itself does not forbid or attach a penalty to the transaction of subletting,

(1) (1900) I. L. R. 24 Bom. 622.

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but merely gives power to impose a condition under which it can be forbidden should the Collector see fit to do so for what can be only purely administration purposes. The Act imposing tolls is an Act passed for the benefit of the revenue and not an Act for the protection of public morals." Ranade, J., said: "As a general rule, the law does not forbid things in express terms, but imposes penalties for doing them, and the imposition of such penalties implies prohibition, and an agreement to do a thing so prohibited is unlawful under section 23 of the Contract Act. * * * As no penalties are prescribed under the (Tolls) Act, the agreement does not *primâ facie* fall under the 1st clause of section 23". The same view was held in similar cases by the Madras and Allahabad High Courts—*vide Abdulla* v. *Mammod* (1), and *Gauri Shankar* v. *Mumtaz Ali Khan* (2). We therefore overrule this contention also.

Mr. Tek Chand's third point is that the alleged payment of Rs. 2,700 was not proved, and he points out that according to the postscript to the agreement the plaintiff should have obtained a receipt for the amount paid, and he contends that in the absence of a receipt the oral evidence on the point is unworthy of credit. He further makes capital of the circumstances that the plaintiff in his examination by the trial Court before settlement of issues stated that he made the payment on the 14th October, while as a matter of fact the deposit in the treasury of the State was made on the 13th October. But the plaintiff stated in the next breath that the payment by him was made on the very day on which the money was deposited in the treasury and thus it becomes clear that he had forgotten the correct date of the payment

(1) (1902) I. L. R. 26 Mad. 156. (2) (1879) I. L. R. 2 All. 411 (F.B.).

and so mentioned 14th instead of 13th October. The oral evidence in support of the payment is very strong and includes the testimonies of two of the witnesses examined by the defendants themselves, namely, Ragunandan and Nand Kishore, both of whom are *lambardars* and appear to be respectable men. They were corroborated on this point by several witnesses produced by the plaintiff. The trial Court having given credence to all this evidence we see no reason for disbelieving it.

Lastly, Mr. Tek Chand contended that the Court below had erred in law in allowing plaintiff interest by way of damages for he himself had claimed profits (to which he was found not entitled) and not interest. But as the defendants received the plaintiff's money under a contract and then dishonestly refused to carry out that contract they were undoubtedly liable not only to return the money, but also to pay damages for breach of the contract or, in other words, wrongful use of the plaintiff's money. It was but fair to estimate damages on the basis of interest at the market rate. The Court below, however, erred in allowing interest " at a very high rate ". We are of opinion that Rs. 9 *per cent. per annum* for three months, *i.e.*, up to the date on which the suit was instituted, and Rs. 6 *per cent.* after that till realization will be quite sufficient.

We therefore accept the appeal to this extent and modify the decree of the trial Court accordingly. The defendants will pay plaintiff's costs on Rs. 2,760-12-0 (Rs. 2,700 *plus* Rs. 60-12-0 interest for three months) throughout.

N. F. E.

Appeal accepted in part