ORIGINAL CIVIL.

Before Mr. Justice Candy.

1897. *January* 11.

AGA GULAM HUSAIN (PLAINTIFF) *v.* SIR ALBERT DAVID SASSOON AND OTHERS (DEFENDANTS).*

Partnership—Death of partner—Right of representative of deceased partner to sue for a specific asset—Contract Act (IX of 1872), *Sec.* 45.

On the death of a partner leaving a surviving partner still carrying on the business of the firm, the representative of the deceased partner may sue for and recover debts due to the firm, although the firm's assets in the hands of the surviving partner are already sufficient to answer all the claims made on behalf of the deceased partner and although the surviving partner is willing to satisfy such claims and disapproves of, and refuses to join in, the suit brought by the representative of the deceased partner.

THE plaintiff was the administrator in Bombay of one Haji Abool Cassum of Bushire, who in his lifetime carried on business at Bushire in partnership with his brother Haji Ali Akbar (defendant No. 5).

The firm traded in the joint names of the two brothers and for many years had dealings with the firm of Messrs. David Sassoon and Co. of Bombay, the partners in which were defendants Nos. 1, 2, 3 and 4. Accounts of these transactions were periodically sent by Messrs. David Sassoon and Co. addressed to the firm at Bushire. Messrs. David Sassoon and Co. also held in deposit two lákhs worth of Government promissory notes which belonged to the firm of Haji Abool Cassum and Haji Ali Akbar at Bushire. These notes were included in the accounts furnished from time to time by David Sassoon and Co. to that firm.

On the 7th February, 1893, Haji Abool Cassum died at Bushire, leaving five sons and a daughter; two of the sons, *viz.*, Aga Mahomed Karim and Aga Mahomed Ismail, had attained majority; the rest of the children were minors.

At the time of Haji Abool's death, David Sassoon and Co. owed his firm a considerable sum of money in respect of the dealings between them. An account for the year 1892 had been duly sent to Bushire addressed as usual to the firm, and the

* Suit No. 20 of 1896.

receipt of the account was acknowledged by a letter signed as usual with the name of the Bushire firm and sent to David Sassoon and Co. of Bombay. This letter of acknowledgment was dated the 6th February, 1893, *i. e.* the day before Haji Abool died.

The Bushire firm under the surviving partner continued to carry on its business as before, notwithstanding the death of the partner Haji Abool Cassum. A few further transactions took place between it and David Sassoon and Co. of Bombay, who continued to furnish their accounts addressed, as before, to the firm. No objections were taken to these accounts or had been taken to any of the previous accounts furnished by David Sassoon and Co.

In March, 1894, and February, 1895, Haji Ali Akbar (defendant No. 5), the surviving partner in the Bushire firm, settled with Aga Mahomed Ismail and Aga Mahomed Karim, two of the sons and heirs of his deceased brother and partner Haji Abool Cassum. The settlements were respectively reduced to writing and were verified by the Vice-Consul at Bushire. By these settlements certain property was allotted to these heirs as their respective shares in their deceased father's property.

On 8th October, 1895, the plaintiff as duly constituted attorney of Aga Mahomed Karim and Aga Mahomed Ismail, the two above-mentioned sons of the deceased Haji Abool Cassum, obtained from the High Court letters of administration (for their use and benefit and limited until they or either of them should obtain letters of administration) of the property and credits of the said Haji Abool Cassum to have effect throughout the province of Bombay. On the 23rd October, 1895, as such administrator he called upon Messrs. David Sassoon and Co. for an account of all moneys, &c., belonging exclusively to the deceased Haji Abool Cassum or jointly to him and his brother Haji Ali Akbar. The next day David Sassoon and Co. furnished an account showing a sum of Rs. 1,63,971 standing to the credit of the Bushire firm and referring to the accounts previously rendered to the Bushire firm. The plaintiff then demanded copies of the previous accounts furnished by Sassoon

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and Co., to which the latter replied that accounts had been regularly furnished to the surviving partner, to whom he (the plaintiff) might refer for copies.

The plaintiff then filed this suit, praying

(1) For an account of the dealings between David Sassoon and Co. and the Bushire firm and of the securities held by David Sassoon and Co., &c.

(2) That David Sassoon and Co. might be ordered to pay to the plaintiff as administrator or to him and Haji Ali Akbar such sum as might be found due on taking accounts and to deliver up all securities, &c.

The surviving partner in the Bushire firm (Haji Ali Akbar) took no notice of the letters and notices addressed to him by the plaintiff's solicitors. The plaintiff, therefore, made him a defendant in the suit (defendant No. 5). A summons was served upon him, but he did not appear.

In their written statement David Sassoon and Co. stated that they were always willing to hand over the money and the securities in their possession to the persons entitled, but for their own protection wished to have it decided who was entitled. They alleged that Haji Ali Akbar (defendant No. 5), the surviving partner of the Bushire firm, entirely repudiated and denied the plaintiff's right to the accounts, moneys and securities claimed by him and that they had notice of his settlement with two of the heirs of the deceased. They also submitted that, in the event of accounts being ordered to be taken by the Court, the accounts which they had rendered to the Bushire firm before and after the death of Haji Abool Cassum, to none of which any objection had ever been taken, should be held binding as settled accounts.

At the hearing the following issues were raised :—

1. Whether the plaintiff is entitled to maintain this suit.

2. Whether, if so, the accounts rendered by David Sassoon and Co. (defendants Nos. 1—4) to the fifth defendant, and not objected to, are not binding on the plaintiff.

3. General issue.

Kirkpatrick and *Scott* for the first four defendants (Sassoon and Co.) :—We admit the money claimed is due from us to the Bushire firm. We only desire to ascertain to whom to pay it. That firm is still carrying on business, and the surviving partner may perhaps demand the money from us. The question is whether the representative of a deceased partner of a foreign firm can sue debtors of that firm to recover a specific asset although there is a surviving partner still carrying on the business who does not join in the suit, who desires to manage and to wind up affairs of the firm himself, and who is willing to satisfy all the claims of the deceased partner. There is no suggestion that the surviving partner here (defendant No. 5) desires to commit any fraud upon the estate of his deceased partner or that he and these defendants are in collusion. On the contrary it is alleged and is not denied that he has already recognised and settled the claims of the two sons of his deceased partner whose attorney the present plaintiff is. Nor is it suggested that the firm's assets now in his hands are not sufficient to meet the claims made on behalf of the deceased partner and his heirs. Under these circumstances has the plaintiff a right, independently of the surviving partner and without any necessity shown, to sue persons who owe money to the firm? To give the representative of a deceased partner an independent right to sue, at his pleasure, all or any of the debtors of the firm, puts the firm and the surviving partner at the mercy of a stranger whose proceedings may possibly ruin both.

We submit that his right is merely a right to sue the surviving partner for partnership accounts and for a share in the final balance when ascertained. That is so in England—Lindley on Partnership (5th Ed.), pp. 288, 344.

Section 45 of the Contract Act (IX of 1872) will be relied on. That section clearly does not apply to partnerships, which are dealt with in a separate chapter of the Act. The very words of the section itself exclude partnerships, for the mere fact of dealing with a partnership, as to which special rules apply, sufficiently shows the contrary intention mentioned in the section—*Gobind Prasad* v. *Chandar Sekhar* [1]; *Ram Narain* v. *Ram Chunder* [2];

(1) I. L. R., 9 All., 486. (2) I. L. R., 18 Cal., 86.

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Imam-ud-din v. *Liladhar* (1) ; *Motilal* v. *Ghellabhai* (2) ; *Vaidyanatha* v. *Chinnasámi* (3).

This Court has no jurisdiction to take general partnership accounts of a firm at Bushire—*Suganchand Shivdas* v. *Mulchand*(4) ; *Kessovji Damodar* v. *Luckmidas Ladha*(5). What decree can it give in this suit for a single asset? The plaintiff has no right to the whole, and the part to which he may perhaps be entitled cannot be ascertained without taking general accounts. As to the accounts regularly furnished by the defendants to the Bushire firm, they must be taken as settled accounts. No objection has been taken to them.

Inverarity (with *Lang* Advocate General) for the plaintiff:—*Motilal* v. *Ghellabhai*(2) practically decides this case, for it assumes that the representatives of a deceased partner can sue. If they could not sue, the question as to the necessity of joining them as parties could not arise. Under section 45 of the Contract Act the right of the deceased co-contractor survives to his representative. If the right survives, there is a remedy—Cunningham and Shephard's Contract Act, notes to section 45. In *Motilal* v. *Ghellabhai*(2) Farran, J., (at page 11) says: "We cannot doubt but that these sections (*i.e.*, 43 and 45) relate to partners as well as to other co-contractors." From *Rivett-Carnac* v. *Goculdas*(6) it is also clear that the representative of a deceased partner has a separate and independent right of suit. In that case he was allowed to recover a specific asset from a surviving partner without a general partnership account.

As to the accounts we are entitled to have accounts from the defendants from the beginning of their dealings—at all events from the end of 1891. The account for 1892 did not arrive at Bushire until after Abool Cassum's death. The defendants, who do not deny their liability to the firm, ought to have paid the amount due into Court.

Kirkpatrick in reply:—We could not pay into Court. Section 376 of the Civil Procedure Code (Act XIV of 1882) does not

(1) I. L. R., 14 All., 524.
(2) I. L. R., 17 Bom., 6.
(3) I. L. R., 17 Mad., 108.
(4) 12 Bom. H. C. Rep., 113 at p. 125.
(5) I. L. R., 13 Bom., 404.
(6) I. L. R., 20 Bom., 15.

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apply to such a case as this, and it is the only section which provides for payment into Court.

CANDY, J. :—Two brothers, Haji Abool Cassum and Haji Ali Akbar, carried on a partnership business at Bushire in Persia in their joint names. In the course of this business they had extensive dealings with the Bombay firm of David Sassoon and Co., who acted as agents for the Bushire firm in purchasing and selling goods, and (apparently as cover) held Government paper to the extent of two lákhs of rupees on behalf of the said Bushire firm.

It is admitted that David Sassoon and Co. have, at this present time, as the result of their transactions with the Bushire firm, a large sum of money to the credit of that firm, and also they are responsible to the Bushire firm for a large sum of money held by Sassoon and Co. in China to the credit of the Bushire firm.

Abool Cassum died at Bushire on 7th February, 1893, leaving him surviving two adult sons, Aga Mahomed Karim and Aga Mahomed Ismael, and two other sons and one daughter, these three being minors. It is clear from the correspondence which has been filed in the case that the surviving brother and partner, Haji Ali Akbar, claimed to be sole executor of his deceased brother's estate, and he asked David Sassoon and Co. to be his agents and to obtain probate of his brother's will, mentioning that one Aga Gulam Husain was using his influence with the adult sons of the deceased to obtain probate in the name of Mahomed Karim. David Sassoon and Co. pointed out that they could not act as agents of Ali Akbar, but that he should come to Bombay and take all necessary steps after obtaining letters from his grown-up nephews to act on their behalf. They also pointed out that the will of the deceased could not be acted upon, as it seems to have been executed (in 1869) for the special purpose of a pilgrimage. Haji Ali Akbar replied that he had come to a settlement with his elder nephews. But he took no steps to come to Bombay, and administer his brother's share of the assets of the partnership in Bombay.

In the meanwhile, the above-mentioned Gulam Husain, as the duly constituted attorney of the said Mahomed Karim and

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Mahomed Esmail, obtained letters of administration (dated 8th October, 1895) of the property of the said Abool Cassum within the Bombay Presidency for the benefit of the said Mahomed Karim and Mahomed Ismail, and limited until they or either of them should obtain letters of administration.

Armed with these letters Gulam Husain's solicitors wrote on the 23rd October, 1895, to David Sassoon and Co. for an account of all moneys due by them to the Bushire firm or to Abool Cassum personally. D. Sassoon and Co.'s solicitors replied, furnishing an account of what in their clients' books was shown due to the Bushire firm, and refusing to recognise the right of Gulam Husain to deal with the same except with the concurrence of Ali Akbar. They further stated that accounts had been rendered from time to time to Ali Akbar. Gulam Husain's solicitors also wrote (November, 1895) to Ali Akbar at Bushire, asking him to join in the administration of the estate of the deceased in recovering what was due from David Sassoon and Co. In that letter, mention was made of the accounts of the partnership having been made up and settled between Ali Akbar and the two adult sons of the deceased, the statement of account being signed by Ali Akbar and the two sons. It does not appear that any answer was received to that letter.

The present suit was filed on 9th January, 1896, by Gulam Husain against David Sassoon and Co. and Ali Akbar, praying that an account should be taken of all the dealings between Sassoon and Co. and the Bushire firm, and that David Sassoon and Co. should hand over to him, or to him and defendant Ali Akbar, the balance found due and the Government paper above mentioned. Defendant Ali Akbar has not appeared to plead in the suit. It being shown to the Judge in Chambers that service of the summons could not be effected under section 90 of the Civil Procedure Code (Act XIV of 1882) an order was made that the summons should be sent by registered post, and that such should be deemed good and effectual service. The postal cover has been returned as "refused." I held that the summons was duly served. The ruling in *Jagannath* v. *J. E. Sassoon*[1] does not

(1) I. L. R., 18 Bom., 696.

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apply, as the defendant in that case resided in British territory. It would be practically impossible in the present case to prove directly that the person to whom the postal official at Bushire tendered the cover, and by whom it was "refused," was the defendant Ali Akbar. But there is the indirect evidence of the fact that the cover is most clearly addressed to Ali Akbar, a person who must be well known in Bushire, and there is the affidavit before the Judge in Chambers, showing that Ali Akbar knows of this suit. To rule that there can be no valid service on Ali Akbar (for that would be the effect of the ruling that the present service is ineffectual) would amount to a denial of justice, assuming that this Court has jurisdiction. That is the main question which arises on the written statement filed by David Sassoon and Co., and forms the subject of the first issue raised by their counsel "whether the plaintiff is entitled to maintain this suit."

Mr. Kirkpatrick's argument may be put briefly thus :—There is no authority for the representative of the estate of a deceased partner in a foreign firm (there being a surviving partner of the foreign firm still carrying on the business of that firm) coming into this Court as such representative, and claiming to recover a specific asset from a debtor of the firm. All he can do in the present case is to sue Ali Akbar for a partnership account in the Court in Persia, and, if the Persian law allows a receiver to be appointed, to obtain such appointment; and such receiver could then come here and ask David Sassoon for an account, and recover the specific sum found due. Section 45 of the Contract Act does not apply to partnerships: even if it does, there is here a "contrary intention" impliable from the fact that the promisees were partners, and the ordinary common law of partnership would thus apply by which the right of action belongs to the surviving partner only. As this Court cannot take a general account of the whole partnership of the firm in Bushire, complete justice cannot be done here between the surviving partner and the representative of the deceased partner, and it cannot entertain the suit for the recovery of a specific asset. Such, in brief, is the learned counsel's argument.

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Now, first as to the word "foreign": this may really be at once eliminated from the argument. In this case part of the cause of action certainly arose in Bombay, and leave to sue has been obtained under clause 12 of the Letters Patent. The fact, therefore, that the surviving partner, who is sued with the Bombay debtors of the firm, is a Persian subject, not ever living or carrying on business within the jurisdiction of this Court, cannot oust the jurisdiction of the Court. Eliminating the word "foreign," the argument then comes to this that the right of the representative of the estate of a deceased partner is limited to a general suit for the partnership account (which in this case would not lie in any Court in British India); and such apparently is the reasoning of Sir J. Edge, C. J., in *Gobind Prasad* v. *Chandar Sekhar*[1], where he says: "The legal representative in this case would not be entitled necessarily to a moiety of the amount recovered in the action: his share of the amount recovered would depend on a settlement of accounts on the realization of the partnership assets, and it would, in my judgment, be highly inconvenient and possibly mischievous to allow him to interfere in the realization of the assets, unless through the intervention of the Court, by the appointment of a receiver in cases in which such interference by the Court might be necessary."

But in this Court I am bound by the decision of the appeal Court in *Rivett-Carnac* v. *Gouldas*[2], in which case the headquarters of the partnership were at Karáchi, and the partners all dwelt and worked for gain outside the jurisdiction of this Court. On the dissolution of the partnership by the death of one of the partners, no adjustment of the partnership accounts was made. The surviving partners had, however, recovered certain assets of the firm which were in Bombay in the hands of an officer of the Court, and the suit in question was brought by the representative of the deceased partner against the surviving partners and the holder of the assets to recover those assets on the ground that they belonged wholly to the estate of the deceased partner. Leave was obtained under clause 12 of the Letters Patent. On the question of jurisdiction the appeal

(1) I. L. R., 9 All., 486. (2) I. L. R., 20 Bom., 15.

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Court were quite unable to feel any doubt (see pp. 41-45 of the report), and their Lordships decreed in the terms of para. B of the plaint, that if necessary for the purposes of the suit the account of the partnership between the estate of the deceased partner and the surviving partners should be taken by this Court.

Now here no such general partnership account is asked for or is necessary. The representative of the deceased partner simply says to the surviving partner: "Join me in recovering an amount due to the firm in Bombay: if you refuse, then I must sue alone and join you as defendant; the only account at present to be taken is that of the debtor of the firm in Bombay." Is it a valid answer to say "The Court has no jurisdiction, and cannot assist you, because the Court cannot recognise you; it can only recognise the surviving partner if he chooses to sue to recover this asset, or a validly appointed receiver, if such can be appointed by the Courts and law of Persia?" The decision in the case quoted above gives an answer in the emphatic negative.

There remains the argument regarding section 45 of the Contract Act. That point has been definitely settled by this Court. The answer is shadowed forth in the judgment just quoted at the top of page 43 of the report. But in the previous case of *Motilal* v. *Ghellabhai*[1] the Chief Justice (then Mr. Justice Farran) with the late Acting Chief Justice laid down clearly that section 45 of the Contract Act does relate to partners as well as to other co-contractors. Not only so, but the *ratio decidendi* of the whole judgment goes to show that in this Court we cannot accept the argument now put forward by Mr. Kirkpatrick, *viz.*, that in India the right to enforce a partnership contract rests with the surviving partner only. It is shown in that judgment that the only logically consistent result of the application of section 45 of the Contract Act to partnerships is that "the right to performance of the contract, as far as the other contracting party is concerned, *rests just as much with the representative of the deceased partner as with the surviving partner*," and that though it is logically inconsistent to allow the surviving partner to sue without joining the representative of the deceased partner as a party to the suit, yet it was not necessary, notwith-

[1] I. L. R., 17 Bom., 6.

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standing the provisions of the Contract Act, to change the old practice of the Small Causes Court which permits the surviving partner to sue alone.

Of course, it follows that the representative of a deceased partner can join the surviving partner in a suit; and if the latter does not join as plaintiff, then he can be made a defendant, and so a party to the suit. What right have David Sessoon and Co., the debtors of the firm, to raise any objection? It is no answer to say that under section 63 of the Contract Act Ali Akbar could have given them a valid receipt and discharge for their liabilities to the Bushire firm. As a fact they admit that they have not discharged their liability to the firm. On the contrary when they had notice that Ali Akbar had made an adjustment of the accounts of the firm with his two adult nephews, Mohamed Karim and Mohamed Ismail—(see the accounts 2, 3 and 4)—in March, 1894 and February and May, 1895, they refused payment of a draft drawn on them apparently in liquidation of that adjustment. Subsequently, in July, 1895, Mohamed Karim and Mohamed Ismail gave a power of attorney to the present plaintiff to obtain letters of administration and so recover the debt due in Bombay to the firm. How far Mohamed Karim and Mohamed Ismail may be bound to Ali Akbar by the alleged settlement of partnership accounts, it is not for this Court now to say. But the fact of that adjustment, if it is a fact, cannot prevent them or the plaintiff on their behalf from recovering the debt due in Bombay from David Sassoon and Co., so long as Ali Akbar is made a party to the suit. Nor can the writ of attachment (Exhibit 11, with which compare the letters O and P) under section 268 of the Civil Procedure Code, or the letter from the Bank of Persia in London to the firm of Sassoon and Co. in London (Exhibit 12), be pleaded by David Sassoon and Co. as a bar to the present suit, that is, to the account being taken in order to show what is due from David Sassoon and Co. to the Bushire firm. The finding on the first issue must, therefore, be in the affirmative.

There remains the question as to the accounts rendered by David Sassoon and Co. to the Bushire firm. Clearly they are not settled, that is, adjusted accounts. But they are stated accounts. There

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is the evidence of the manager of David Sassoon and Co. that they were never objected to. The last one received by the Bushire firm before the death of Abool Cassum was received and acknowledged the day before his death. That was up to the end of 1892. It follows that all the accounts rendered up to and including the period up to the end of December, 1891, must be taken as stated accounts, no objection having been made thereto within a reasonable time. Those accounts, therefore, must remain in full force and vigour as stated accounts, except so far as they can be impugned by the plaintiff, who has the burden of proof on him to establish errors and mistakes (Story's Equity Jur., section 523). The fact that the Bushire firm had no agent in Bombay, and no partner of the firm came to Bombay to examine David Sassoon and Co.'s accounts with vouchers, &c., would not make the account less stated accounts. It is for him to surcharge and falsify with regard to the accounts rendered up to and including 1891, and, subsequently, the account must be taken as open and treated accordingly by the Commissioner in the ordinary way. He should include the moneys due on account of the China transaction and referred to in paragraph 4 of the written statement, and also the Government promissory notes with interest held by David Sassoon and Co. on behalf of the Bushire firm. It is unnecessary to pass any decree now regarding those notes, as the interest has always been included in the account, and the final order as to the disposal of the notes can be passed when the final decree is to be made.

There will be a reference to the Commissioner in accordance with the above directions. All costs and further directions reserved.

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