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It appears to us that if the plaintiff establishes his right, this is eminently a case for an injunction. If this relief be not granted, there is the danger of a multiplicity of legal proceedings, or worse still, that the parties will take the law into their own hands, and in our opinion the Court should be ready as far as possible to grant such relief as will tend to prevent the risk of these evils.

We may further point out that even had damages been the proper remedy, it would have been incumbent on the District Judge, according to the authority of *Callianji* v. *Narsi Tricum*,[1] to have decided the first four issues for the purpose of determining whether damages should be awarded.

The decree must be reversed, and the case remanded for retrial on the merits. Costs will abide the result.

Decree reversed, case remanded.

(1) (1895) 19 Bom. 764.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Batty.

1902. *July* 23.

KASHINATH KEDARI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* GANESH HARI NARKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Partnership — Two firms — Common partners — Advances by one firm to the other — Suit to recover such advances — Partnership account necessary — Practice — Procedure.

The two plaintiffs were the owners and sole partners of the firm of Apaji Kashinath. They were also partners in the defendant firm of Ganesh Hari Narkar, in which there were three other partners besides themselves. Between 1891 and 1896 the firm of Apaji Kashinath advanced money to the firm of Ganesh Hari Narkar, which latter firm ceased to do any business in 1897, although the partnership was not formally dissolved. In 1899 the plaintiffs brought this suit against the firm of Ganesh Hari Narkar to recover their advance. Being partners in the firm, the plaintiffs appeared also as defendants (Nos. 3 and 4) in the suit, the real object of the suit being to recover from the other partners (defendants 1, 2 and 5) their share of the amount alleged to be due by the firm to the plaintiffs.

* First Appeal No. 106 of 1901.

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Held, that the suit as framed was not maintainable. The money claimed was only one item in the partnership account between the plaintiffs and the defendants. Without taking a general partnership account it was impossible to say whether there was anything due by the defendants to the plaintiffs.

Rustomji v. *Purshotamdas*[1] followed.

APPEAL from the decision of Ráo Bahádur A. G. Bhave, First Class Subordinate Judge of Sholápur.

The plaintiffs' firm of Apaji Kashinath consisted of two partners, viz., (1) Kashinath Kedari and (2) Bapu Nana.

The defendants' firm, which carried on business under the name of Ganesh Hari Narkar, consisted of five partners, viz., the following defendants:—(1) Ganesh Hari, (2) Eknath Bapu, (3) Kashinath Kedari, (4) Bapu Nana, (5) Hari Krishna.

Thus both the partners in the plaintiffs' firm were also partners in the defendants' firm (defendants 3 and 4).

The plaintiffs' firm advanced money to the defendants' firm between 1891 and 1896 and received two acknowledgments of balances due, which were executed on behalf of the defendants' firm by defendant 2 and were dated 1st July, 1894, and 4th September, 1896. The defendants' partnership had not been formally dissolved, but all business had ceased in 1897.

This suit was filed by the plaintiffs in 1899 to recover from the defendants Nos. 1, 2 and 5 the sum of Rs. 9,554, being their share of the amount due from the defendants' firm. The plaintiffs, who, as above stated, were also partners in the defendants' firm, were made nominal defendants in the suit (defendants 3 and 4).

The defendants 1 and 2 contended that the plaintiffs being their partners could not recover any amount from them until the general partnership accounts of the firm were adjudged and settled.

The Subordinate Judge held that the plaintiffs could not maintain a claim as creditors of the defendants until it was shown that they were really creditors of the defendants, who were also their partners, and that in order to ascertain this it was necessary that the partnership accounts of the defendants' firm, in which all the parties were co-partners, must therefore be adjusted and

(1) (1901) 25 Bom. 606.

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settled before this suit could be maintained. In his judgment he said:

I shall next proceed to consider the third issue which raises the question as to whether the plaintiffs, who are also partners in the defendants' firm, cannot maintain this suit as creditors of that firm for the advances made to it without first settling the partnership accounts; I answer the question in the negative on the authority of *Rustomji* v. *Purshotamdas* (3 Bom. L. R. 227), where it has been held that 'it is not permissible to one partner to sue his co-partners for money lent by him to a partnership of which they are all members, because the advances made can only form an item in the partnership accounts.' Were it not so, a creditor who is also a partner might be able to recover his dues from partnership without contributing his quota to its other liabilities or losses sustained in the business. The rule laid down by the above decision of the High Court appears to me to be applicable with all force to the facts of this case in which the plaintiffs are, as was the plaintiff in the case cited, interested in the subject-matter both as creditors and debtors. This case only differs from *Rustomji* v. *Purshotamdas* in this. In the latter case one only of the two plaintiffs, who were members of a joint Hindu family, was a partner in the defendants' firm, whereas in this case both the plaintiffs are partners in the defendants' firm. The Chief Justice in that case observed that if Purshotamdas had been the sole creditor he clearly could have recovered the amount in a suit properly framed; had the advance been out of Nagindas' separate moneys, a suit to recover that money would not have lain. The principle enunciated by this decision, in my opinion, governs this case, and according to it it must be held that the present suit will not lie.

Plaintiffs appealed to the High Court.

G. S. Rao for appellants (plaintiffs):—We submit that this suit is maintainable although two of the partners are common to the firms of plaintiffs and defendants. Such a suit will lie so long as all the parties are brought on the record. The plaintiffs are entitled to a declaration, although that decree cannot be executed until other partnership debts are paid off.

M. B. Chaubal for the respondents (defendants):—The principle contended for by the other side applies only in cases where the partnership is a going concern: it has no application to a case like the present, where the business of the partnership has already ceased. The only way open to the plaintiff is to sue for winding up the partnership and for general accounts.

CROWE, J.:—The plaintiffs in this suit, who were also partners in the defendants' firm, sued to recover the sum of Rs. 9,554

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from defendants 1, 2 and 5, the plaintiffs' names appearing among the defendants as defendants 3 and 4. The sum claimed was the three-fourths share of defendants 1 and 2 of the balance alleged to be due by the firm for advances made to it between 8th November, 1891, and 4th September, 1896. The plaintiffs relied on two acknowledgments of balances executed by defendant 2 on 1st July, 1894, and 4th September, 1896, respectively, on behalf of the firm.

The first defendant contended that he was not a partner, that the balance claimed was not due from the firm and that he was not bound by the acknowledgment executed by defendant 2, who was acting in collusion with plaintiffs, that plaintiffs could not maintain the suit until the partnership accounts were settled, and that the claim was time-barred.

The second defendant replied that the balance claimed was not due, and that he could not be held responsible for any balance due to plaintiffs until the accounts of the partnership had been adjusted and settled.

The First Class Subordinate Judge found that defendant No. 1 was a partner in the firm, but that the plaintiffs were not competent to maintain this suit without first settling the partnership accounts by a separate suit or otherwise.

The only point which arises in this appeal is whether the suit is maintainable on this ground. The plaintiffs relied on the deed of partnership dated 29th June, 1894, three years after the partnership was entered into. In a previous suit, No. 189 of 1897, the plaintiffs sued the first defendant alone on the same agreement of partnership, alleging that he had undertaken a personal liability for a debt due by the shop of one Rajaram K. Narkar, the uncle of the first defendant. It was held by the lower Courts, rejecting the claim, that the amount of the debt had been fraudulently entered in the partnership agreement, which was therefore void, and that the defendant had not expressly agreed to take upon himself liability for the debt; and on appeal to the High Court the decree of the lower Court was confirmed.

The question before us is whether it is competent in the circumstances of this case for the plaintiffs to sue their partners for payment of the advances alleged to have been made to the

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firm between 1891 and 1896. It is admitted that the partnership has not been formally dissolved, though all dealings as a firm ceased in 1897. The Subordinate Judge has relied on the ruling of Jenkins, C.J., in *Rustomjee* v. *Purshotamdas*,[1] who held that where an individual is a common partner in two firms, no action can be brought by one firm against the other upon any transaction between them while such individual is a common partner, and this doctrine was founded on the rule that the same individual, even in two capacities, cannot be both plaintiff and defendant in one and the same action. Mr. Rao has argued that since the passing of the Judicature Acts and the Rules of the Supreme Court there has been a change in the law in this respect, and that it is open to a partner to sue his co-partners, and that a Court of Equity always allowed a suit by one partner against another. No authority has been cited to us to show that an action will lie for money lent to the firm of which the plaintiff was himself a member, for, as remarked by the Chief Justice in the case above cited, the advance only formed an item in the partnership account. On this point Lindley, when discussing the alterations in the law and the improvement in legal proceedings by and against partnerships effected by the passing of the Judicature Acts, observes (page 267): "There appears to be no reason why, if two firms have common partners, an action should not be maintained by one firm against the other, not perhaps in their mercantile names, but by those members of one firm who are not common to both, against the members of the other firm."

The question then arises whether, on considerations of equity, the Court below was competent to entertain this suit. We think not. It seems clear that justice cannot be done between the parties without taking a general account, and therefore no action in this form will lie. No settlement of accounts has taken place. The first defendant disputes the acknowledgments executed by defendant 2 as not binding on him. The second defendant contends that the partnership business has resulted in a profit and nothing is due to the plaintiffs, and that he cannot be held responsible for any balance due till the account of the partner-

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ship business is adjusted and settled. By the express terms of paragraph 10 of the partnership agreement, unless the debts due by the shop business carried on in the name of Ganesh Hari to local and up-country creditors are paid off, the interest-bearing amount belonging to Apaji Kashinath, mentioned in paragraph 3, is not to be drawn by him. It is quite clear that without taking an account it is impossible to ascertain whether there remain any outstanding claims.

We think, therefore, that the First Class Subordinate Judge was right in his view that the suit in its present form is not maintainable. We affirm his decree and dismiss this appeal with costs.

Decree confirmed.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.

1902.
July 25.

JUGMOHANDAS VURJIWANDAS (ORIGINAL DEFENDANT), APPELLANT, *v.* NUSSERWANJI JEHANGIR KHAMBATTA (ORIGINAL PLAINTIFF), RESPONDENT.*

Damages—Mode of assessing damages where no proof of market price—Contract—Breach of contract.

On 21st October, 1899, defendant contracted to deliver to the plaintiff at Bombay 1,000 tons of Powell Duffryn coal, January to May shipments, 200 tons to be supplied each month. The first shipment was due in middle of February. Defendant failed to deliver any of the coal, and the plaintiff did not purchase any coal against defendant's contract. The plaintiff now sued for damages for breach of the contract. The only question was as to the mode of assessing damages. There was practically no coal in Bombay of the description contracted for at the dates at which delivery should have been given and consequently no market rate could be proved. At the hearing plaintiff produced a statement showing the rates at which he had, during the contract period, settled certain contracts for Powell Duffryn coal which he had with the Bombay Company, Limited.

Held, that under the special circumstances of the case, and in the absence of any evidence as to a market rate, the figures given in this statement might properly be received in evidence for the purpose of fixing the actual value of the coal at the dates of breach, thus affording a measure of the damages suffered.

* Suit No. 897 of 1900; Appeal No. 1188.