PRIVY COUNCIL.

P. C.*
1898.
November 15,
December 10.

BHAGWANDAS MITHARAM (Defendant No. 2), Appellant, and RIVETT-CARNAC (Plaintiff No. 2), Respondent.

On appeal from the High Court at Bombay.

Partnership—Death of partner—Subsequent recovery of assets by surviving partner—Suit by administrator of deceased partner against surviving partner for recovered assets—Suit for partnership account—Limitation Act (XV of 1877), Secs. 7 and 17.

In 1889, one Hemabai, a widow and partner in a firm carrying on business in partnership with Goculdas and Bhagwandas (defendants Nos. 1 and 2) in Sind and at Behrin in the Persian Gulf, died, and the partnership was then dissolved. She had no children, but it was alleged that she had adopted one Purshotam, the brother of the second defendant. On the 13th February, 1890, the guardian of one Kissondas, a minor (her husband's nephew), applied to the High Court of Bombay for letters of administration to her estate, alleging that Kissondas was her heir and next of kin. A caveat was filed by her father and others, in which they denied that Kissondas was her heir, and alleged that Purshotam had performed her funeral ceremonies. The matter came on as a suit on the 19th February, 1894, when an order was made without prejudice to any of the questions raised by the issues, dismissing the application and ordering letters of administration to Hemabai's estate to issue to the Administrator General of Bombay. Letters of administration were accordingly granted to him on the 30th March, 1894.

In the meantime, however, *viz.*, on the 12th April, 1893, Bhagwandas (defendant No. 2) had filed three suits in the High Court of Bombay, in the name of himself and Goculdas (defendant No. 1), as surviving partners of Hemabai's firm, to recover certain debts due to that firm. Disputes subsequently arose between Bhagwandas and Goculdas, and, by a consent order of the 22nd July, 1893, it was ordered that any money recovered in the said three suits should be paid over to a receiver (defendant No. 3) to be held by him until further order. On the 1st August, 1893, consent decrees were passed in the above three suits for a total sum of Rs. 28,335, which was forthwith handed over to the receiver.

On the 22nd April, 1894, this suit was filed by the Administrator General of Bombay as administrator of Hemabai appointed as above stated. He claimed to recover the whole sum paid to the receiver, alleging that the first and second defendants as her partners were largely indebted to the firm, and that the money really belonged to her estate. He prayed that the receiver might be directed to pay over the money to him, and, if necessary, the partnership accounts should be taken. The second defendant (*inter alia*) pleaded that the suit was one for

* Present: Lords Ashbourne, Hobhouse, and Macnaghten, and Sir R. Couch.

partnership accounts, and as such was barred by limitation, and also that the High Court of Bombay had no jurisdiction to try it.

Held, affirming the decision of the High Court of Bombay, that this suit was not barred by time; the latter Court having decided on the ground that the Administrator General having been the only person capable of suing within the meaning of section 17 of Act XV of 1877 (Limitation) that section operated to allow the period of article 106 to be computed from the issue of administration of this estate.

A decree was made for a general partnership account to establish what was due to the estate of the deceased in respect of her share in the partnership, and of any money of hers employed in the business continued by the survivors.

APPEAL from a decree (13th August, 1895) of the appellate High Court, varying a decree (19th November, 1894) of the High Court in the Original Jurisdiction.

The proceedings in this suit prior to this appeal are reported in *Rivett-Carnac* v. *Goculdas Sobhan Mull, Bhagwandas Mitharam and Limji Navroji Banaji* [1], where the judgments of the Court of Original Jurisdiction and of the appellate High Court are given at length. And there the facts of the case are all stated, as well as in the judgment on this appeal.

This suit was brought on the 22nd April, 1894, by the Administrator General of Bombay, who obtained, on the 30th March, 1894, administration of the estate of a widow, Hemabai, deceased on the 1st September, 1889, then being in partnership with the first and second defendants in a business carried on at Karáchi and Behrin in the Persian Gulf. The claim was for Rs. 28,335 in the hands of the third defendant, the receiver appointed to have charge of that money, which had been paid in discharge of decrees obtained by the first and second, as surviving partners, against debtors to the firm in which the deceased had been a partner, that firm having been continued by the survivors.

The plaint stated that the whole of the capital was supplied by Hemabai's late husband, who died in 1884, leaving her as his heiress; and alleged that the first defendant was a working partner, with whom Hemabai carried on the business, and that they had admitted the second defendant Bhagwandas, who also supplied no capital: that, at her death, the first and second were each in-

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debted to the partnership, and had nothing to receive therefrom, as would appear on taking the accounts, if found necessary to be taken.

The prayer for relief was (*a*) "that it may be declared that the said moneys in the hands of the receiver belong to the estate of Hemabai and that the plaintiff is entitled to the same; (*b*) that, if necessary for the purposes of this suit, the account of the partnership, between Hemabai and the first and second defendants, may be taken."

Bhagwandas Mitharam alone defended, alleging that the accounts of the partnership had never been taken, and that the right to an account was now barred under article 106 of Act XV of 1877. The money now claimed would have come in as an outstanding debt to the partners. He also counter-claimed a share in Rs. 5,292, a debt due to the firm, but paid by the debtor to the plaintiff.

Goculdas assented to the share of Hemabai being taken by her representative.

The principal questions raised at first, and again on this appeal, were, (1) whether after the dissolution of a firm by the death of a partner, and the continuance of its business by the survivors, assets consisting of debts due to the late firm could, when realized by the survivors, be apportioned to the representative of the deceased, as belonging to her estate, without an account being taken of the partnership; (2) whether such an account having been a necessity, and being now barred by article 106, as the defence insisted, the suit must be dismissed.

The first Court (Candy, J.) was of opinion that the claim to a general account of the partnership business was barred by time; but that, without it, the estate of the deceased was entitled to a share of the assets in charge of the receiver proportionate to what had been her share in the business, and to a similar share in the sum paid to the plaintiff in his character as her administrator.

From this decree the Administrator General appealed, alleging, as before, that Hemabai's estate was entitled to the whole of those

assets. The defendant thereupon filed cross-objections to the effect that the suit ought to have been dismissed entirely.

The appellate High Court (Farran, C. J., and Starling, J.) decided that a general account was not barred by time. Inasmuch as the Administrator General had been the only person not under a disability to sue, or the only person, in the words of section 17, "capable of suing," the time of limitation must be reckoned from when administration of the estate was delivered to him, who represented the interests of the minor heir, against whom no time had run.

The grant of leave to sue under clause 12 of the Letters Patent was sufficient to give the jurisdiction which had been exercised, the money sought to be awarded being in the receiver's hands. The technical objections failed, and there was no defence upon the merits that could possibly stand. The High Court, therefore, varied the decree of the Court below and decreed in the terms of (*a*) and (*b*) in the plaint. The effect of the appellate Court's decree was that the plaintiff was entitled to the sum that he had already received.

The defendant No. 2 appealed.

Crackanthorpe, Q. C., and *J. D. Mayne*, for the appellant:—The suit was such as to necessarily involve that no decree for the division of the assets among the parties could be made without the general accounts of the partnership having been taken. The original Court was wrong in ordering distribution of the shares in the assets while the state of those accounts was neither admitted nor ascertained. The liabilities of the firm had to be considered. So far as to the necessity of an account. But in regard to article 106, and section 17 of the Limitation Act, there had been no solution of the question whether an account was not now barred by time. It had not been determined whether there had not been a legal representative of Hemabai all the while.

Jardine, Q. C., and *J. H. A. Branson* for the respondent:—The decree of the appellate High Court was substantially right and the appeal should be dismissed. But the Administrator General did not oppose the taking the account which in effect was decreed. It was insisted, however, that it would appear, as the fact was,

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that all the existing capital of the firm belonged to Hemabai's estate.

Counsel for the appellant did not reply. Their Lordships' judgment was afterwards, on 10th December, read by

LORD MACNAGHTEN:—It appears that one Hemanmal carried on business with the defendant Goculdas in Sind and in the Persian Gulf until his death in 1881. He left a widow named Hemabai but no issue. After his death the business was continued by Goculdas and Hemabai. On the 7th of August, 1889, the appellant Bhagwandas was admitted into the firm, and a partnership agreement of that date was made between the three - Hemabai, Goculdas and Bhagwandas. Hemabai was admittedly the moneyed partner if not the owner of the business. She died on the 1st of September, 1889. On her death the partnership was dissolved. But the affairs of the partnership were not wound up, and apparently her moneys were retained by the surviving partners and employed in the business.

In 1890 an application for letters of administration was made on behalf of one Kissondas, then about ten years old, claiming to be the heir. But the application was resisted by Bhagwandas, who alleged that Kissondas was not heir and alleged also that Hemabai left a will. The case came before the Court. No will was forthcoming, nor was it suggested then that there was a nearer heir. The Court, however, directed that the Administrator General should take out administration without prejudice to any question, and made provision for the costs of all parties.

In the meantime, Goculdas and Bhagwandas as surviving partners took proceedings in Bombay to recover certain debts, or the balance of certain debts, owing to the business. Ultimately the amount claimed, which came to about Rs. 28,000, was paid to a receiver appointed by the Court. On the 30th of March, 1894, the Administrator General took out representation to Hemabai, and in April following he brought this suit against Goculdas and Bhagwandas claiming (*a*) to have the whole amount in the receiver's hands paid to him in his representative character, alleging that Goculdas and Bhagwandas had nothing to receive, but were in fact debtors to the partnership and (*b*) if necessary to have the ac-

counts of the partnership taken. He also asked for such further relief as the circumstances might require. Goculdas did not resist the plaintiff's claim. Bhagwandas set up every possible defence. He submitted that the Court in Bombay had no jurisdiction in the matter. He relied on the law of limitation and he alleged, what was perfectly true, that the accounts of the partnership had never been taken. By a supplemental defence he insisted that the plaintiff was bound to account to Goculdas and himself for their shares in a sum of Rs. 5,292 which admittedly had been recovered from a debtor to the partnership by the plaintiff himself since the institution of the suit.

Candy, J., before whom the case came in the first instance, gave effect, in a great measure, to the points raised by way of defence on behalf of Bhagwandas. He held that the Court had jurisdiction only in regard to the assets recovered in Bombay. He also held that the plaintiff's right to a general account was barred by limitation, and in the result he ordered the costs of all parties to be paid out of the fund in the hands of the receiver, and divided the balance of that fund, as well as the moneys recovered by the plaintiff, between the plaintiff and Bhagwandas, giving to the latter the proportionate share to which he would have been entitled under the partnership agreement if the assets in dispute had been profits of the partnership business.

The learned Judges of the High Court on appeal held that the jurisdiction of the Court was not limited to the assets recovered in Bombay. It was not disputed at the bar that the judgment of the Appeal Court was right so far. Then they held that the suit was not barred by limitation. They considered—and their Lordships agree in their view—that on the materials before the Court it must be taken that the Administrator General is suing on behalf of the infant heir. As far as the evidence goes, the opposition on the part of Bhagwandas in the probate suit was a mere pretence put forward in order to defeat or delay the infant's right to an account against Hemabai's surviving partners. The Appeal Court ordered Bhagwandas to pay all the costs, and adjudged to the plaintiff the whole fund in the hands of the receiver.

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Although their Lordships agree with the Appeal Court in the main, they are unable to find sufficient evidence to justify the decree in the form in which it was drawn up. In his pleadings Bhagwandas insisted that an order in the plaintiff's favour ought not to be made without taking the accounts. And that was his principal contention before their Lordships. Nor does it appear that he ever receded from that position. To a certain extent, indeed, it was common ground that the accounts must be taken. One of the plaintiff's reasons, in his memorandum of appeal from the judgment of the lower Court was "that the plaintiff was entitled to insist on the partnership account being taken before the second defendant"—that is Bhagwandas—"could be allowed any share in the moneys recovered by the plaintiff." And it would appear, from the language of the judgment delivered by the Chief Justice, that it was intended that provision should be made for taking the accounts, unless they were waived by Bhagwandas. His conclusion was that the decree of the lower Court "must be varied by making a decree in terms of paragraphs (*a*) and (*b*) of the plaint." Now paragraph (*b*) asked for an account, while paragraph (*a*) asked for payment without an account. There is nothing to show how it was that the decree came to be drawn up in its present form. Probably both parties are to blame for the error and for the expense which has resulted from it.

It seems to their Lordships that the proper order will be to direct an account to be taken of the partnership dealings and transactions, to enquire what was due to the estate of Hemabai in respect of her share at the time of her death, and how the amount due to her estate has been dealt with, and, if it appears that such amount, or any part thereof, has been employed in the business continued by the surviving partners, to direct the accounts of such business to be taken. Further consideration and costs must be reserved.

This order will enable the Administrator General to make such claim as he may be advised in respect of interest or profits since Hemabai's death. Bhagwandas must pay the plaintiff's costs up to and including the hearing by the lower Court. Each party must bear his own costs here and in the Appeal Court.

Their Lordships will, therefore, humbly advise Her Majesty that an order be made to that effect.

Appeal allowed. Decree amended.

Solicitors for the appellant:—Messrs. *Lattey and Hart.*

Solicitors for the respondent:—Messrs. *Payne and Lattey.*

ORIGINAL CIVIL.

Before Mr. Justice Tyabji; and on appeal before Mr. Justice Candy and Mr. Justice Starling.

RALLI BROTHERS, PLAINTIFFS, *v.* CHABILDAS LALLUBHAI AND OTHERS, DEFENDANTS.*

1899. *March* 3, 7.

Ship—Charter-party—Bill of lading—Freight—Rate of freight in charter-party—Contract by sub-charterer with shipper for freight at lower rate—Refusal by captain to sign bills of lading at lower rate than rate in charter-party—Payment by shipper of difference under protest.

On 3rd March, 1898, Karamsi Dharsi & Co., a firm of freight jobbers in Bombay, contracted to provide the plaintiffs with freight for 3,000 tons of cargo to Liverpool at 16*s.* 6*d.* per ton in a steamer to be subsequently named, and on the same day handed to the plaintiffs three shipping orders addressed to the captain of the ship, the name of which was to be afterwards inserted. In these shipping orders the higher and lower rate clause was as follows:—"Bill of lading if required at lower or higher rate, difference payable here as customary." This clause the plaintiffs struck out from each of the shipping orders according to their usual practice. On 11th May, 1898, the defendants chartered the steamship "Paddington" of which they were also the owners' agents in Bombay, and on the 12th May assigned a half share of their interest under the charter-party to Karamsi Dharsi & Co. By the charter-party a full and complete cargo was to be loaded, and the freight was to be £1-10 per ton. The captain, however, was authorized to sign clean bills of lading at any rate of freight required by the charterers without prejudice to the charter-party, but at not less than the chartered rate, unless the difference was paid in cash before sailing.

Karamsi Dharsi & Co. having thus sub-chartered the "Paddington" declared that steamer to the plaintiffs for 2,747 tons of cargo under their contract of the 3rd March, 1898, and the name of the steamer was then entered in the shipping orders for that amount of cargo. The plaintiffs thereupon commenced to load a cargo of wheat. By the 21st June, 2,100 tons had been put on board; mate's receipts were given to the plaintiffs and bills of lading were prepared by them, stating the rate of freight to be 16*s.* 6*d.* per ton as per the shipping orders, and were

* Suit No. 339 of 1898; Appeal No. 1003.