

1880
SEP. 13.
—
APPEL-
LATE
CIVIL.
—
5 B. 29.

the injunction continued in force. For the time being, it was to all intents and purposes as if it did not exist. It could not be revived for any purpose whatever, until the injunction was removed. If, during the continuance of the injunction, the respondent had applied for the entry of his name, we conceive that the answer of the Court to his application would have been this; that Jadunathji's application was in abeyance; that it might happen that it would never be revived at all, inasmuch as Premchand might succeed in his suit; that if Premchand failed, it might still happen that it would not be revived in favour of the respondent, for, even if he were Jadunathji's representative at the date of his application, he might be dead before the decision of Premchand's suit; and that for these reasons the Court refused to entertain his application, or to make any inquiry into his claim to be Jadunathji's representative, inasmuch as such inquiry would certainly be premature, and would possibly turn out to be useless.

For the reasons which we have stated, we are of opinion that the respondent's application of the 19th February, 1880, is governed, not by art. 179, but by art. 178, sch. II, Act XV of 1877: and that, inasmuch as it was made within three years from the date of the removal of the injunction, on which date we consider that the right to make the application accrued, the application was not barred by the provisions of the said article.

We, accordingly, confirm the order of the Subordinate Judge with costs.

Decree confirmed.

5 B. 38=5 Ind. Jur. 372.

[38] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

SAMALBHAI NATHUBHAI (*Original Plaintiff*), Appellant v.
SOMESHVAR, MANGAL, AND HARKISAN (*Respondents*).*
[2nd August, 1880.]

Partnership—Hindu Law—Joint Hindu family—Business carried on by one member as manager—Liability of all as joint owners—Ancestral trade and ordinary partnership, difference between—Indian Contract Act IX of 1872.

J., the father of the three defendants, established a trading firm in 1865 under the name of J. H. He and his three sons lived together as a joint Hindu family. J. died in 1872 and the business was continued under the same name by S. as the eldest brother and manager of the family. The youngest of the three brothers was a minor at the date of his father's death. The plaintiff sued the three brothers to recover money due on an account signed by S. in the name of the firm. The second defendant contended that he had never participated in the property of the business; that he had not resided at the family residence for six years; that he could not be considered a partner of the firm and, therefore, was not liable to the plaintiff:

Held that he could not repudiate a liability arising out of the ordinary transactions of the firm. During his father's life he was joint owner, and after his father's death he acquiesced in the continuance of the firm under the same name and ostensibly, therefore, with the same constitution. He had done no act to divest himself of his share. He had given no notice of repudiation, and made no partition, and there was nothing to prevent him from demanding his share of

* Second Appeal No. 20 of 1880.

the partnership, or claiming to share in the profits. There was; therefore, nothing to exempt him from the ordinary rule of Hindu law, which makes every member of a united family liable for debts properly incurred by a manager for the benefit of the family. The debt due to the plaintiff for goods supplied to the shop was properly incurred in the course of the ordinary transaction of the firm, and presumably, therefore, for the benefit of all the joint owners of the firm.

The rights and liabilities arising out of joint ownership in a trading business created through the operation of Hindu law between the members of an undivided Hindu family cannot be determined by exclusive reference to the Indian Contract Act (IX of 1872), but must be considered also with regard to the general rules of Hindu law which regulates transactions of united families.

An ancestral trade may descend like other inheritable property upon the members of a Hindu undivided family. The partnership so created or surviving has many, but not all, of the elements existing in an ordinary partnership. For example, the death of one of the partners does not dissolve the partnership; nor, as a rule, can one of the partners, when severing his connection with the business, ask for an account of past profits and losses.

[F., 10 Ind. Cas. 978 (979) = 4 S.L.R. 260 (261); R., 29 A. 176 (180) = 4 A.L.J. 94 = A. W.N. (1907) 13; 14 B. 189 (194); 26 B. 206 = 3 Bom. L.R. 738 (755); 34 B. 72 (80) = 11 Bom. L.R. 255 = 2 Ind. Cas. 173; 15 M. 356; 22 M. 166 (170) = 9 M.L.J. 3; 9 Bom. L.R. 1289 (1292); 11 Bom. L.R. 255 (265) = 2 Ind. Cas. 173; 9 Ind. Cas. 999 (1010) = 97 P.R. 1910 = 142 P.W.R. 1910 = 11 P.L.R. 1911; D., 25 A. 378 (383); 28 M. 344; 10 Bom L.R. 668 (672, 673).]

THIS was a second appeal against the decision of S. H. Phillpotts, Judge of the District of Ahmedabad, amending the decree of R. S. Madhuvachhram, Subordinate Judge of Kapadvanj.

[39] The facts of the case, in so far as they are material for the purposes of this report, are as follows:—

The plaintiff sued on a balance of account, dated 24th April, 1896, signed by the first defendant Someshvar in the name of the firm of "Jivram Haribhai." This firm was established about the year 1865 by Jivram, the father of the three defendants. Jivram died in 1872, leaving the defendants, of whom Someshvar was about 23 years old, Mangal 17, and Harkisan, a minor. Till his death Jivram continued to be the owner of the firm, and on his death the three defendants succeeded him, and up to the date of the suit no partition had taken place amongst them. The family remained, as before, a joint Hindu family, but the business of the firm was transacted by Someshvar alone as the eldest brother and manager of the family.

Someshvar admitted the claim, but urged that the liability lay upon the firm, and not upon himself personally. The second and third defendants set up a plea of limitation, and contended that they were not the owners of the firm of "Jivram Haribhai" solely managed by Someshvar. On all these points the Subordinate Judge ruled in favour of the plaintiff, and made a decree accordingly.

Mangal alone appealed to the District Judge. He contended that he never participated in the profits of the firm, that he did not reside at the family residence, and could not be considered a partner of the firm.

The District Judge held that Mangal was not a partner. He said: "there is no evidence whatsoever that Mangal participated in the benefits of the firm, except the vague statement that the house expenses were paid out of its assets, but it is in evidence that Mangal has always been absent from Kapatvanj, where the family house is, since a year after his father's death; and there is no evidence that he has any wife or child supported at the expense of the firm. Under s. 241 of the Indian

1880

AUG. 2.

APPEL-

LATE

CIVIL.

5 B. 38=

5 Ind. Jur.

372.

1880
AUG. 2.
—
APPEL-
LATE
CIVIL.
—
5 B. 38=
5 Ind. Jur.
372.

Contract Act, though Mangal had left the portion due to him as representative of his deceased father, that alone would not make him a partner. There is no evidence that Mangal has, by his conduct, led respondent to believe that he is a partner (s. 245), [40] or that he has consented to allow himself to be represented as a partner under s. 246 of the Indian Contract Act. The Subordinate Judge writes that the maintenance of all of them was derived from the business, but that is not proved; on the contrary, the only evidence in the case shows that appellant has been absent at Dongarpur almost entirely since his father's death, and that he has remitted moneys, which are debited to his own private account; and there is no evidence that he has drawn any moneys or received any benefit as partner." For these reasons the District Judge amended the decree of the Subordinate Judge by absolving Mangal from liability.

Nanabhai Haridas, Government Pleader, for the appellant.
Shantaram Narayan, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

M. MELVILL, J.—This is not the case of an ordinary partnership arising out of contract. It is the case of joint ownership in a trading business, created through the operation of Hindu law between the members of an undivided Hindu family. The rights and liabilities arising out of such a relation cannot be determined (as the District Judge has determined them) by exclusive reference to the Indian Contract Act, but must be considered also with regard to the general rules of Hindu law, which regulate the transactions of united families.

As stated in *Ramall v. Lakmichund* (1), an ancestral trade may descend, like other inheritable property, upon the members of a Hindu undivided family. The partnership so created, or surviving, has many, but not all, of the elements existing in an ordinary partnership. For example, the death of one of the partners does not dissolve the partnership. Nor, as a rule, can one of the partners, when severing his connection with the business, ask for an account of past profits and losses.

Whether a Hindu, who becomes entitled by inheritance to a share in a trading business, is, *ipso facto*, and without his own consent, involved in all the liabilities of a partner, it is not necessary for us to determine. In the present case, we find sufficient reason for holding the respondent Mangal liable for the plaintiff's claim. The three respondents are brothers, and admittedly a [41] united family. The trading business, in respect of which the claim has arisen, was started by Jivram Haribhai, father of the respondents. At that time, and down to Jivram's death, Jivram and his sons lived together as a joint family. The presumption (which is not rebutted) is that the business was started by means of joint family funds. It, therefore, became the joint property of Jivram and his sons. After Jivram's death, Mangal continued to live with his brother for a year; but since that time he has generally been absent from Kapadvanj, where the firm is carried on. The business has been continued in the name of Jivram Haribhai, but has been managed by the eldest brother Someshvar only, Mangal having been absent, and the 3rd respondent being a minor. We cannot agree with the District Judge that these circumstances entitle Mangal to repudiate a liability arising out of the ordinary

(1) 1 B.H.C.R. Ap. 51.

transactions of the firm. During his father's lifetime he was joint owner of the firm of Jivram Haribhai. After his father's death he acquiesced in the continuance of the firm under the same name, and ostensibly, therefore, with the same constitution. He has never done any act to divest himself of his share in the business. He has given no notice of repudiation and has made no partition with his brothers. He has only been absent for six years; and there would, therefore, be nothing to prevent him from demanding his share of the partnership stock, or claiming to share in the profits. We can see no reason for exempting him from the ordinary rule of Hindu law, which makes every member of a united family liable for debts properly incurred by a manager for the benefit of the family. The eldest brother Someshvar must be regarded as manager on behalf of the family of so much of the family property as is represented by the trading business; and it has never been suggested that the debt due to the plaintiff, for goods supplied to the shop, was not properly and necessarily incurred in the course of the ordinary transactions of the firm, and presumably, therefore, for the benefit of all the joint owners of the firm.

For these reasons we reverse the decree of the District Court, and restore that of the Subordinate Judge. Costs of appeal and second appeal on respondent Mangal.

Decree reversed.

5 B. 42 = 5 Ind. Jur. 422.

[42] ORIGINAL CIVIL.

Before Sir Charles Sargent, Justice.

THE LONDON, BOMBAY AND MEDITERRANEAN BANK,
LIMITED (*Plaintiffs*) v. BADEE BEEBEE AND OTHERS
(*Defendants*). * [26th November, 1880.]

*Jurisdiction—Cause of action—Letters Patent, 1865, cl. 12—Company—Winding up—
Suit on foreign judgment—Balance order—Service on defendant.*

The defendant, who resided outside the jurisdiction of the High Court, was sued at Bombay as a contributory upon a balance order made by the Court of Chancery in England in the winding up of the plaintiffs' bank. It was contended on his behalf that no part of the cause of action had arisen within the jurisdiction, and that the suit was therefore not maintainable. The plaintiffs contended that service of the balance order upon the defendant was necessary and constituted part of the cause of action, and that such service had been effected upon the defendant in Bombay, the Court had jurisdiction.

Held, that service of the balance order upon the defendant was not necessary, and that as no part of the cause of action had arisen within the jurisdiction, the suit should be dismissed.

THIS was a suit brought by the plaintiffs against the defendants as heirs and legal representatives of one Cazeo Bhawodeen, deceased, to recover Rs. 1,200, the balance of a call of £10 per share alleged to be due in respect of certain shares in the plaintiffs' bank standing in the name of the deceased.

By an order of the High Court of Chancery in England, dated the 20th July 1866, the plaintiffs' bank was ordered to be wound up, and by a subsequent order liquidators were appointed. On the 28th July 1870, the same Court ordered a call of £10 per share to be made upon the contributories, and by a balance order made on the 25th January 1871, it was

* Suit No. 50 of 1877.

1880
AUG. 2.
—
APPEL-
LATE
CIVIL.
—
5 B. 38 =
5 Ind. Jur.
372.