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 MORARJI
 v.
 JAMNADAS
 PITAMBER-
 DAS.

for surveyor's fee and the Rs.16-8 for solicitors' notices mentioned in the particulars of demand. I also disallow Rs. 39-1-3 for interest claimed in these particulars, and do not give interest since the filing of the plaint, as I think that the plaintiffs' hasty conduct has greatly conduced to this litigation, and I, therefore, am not disposed to give them interest by way of damages. Deducting Rs. 73-9-3, the total of these disallowed items, from the Rs. 1,631-11-1 claimed in the plaint, I pass a decree for the plaintiffs for Rs. 1,559-1-10 and costs.

Attorney for plaintiffs.—Mr. *R. M. Sayani*.

Attorneys for defendant.—Messrs. *Shapurji and Thakurdas*.

ORIGINAL CIVIL.

Before Mr. Justice Latham.

LUKMIDAS KHMJI AND OTHERS, PLAINTIFFS, v. PURSHOTAM
 HARIDAS, OODHOWJI WALLJI AND GOCULDAS JEWRAZ,
 DEFENDANTS. *

September 27.

Partnership—Parties—Practice—Contract Act (IX of 1872), Section 43.

In a suit brought upon a contract made by a firm the plaintiff may select as defendants those partners of the firm against whom he wishes to proceed, allowing his right of suit against those whom he does not make defendants to be barred.

In this suit the plaintiffs sued to recover from the defendants the sum of Rs. 16,424, the price of goods sold and delivered.

Written statements were filed by the first and third defendants. The first defendant denied that he was a partner with the second and third defendants. The third defendant also denied that the first defendant had ever been a partner in his firm, which consisted of three partners, viz., himself, the second defendant and one Hemraj Haridas. He submitted that the said Hemraj Haridas ought to be made a party to this suit.

Upon the issues being framed at the hearing, counsel for the defendants raised the point as to whether the alleged partner, Hemraj Haridas was not a necessary party to the suit.

Starling (with the Hon. *B. Lang*, Acting Advocate General) contended that, under section 43 of the Indian Contract Act (IX of 1872), a plaintiff might sue as he pleased any or all of the partners

* Suit, No. 216 of 1880.

in a firm. He referred to sections 42, 249, 262, and *Hemendra Coomar Mullick v. Rajandrolall*(¹); Pollock's County Courts Act, p. 66; Act IX of 1850, sec. 36; *King Hoare*(²).

Farran (*Kirkpatrick* with him) for the first and third defendants *contra*.

LATHAM, J.—The preliminary issue now to be decided is whether Hemraj Haridas is a necessary party to this suit, it being assumed for the purpose of this issue that Hemraj was a partner in the defendants' firm. Plaintiffs rely on the first clause of section 43 of the Contract Act: "When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one of such joint promisors to perform the whole of the promise." Section 43 is one of the series of sections materially altering the rules of English Common Law as to the devolution of the benefit of and liability on joint contracts, the English rule corresponding to section 43 being that "all joint contractors must be sued jointly for a breach of contract:" Dicey on Parties to an Action, p. 11. With section 42 compare Dicey p. 237; with section 45, Dicey, p. 108; and with section 45, Dicey p. 128.

Section 43 is in itself perfectly clear, and the defendants do not dispute that, in cases where it applies, the promisee may at his option sue any one or more of the joint promisors; but they say that the section does not apply to the case of the members of a partnership firm being sued on a contract of the firm. Now, by section 226, "contracts entered into through an agent, and obligations arising from acts done by an agent may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person." According to English law the responsibility of partners on a contract entered into by a co-partner depends on the doctrine of agency; and, unless that law has been altered here, I see no reason to suppose that co-partners, who by English law are joint promisors when the promise is that of the firm, are outside section 43. Mr. Farran relies on the definition of the word *firm* in section 239 and its use in Chapter XI headed "Of Partnership", as constituting the firm a species of legal *persona*, the

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(1) I. L. R. 3 Calc. 353.

(2) 13 M. & W. 494.

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members of which cannot be separately sued. I cannot accede to this argument, as to me such definition and use of the word *firm*,— a use not always consistent with itself (section 251, cls. *a*, *b* and *c*)— seems to be simply a compendious expression for the several persons^c who are members of the firm. I find that Mr. Pollock is of the same opinion, as in his Digest of Partnership, Art. 9, he adopts the definition of *firm* contained in section 239 of the Contract Act as appropriate in England, while in Art. 11 he points out that “the law of England knows nothing of the firm as a body or artificial person distinct from the members composing it.” The Judicature Act (Order XV, Rule 10,) has enabled partners to sue and be sued in the names of their firms, a provision going further than anything in the Indian law of Partnership. Still, according to Mr. Pollock (Art. 63), this rule does not introduce “anything that amounts to the recognition of the firm as an artificial person distinct from its members.”

Then I am pressed with the argument *ab inconvenienti*. Now, it is impossible to see how any inconvenience can arise from the application to partners of the first clause of section 43. The promisee can select those partners against whom he wishes to proceed, allowing his right of suit against such as he does not make defendants to be barred: *Hemendro Coomar Mullick v. Rajendro-loll Mooshee*⁽¹⁾ *Kendall v. Hamilton*⁽²⁾; and the rights of the partners the joint promisors *inter se* are saved by the latter clauses of section 43. But it is said that if section 43 applies to partners, so must section 45, and that from such application of the latter section great inconvenience will result. The words of the two sections are not identical: and I think that it would be an unsound principle of construction to interpret section 43 by the light of the possible inconvenience which might result from a similar construction being placed on section 45. I am sensible that if section 45 does apply to partners who are joint promisees, the resulting inconvenience may sometimes be very great; especially having regard to the decision in *Ramsebuk v. Ramlall*⁽³⁾ that if a suit is barred by limitation as to some joint promisees added as

(1) L. R. 3 Calc. 353.

(2) 3 C. P. D. 403.

(3) I. L. R., 6 Calc. 815.

co-plaintiffs by amendment, it is barred as to the original plaintiffs also. But the inconvenience will be the same in kind, if greater in degree, as must result from the application of the section to any joint promisees; and to my mind it must be dealt with, if at all, by the Legislature altering the expressions of its intention, and not by a Judge putting a forced construction on the words in which that intention is at present embodied.

I therefore find that Hemraj Haridas is not a necessary party to the suit.

Attorneys for the plaintiffs.—Messrs. *Payne and Gilbert*.

Attorney for the defendants.—Mr. *Khunderao Morojee*.

ORIGINAL CIVIL.

Before Mr. Justice Latham.

AHMEDBHOY HUBIBHOY, PLAINTIFF, v. VULLEEBHOY CASSUMBHOY, SATBAI AND FAZULBHOY CASSUMBHAI, DEFENDANTS.*

September
29-30, 1882

Decree—Fraud—Decree when binding—Effect of fraud—Parties and privies to suit—Strangers to suit—Collusive fraud between parties in obtaining decree—Civil Procedure Code (Act X of 1877), Section 13—Res judicata—Evidence Act (I of 1872), Section 44—Khoja Mahomedan administrator with the will annexed.

The powers of a Khoja Mahomedan executor or administrator, like those of a Cutchi Mahomedan executor or administrator, seem to be generally limited to recovering debts and securing debtors paying such debts.

Where a will gave the executor full powers with regard to the payment of the testator's debts, *Held* that an administrator with the will annexed who was a Khoja Mahomedan succeeded to those powers, and in a suit brought against him as such administrator by an alleged creditor of the testator's estate represented all the persons interested in the estate.

Where a decree in a suit has been honestly obtained without fraud it cannot be subsequently disputed by the parties thereto or their privies or by persons who were represented by such parties. Strangers to the suit (*i. e.* persons neither privies to nor represented by the parties thereto) are not bound by such a decree if it be a decree *inter partes*; but if it be a decree *in rem* and passed by a competent Court, they are bound by it and cannot controvert it.

Where a decree has been obtained by means of the fraud of one party against the other, it is binding on parties and privies and on persons represented by the parties so long as it remains in force, but it may be impeached for fraud and may

* Suit No. 486 of 1881.