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17 B. 1 (P.C.) = 19 I.A. 170 = 6 Sar. P.C.J. 238.

interests of his heirs; and that a Mahomedan will is, therefore, inoperative with regard to two-thirds of the testator's succession, unless it is validated [5] by the consent of the heirs having interest. Their Lordships do not think the appellants would take any benefit from the document of 1838 if it were construed as the will of Karimuddin. It was plainly not his intention to create a series of life-rents, a kind of estate which does not appear to be known to Mahomedan law (see *Humeeda and others* v. *Budlun and the Government* (1)), but to make the fee devolve from one generation of his descendants to another without its being alienable by them, or liable to be taken in execution for their debts. Even if Tahirabibi had expressly consented to accept the will, she would not have been the owner of a life estate, but a full owner, with prohibition against alienation, which, being void in law, could not affect either herself or her creditors. Although this point was taken in the High Court, the appellants were not in a position to press it. They have not averred in their pleadings that Tahirabibi gave such consent, and there is no evidence to show that she did. Besides, there was no issue taken upon the point, and, therefore, no finding in fact upon which the High Court could proceed in a second appeal.

The judgment of the High Court appears to their Lordships to dispose, in a satisfactory manner, of all the arguments which have been addressed to them in the *ex parte* argument upon this appeal. They will humbly advise Her Majesty to affirm the judgment complained of, and to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Barrow and Rogers.*

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[6] ORIGINAL CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Farran.

MOTILAL BECHARDASS AND OTHERS (*Plaintiffs*) *v.* GHELLABHAI HARIRAM AND OTHERS (*Defendants*)* AND BHANALALLA AND OTHERS (*Plaintiffs*) *v.* DADABHOY SAGUNBAKSH AND OTHERS (*Defendants*).† [29th July and 2nd September, 1892.]

Partnership—Death of partner—Suit by Firm for a debt accrued due during his life—His representatives need not be parties—Practice—Parties—Indian Contract Act, IX of 1872, *s.* 45.

The representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrued due to the partnership in the lifetime of the deceased partner.

[**F.**, 32 A. 638 (640) = 7 A.L.J. 759 = 6 Ind. Cas. 840; 10 P.R. 1906; **Rel.**, 17 C.L.J. 201 = 16 Ind. Cas. 852 (854); **Appr.**, 17 M. 108, (117); **R.**, 20 A. 365 (366); 22 A. 307 (315, 319); 21 B. 412 (421); 25 B. 378 (384); 10 Bom.L.R. 306 (312); 9 C.L.J. 331 (335) = 13 C.W.N. 509; 1 S.L.R. 191 (194); U.B.R. (1892—1896) 204 (210); 24 Ind. Cas. 268.]

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* Small Cause Court Suit, No. 15099 of 1891.
† Small Cause Court Suit, No. 1682 of 1892.
(1) 17 W. R. C. R. 525.

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CASE stated for the opinion of the High Court by C. W. Chitty, Chief Judge of the Bombay Court of Small Causes, under s. 69 of the Presidency Small Cause Courts' Act (XV of 1882) :—

"1. In this case the plaintiffs, sons of Bechar Nager, deceased, sue to recover a sum of Rs. 545-7-0 as the balance of an agency account for goods purchased and moneys paid by the plaintiffs, on account of goods in Bombay, from *Magha Vad* 3rd to *Jesth Sud* 5th, 1945 (18th February to 3rd June, 1889).

"2. The defendants took the preliminary objection that Bechar Nager was a member of the firm when the debt accrued due; that he died about a year ago; that his representatives were not joined, and that no probate or letters of administration or certificate to his estate had been taken out.

"3. It was proved that the plaintiffs, five brothers, and their father carried on a joint business in the name of Bechar Nager at Surat. They were members of a joint and undivided Hindu family, but the said Bechar Nager had no brothers or nephews. The said Bechar Nager died a year ago, after the accrual of the debt in question.

"4. The question for decision in this case is the same as that in suit No. 1682 of 1892, which is sent with this, namely, whether under s. 45 of the Contract Act the representatives of a deceased partner are necessary parties to a suit for the recovery [7] of a debt which accrued due to the partnership in the lifetime of the deceased partner.

"5. If the above question be decided in the affirmative, the further question also arises in this case, whether such a rule would apply in the case of a joint and undivided Hindu family carrying on a business in partnership.

"6. This case is stated on the application of the defendants, and I have postponed the hearing of the suit pending the decision of their Lordships on the above points."

Russell, for the plaintiffs in suit No. 15099 of 1891.

Anderson, at the request of the Court, appeared for the defendants.

The parties in the second suit (No. 1682 of 1892) were not represented by counsel.

JUDGMENT.

The arguments of counsel and the authorities cited fully appear from the judgment, which was delivered by

FARRAN, J.—Upon the first question referred for our opinion in this case there is a conflict of decision between the High Court of Calcutta and the High Court of Allahabad. The latter Court has held that the surviving partners in a firm can sue for a debt due to the partnership without joining the representatives of a deceased partner as plaintiffs—*Gobind Prasad* v. *Chandar Sekhar* (1). The Calcutta High Court has ruled that the representatives of a deceased partner are, in such a case, necessary parties to the suit—*Ram Narain* v. *Ram Chunder* (2).

The question as to what plaintiffs should join in suing to enforce a joint right, is not determined by Statute law in India. The rules by which that question must be solved are rules adopted by the Judges in India from the rules of English law and equity, modified on account of the different procedure which prevails here and in part altered by legislation. In the Common Law Courts in England, before the Judicature

(1) 9 A. 486. (2) 18 C. 86.

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Acts, it was necessary for all persons, jointly interested at law, to join in suing as plaintiffs. The same rule prevails generally in equity; but, when there was a substantial ground for not making some of such persons plaintiffs, it has been held sufficient if they were made defendants —Daniell's Chancery Practice (6th Ed.), Vol. I, [8] p. 216; *Luke* v. *South Kensington Hotel Company* (1). These rules, though not of statutory obligation, were deemed essential to the due administration of justice, in order that the same defendant might not be more than once molested in respect of the same cause of action, to give the debtors a valid discharge, and to prevent multiplicity of suits. According to the old English practice, however, not only was it requisite to make all proper persons plaintiffs, but at law the misjoinder of plaintiffs was fatal to the action; and the rules as to who could join in suing were strict and narrow. It was often difficult to select the proper plaintiffs, and mistakes frequently occurred on account of the stringency of the law. To remedy this inconvenience, and to give a latitude, which was considered advisable in this branch of the law of procedure, the rules framed under the Judicature Acts provided that all persons might be joined as plaintiffs in whom the right to any relief claimed was alleged to exist, whether jointly, severally, or in the alternative (Order XVI, R. 11). After the passing of this rule, a misjoinder of plaintiffs, except in the matter of costs, became an immaterial error. The rules and practice, as to the necessity of joining as parties to the suit, all persons jointly interested in the cause of action, have been adopted by all the Indian High Courts—*Kalidas Kevaldas* v. *Nathu Bhagvan* (2); *Dular Chand* v. *Balram Das* (3); *Ramsebuk* v. *Ramlall Koondoo* (4); *Arunachala* v. *Vythialinga* (5). The case last cited is an authority for saying that the rule adopted in the Court of Chancery, rather than that followed by the Courts of Common Law, is the one followed in India.

The Indian Legislature has introduced the provision as to the persons who can sue as plaintiffs in a joint and in a common cause of action from the rules framed under the Judicature Act which we have adverted to. It is now enacted as s. 26 of the Civil Procedure Code. This is a permissive section enacted for the reason and with the object already referred to. The general law, as to the necessity of joining as parties to the suit all persons who have a joint or common interest in the cause [9] of action, and as to the consequences of a misjoinder of plaintiffs may be said to be now practically identical under English law and under the practice of the Indian Courts.

Turning to the more particular question with which we have to deal in this reference—the law applicable to joint contractors—we find that, at common law, on the death of one of them the benefit of the joint contract devolved upon the survivors. "In the same manner it is of debts and duties, &c., for if an obligation be made to many for one debt, he, which surviveth, shall have the whole debt or duties, *and so it is of other covenants, contracts, &c.*" (6). An exception was made in the case of partners in trade. The comment of Lord Coke upon the above passage from Littleton is this—"Here by force of the Act an exception is to be made of two joint merchants for the wares, merchandize, debts or duties that they have as joint merchants or partners shall not survive, but shall go to the executors of him that deceaseth: and this is *per legem*

(1) 11 Ch. D. 121. (2) 7 B. 217. (3) 1 A. 453. (4) 6 C. 815.
(5) 6 M. 27. (6) Coke upon Littleton (Ed. 1832), Vol. II, s. 282, p. 182*a*.

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mercatoriam, which (as hath been said) is part of the laws of this realm for the advancement and continuance of commerce and trade which is *pro bono publico*, for the rule is that *jus accrescendi inter mercatores pro beneficio commercii locum non habet.* And to the latter, &c., in this section the like exceptions must be made." Mr. Justice Williams says: "The general rule is that the interest which the testator had in a chose in action jointly with another shall not pass to his executor, yet *per legem mercatoriam* as formerly mentioned an exception was established in favour of merchants which has been extended to all traders and persons engaged in joint undertakings in the nature of trade"—Williams on Executors (8th Ed.), p. 850. This is relied upon as a true exposition of the law by Mellish, L. J., in *McClean* v. *Kennard* (1). The whole subject is elaborately considered in *Buckley* v. *Barber* (2). It is clear upon these authorities that in the case of trading partnerships the benefit of a deceased [10] partner in a joint contract survived to his executors, both at law and in equity, under the English system. That portion of the English law was incorporated into the law administered in India long before the Indian Contract Act.

The obligations of joint debtors under a joint contract were governed by similar principles. All, if living, were liable to the creditor for the due performance of the contract, but this liability did not devolve, either at law or in equity, upon the representatives of one of them dying in the lifetime of the others—*Richardson* v. *Horton* (3); *Other* v. *Iveson* (4). Partners stood upon a different footing. The estate of a deceased partner was liable, in equity, in respect of a joint contract of the firm. As to how that equity arose, see the judgment of Cairns, L. C., in *Kendal* v. *Hamilton* (5). This equity was also given effect to in Courts in India before the Contract Act. In this High Court it was the common practice to sue the surviving partners and the representatives of a deceased partner for debts due by the firm.

The Indian Contract Act was avowedly based upon the English law. In the case of joint contracts it made a radical change. Section 45, dealing with the right under a joint contract, provides that (unless a contrary intention appears from the contract) "when a person has made a joint contract with two or more persons jointly, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representatives of such deceased person jointly with the survivor or survivors." This enactment places all joint contractors, where a contrary intention is not expressed, upon the same footing as partners jointly contracting (as we have shown) formerly stood. The maxim in India now should be *jus accrescendi inter contractores locum non habet nisi aliter in contractu expressum.*

A somewhat analogous change was made by s. 42 in the obligation which joint contractors lay under to fulfil a joint contract. The obligation is extended to the representatives of [11] a deceased contractor, thus again assimilating the law to that which prevailed in the case of partners jointly contracting. The provision of s. 43, which gives the right to the creditor to compel any one of the joint contractors, or the representatives of a deceased contractor, to perform the contract, seems

(1) L. R. 9 Ch. 336, (346).
(2) 6 Ex. 178. The distinctions drawn in this case are difficult to follow; Lord Justice Lindley speaks of it as a "perplexing case." Lindley on Partnership (5th Ed.), p. 342 (in notes).
(3) 6 Beav. 185. (4) 3 Drew. 177. (5) 4 Ap. Ca. 504, (516).

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new both in the case of ordinary joint contractors and in that to partners jointly contracting; as far as the liability under a contract is concerned, it appears to make all joint contracts joint and several.

We cannot doubt but that these sections, which we have referred to, relate to partners as well as to other co-contractors. It has been so decided in *Lukmidas Khimji* v. *Purshotam Haridas* (1), and, we think, rightly. If the Legislature had intended to except partners from the provisions of these sections, it would have done so in express words. There is no reason for thinking that the general rules laid down in Chap. IV of the Contract Act are not applicable to partners as well as to other contracting parties. The sections under consideration seem, on the contrary, to be intended to assimilate the law relating to joint contracts generally to that which has always been applied to partners contracting jointly.

The Contract Act is not, however, an Act of Procedure. It defines and declares rights and obligations arising out of contracts and obligations *quasi ex contractu*. The rules as to the procedure for enforcing these rights—the remedy in cases of breach of them—must be sought elsewhere.

In the case of contracts, as in other divisions of the law relating to actions, the parties to sue and to be sued were by English law usually those in whom the right to enforce and the liability under a contract "rested," to use an expression borrowed from the Contract Act. These rules governing the proper choice of plaintiffs and defendants in the case of joint contracts will be found concisely stated by Mr. Dicey in his work on Parties to Actions (R. 16, 48, 52, 55 and 58). Speaking broadly, the representatives of deceased joint contractors were not proper parties, either as plaintiffs or defendants, in an action [12] upon a joint contract, but all living parties to the contract were necessary parties. The reason of these rules founded on substantive law relating to joint contracts excluding the representatives of deceased contractors from the benefit and burden of joint contracts has ceased to exist in India since the Contract Act was passed. Logically, the rules should also cease to be operative *ratione cessante lex ipsa cessat*.

The practice relating to the *remedy* in favour of and against partners was, in English law, anomalous. Although amongst them there was no *jus accrescendi* and the interest of a deceased partner in the joint property, including the contracts of the firm devolved upon his executors, the latter could not join the surviving partners in an action upon joint partnership contract—Dicey, R. 21 and 24; Lindley on Partnership (5th Ed.), p. 284. This is stated by Mr. Justice Williams in the passage I have quoted above. It continues thus: "But in these cases, although the right of the deceased partner devolves on his executor, it is now fully settled that the remedy survives to his companion, who alone must enforce the right by action, and will be liable on recovery to account to the executors or administrators for the share of the deceased"—Williams on Executors (8th Ed.), p. 850.

A more logical view was taken in one old case. A surviving partner sued for a debt due to the partnership. The defendant demurred on the ground that the executor of the deceased partner was a necessary co-plaintiff. The demurrer was allowed—*Hall* v. *Huffam* (2). That case was, however, overruled, and the law before the Judicature Acts was well established, that the right to sue for a debt owing to the firm devolved, in

(1) 6 B. 700.

(2) 2 Lev. pp. 188 and 228.

the event of the death of one partner, upon the surviving partners exclusively—Lindley on Partnership (5th Ed.), p. 341.

The same anomalous practice prevailed in Courts of Equity. When the surviving partner in a firm sued for an account, or other legal claims, it was not, except under special circumstances, necessary to make the personal representatives of a deceased partner parties to the suit—*Haig* v. *Gray* (1), Daniell's Chancery Practice, [13] p. 219, (6th Ed.), Vol. I. The Judicature Acts and Rules have made no changes in procedure when a surviving partner sues—Bullen and Leake's Pleadings (4th Ed.), Vol. I, p. 294. The same practice prevailed in Indian Courts in the Bombay High Court and in the late Supreme Court at Bombay, at all events before the Indian Contract Act.

Since the passing of that Act the practice in the High Court of Calcutta has been changed—*Ram Narain* v. *Ram Chunder* (2) ; but not in the Allahabad High Court—*Gobind Prasad* v. *Chandar Sekhar* (3). Logical consistency has there yielded to long-established practice based upon considerations of practical convenience. The inconvenience, often resulting in a denial of justice, of altering the procedure is pointed out by Edge, C. J., in his judgment in the above cited case of *Gobind Prasad* v. *Chandar Sekhar* (3).

In the judgment of the third Judge of the Small Cause Court in a case sent up with this reference, it is stated that the practice of the Small Cause Court in Bombay has, hitherto, been not to join the heirs of a deceased co-partner with the surviving partners when suing for a partnership debt. The question has not been, so far as we know, the subject of judicial decision in this High Court, though we believe that since the dictum of the Court in *Lukmidas Khimji* v. *Purshotam Haridas*(4) it has been more usual to add the heirs of a deceased partner as parties plaintiffs *ex majore cautela*. This was a mere form until the passing of the recent Act making it necessary for such heirs to obtain probate or letters of administration before a judgment can be passed in their favour. It has now become a matter of vital importance.

To the observations of Edge, C. J., may be added the remark that frequently the representative of a deceased partner has no interest whatever in the property of the firm, such interest being often represented by a *minus* quantity. Section 263 of the Contract Act IX of 1872 preserves to surviving partners the right of giving valid discharges to debtors of the firm which they possessed under [14] English law—*Butchart* v. *Dresser*(5), *Brasier* v. *Hudson*(6) ; Lindley on Partnership (5th Ed.),p. 342. There is no reason on that ground for holding that the surviving partners are not competent to sue.

The introduction, into s. 45, of the words " as between him and them " occasions, no doubt, a serious difficulty in adopting the ruling of the High Court of Allahabad. It is difficult to give these words their full effect, if the surviving contractors in the case of partners are allowed to sue alone. 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. Can the latter, then, sue without joining the former as a party to the suit? Logical consistency points to an answer in the negative. The case of partners is,

(1) 3 DeG. & Sm. 741. (2) 18 C. 86. (3) 9 A. 486.
(4) 6 B. 700. (5) 4 DeG. M. & G. 542. (6) 9 Sim. 1.

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however, as we have shown, anomalous, and we think that as the Legislature has not enacted that the representatives of a deceased partner must join in suing in a partnership contract jointly with the surviving partners, we are not wrong in holding that, notwithstanding the provisions of the Contract Act, the old practice of the Small Cause Court need not be changed.

The decision of this Court in *Raghavendra Madhav* v. *Bhima* (1) involves an answer in the affirmative to the second question.

Attorney for the plaintiff:—Mr. *T. A. Bland.*

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17 B. 14.

ORIGINAL CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Farran.

VASSONJI TRICUMJI AND CO. (*Plaintiffs*), *Petitioners v.* THE SOUTHERN MARATHA RAILWAY COMPANY (*Defendants*), *Opponents.** [2nd September, 1892.]

Presidency Small Cause Courts Act (XV of 1882), ss. 38 and 69—Rehearing—Miscarriage or failure of justice—Case stated for the opinion of High Court.

In a suit in the Court of Small Causes, in which questions of law and fact were raised, the plaintiffs at first asked the Judge to state a case for the opinion of the High Court under s. 69 of Act XV of 1882. The Judge was willing to do [15] so, but the plaintiffs withdrew their request. The Judge thereupon delivered his judgment and dismissed the suit. The plaintiffs then applied to the High Court for a rehearing under s. 38 of Act XV of 1882. It was contended that the Judge was wrong in his view of the law as applicable to the facts.

Held that, even if that were the case, there was no "miscarriage or failure of justice" within the meaning of s. 38, and that the plaintiffs were not entitled to a rehearing.

APPLICATION for a rehearing under s. 38 of the Presidency Small Cause Courts Act (XV of 1882).

The plaintiffs petitioned for a rehearing of this suit, which had been dismissed with costs by C. W. Chitty, the Chief Judge of the Small Cause Court, on the 10th August, 1892.

The plaintiffs had at first asked the Chief Judge to state a case for the opinion of the High Court, under s. 69 of the Small Cause Courts Act, but subsequently withdrew such request on the ground that they were advised to apply for a rehearing under s. 38 of the Act.

The petition stated as follows—

1. That your petitioners brought a suit (No. 12790 of 1892) in the Bombay Court of Small Causes against the defendants, the Southern Maratha Railway Company, for the recovery from them of the sum of Rs. 1,481-15, being the amount levied by the defendant Company, or their agents, the Bombay Steam Navigation Company, at Bombay in respect of Port Trust charges and in excess of the freights for which the defendant Company had agreed to carry from stations on the line of their railway to Bombay, *via* Marmagoa, several consignments of cotton belonging to the petitioners, and which amount the petitioners were forced to pay and did pay under protest for obtaining delivery of their said consignments.

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* Small Cause Court Suit, No. $\frac{200}{12790}$ of 1892.

(1) 16 B. 349.