APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

VADILAL LALLUBHAI (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHAH KHUSHAL DALPATRAM AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), RESPONDENTS.* 1902. *December* 3.

Partnership—Joint Hindu family—Partners—Coparceners not necessarily partners—Suit in the name of the owner of the firm—Parties—Adding parties—Civil Procedure Code (Act XIV of 1882), section 27.

The plaintiff sued as owner of a firm to recover a debt. The defendants pleaded that the plaintiff was joint with his father and brother, and contended that the latter were therefore partners in the firm and ought to be joined as plaintiffs. The lower Appellate Court held that the plaintiff's father and brother were partners with him by reason of their being joint members of a Hindu family and that they ought, therefore, to have been co-plaintiffs. It further held that it was too late to amend the plaint and to add them as parties, and it therefore dismissed the suit. On second appeal,

Held (reversing the decree and remanding the case), that although a person carrying on business is a coparcener in a joint family, it does not necessarily follow that all his coparceners are his partners in that business, entitled with him to its rights and responsible with him for its liabilities. The fact of partnership must be proved by evidence showing that the persons alleged to be partners have agreed to combine their property, labour or skill in the business and to share the profits and losses thereof.

Held, also, that if on remand it was found that the plaintiff's father and brother were partners, the Court ought to allow them to be brought on the record, and under section 27 of the Civil Procedure Code (Act XIV of 1882) the plaintiff was entitled to amend.

Kasturchand v. *Sagarmal*(1) followed.

SECOND appeal from the decision of H. Page, Joint Judge of Ahmedabad, reversing the decree passed by Ráo Bahádur Chandulal Mathuradas, First Class Subordinate Judge at Ahmedabad.

The plaintiff sued as owner of the firm of Chamanlal Vadilal to recover the sum of Rs. 1,882 with interest.

The defendants alleged (*inter alia*) that the plaintiff was a member of a joint Hindu family, of which his father and his minor brother Chamanlal were also members, and they contended

* Second Appeal No. 296 of 1902.

(1) (1892) 17 Bom. 413.

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that, as such, the latter were the plaintiff's partners in the firm and ought to have been made co-plaintiffs. The Subordinate Judge passed a decree for the plaintiff, holding that the claim was proved and that the suit was not bad for non-joinder of plaintiffs. In his judgment he said:

It cannot, I believe, be disputed that the plaintiff Vadilal's father is living with him. But the present suit is brought by Vadilal as the owner of the firm of Chamanlal Vadilal, which carried on its business at Bombay. The plaintiff's witness (No. 39) affirms that the firm belongs to Vadilal alone, and his father says that Vadilal has opened the shop at Bombay. The acknowledgment seems to have been passed to Vadilal alone: while the plaintiff's father Lallubhai, and Manilal and Ghellabhai, admit in their depositions that they have no share or interest in the plaintiff's firm. The defendants' attempt to show that they are partners in the plaintiff's shop appears to me to have failed and the plaintiff alone can maintain this suit.

On appeal the Joint Judge reversed the decree. He held that the suit was bad for non-joinder of Lallubhai, Chamanlal, Ghellabhai and Manilal, and as it was too late to amend, the period of limitation having expired, he dismissed the suit. In his judgment he said:

The plaintiff's father Lallubhai owns that he is joint with his son. He admits having lent him money. The learned pleader for the plaintiff urges that he only lent him money after the business had been started, and asks the Court to place reliance on the fact that he states that his son commenced trading with money borrowed from Popatbhai Amarchand. But I cannot do so. The father's statement on the point is nowhere corroborated, and it is highly improbable that it should be true. Moreover, the presumption is of union in a Hindu family, and where, as in the present case, union is admitted, it lies, I think, on the plaintiff to prove his contention that, though he is joint with his father in living, he trades separate from him. The scanty proof adduced in the present case is wholly inadequate. I hold that Lallubhai is joint with his son, the plaintiff. So, too, I take it, it must be presumed that the minor Chamanlal is joint with the plaintiff.

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But it is urged, relying on 17 Bom. 413 and 7 All. 284, that the suit is not bad for misjoinder as it has been brought in the name of the firm. The learned pleader's contention is that there has been a misdescription, but no misjoinder. I am unable to agree with the view he puts forward. In 17 Bom. 413, the plaintiff was described as "the firm of K. S. by its manager S. S.," and the proposed addition was that of one of the partners of the firm. Such was also the case in 7 All. 284, the partners of the Elgin Mills Company being placed on the record as defendants, whereas before their application only the name of

the firm had been given. In the present case the suit was brought by the plaintiff as owner of the firm Chamanlal Vadilal, and not as the manager. And where he has sued as sole owner I think he is estopped from coming forward and stating that he was not, or even admitting for the sake of argument that he was not. He must stand or fall by the contention he raised in the lower Court. Under these circumstances I decide the first issue in the affirmative.

The plaintiff preferred a second appeal.

G. S. Rao for appellant (plaintiff):—The suit is brought in the name of the firm, and therefore it is not necessary to join all partners. He referred to section 22 of the Limitation Act (XV of 1877) and to *Manni Kasaundhan* v. *Crooke* (1); *Pragi Lal* v. *Maxwell* (2); *Kasturchand* v. *Sagarmal* (3); *Muhammad* v. *Himalaya Bank*.

L. A. Shah for respondent No. 1 contended that all the partners in the firm should be joined as parties, and referred to *Kalidas* v. *Nathu*,(5) *Ramsebuk* v. *Ramlall*,(6) *Samalbhai* v. *Someshvar*,(7) and *Ramkrishna* v. *Ramabai*.(8)

D. W. Pilgamkar for respondent No. 2.

CHANDAVARKAR, J.:—The Joint Judge, differing from the Subordinate Judge, has rejected the suit on the ground that the plaintiff is not the only partner in the firm of Chamanlal Vadilal, but that his father and his minor brother also are partners who ought to have been added as co-plaintiffs. This finding is based upon the fact found by the Joint Judge that the plaintiff's father and minor brother are joint with him, by which we understand the Judge to mean that they are members of a joint Hindu family. But from the mere fact that certain persons are members of a joint family it does not necessarily follow that they are partners in a firm which only one of them says is his, unless it was set up with the help of family funds. There is nothing in the judgment of the Joint Judge to show that the

(1) (1879) 2 All. 296.
(2) (1885) 7 All. 284.
(3) (1892) 17 Bom. 413.
(4) (1896) 18 All. 198.
(5) (1883) 7 Bom. 217.
(6) (1881) 6 Cal. 815.
(7) (1880) 5 Bom. 38.
(8) (1892) 17 Bom. 29.

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firm was so set up except the statement of the father, which is accepted by the Joint Judge. But, according to that statement, the father lent money to the plaintiff. That would make him a creditor of the firm, not a partner.

Whether the relation of partners exists among two or more persons is a question to be determined with reference to the relation between those actually carrying on the shop business. In the present case the Joint Judge does not hold, nor does he point to any evidence showing, that the persons who he finds are partners with the plaintiff agreed with the latter to combine their property, labour, or skill in the business and to share the profits or losses thereof, or what their relations were. All the Joint Judge finds is that those persons and the plaintiff are members of a joint family. In our opinion it is too broad a proposition of law to lay down that because a person carrying on business is a coparcener in a joint family, therefore all his coparceners are his partners in that business, entitled with him to its rights and responsible with him for its liabilities. "Partnership" is defined in section 239 of the Indian Contract Act, and we may further refer the Joint Judge to the observations of Jessel, Master of the Rolls, in *Pooley* v. *Driver*,[1] where he says a partnership "is a contract of some kind undoubtedly—a contract, like all contracts, involving the mutual consent of the parties." Participation in the profits of a business is one of the tests for determining whether a person is a partner. It is, as some of the decided cases show (see *Ex parte Tennant*; *In re Howard*[2]), "very cogent evidence," but, in the words of James, L.J., in the case just cited (page 309), "that evidence is capable of being controlled by the surrounding circumstances." In the same case, Cotton, L. J., puts it thus (page 315): "I take it the law is this, that participation in profits is not now conclusive evidence of the existence of a partnership, but it is one of the circumstances, and a very strong one, which are to be taken into consideration for the purpose of seeing whether or not a partnership exists, that is to say, whether there was a joint business, or putting it in another way, whether the parties were carrying on the business as principals

(1) (1876) 5 Ch. D. 458 at p. 472. (2) (1877) 6 Ch. D. 303.

and agents for one another whether it is a joint business or the business of one only." The law is very tersely summed up in one sentence by James, L. J., in *Ex parte Delhasse*; *In re Megevand*,(1) where he says that the right to control the property, the right to receive profits, and the liability to share in losses are the elements of partnership. These are all merely *indicia* which may help the Joint Judge in finding whether a partnership, as defined in the Indian Contract Act, exists. In the present case there is nothing in the judgment of the Joint Judge from which we can gather that these elements existed. He does not deal with the question as to the participation of profits, nor is there any mention of surrounding circumstances. We are left to presume them from the mere fact that the plaintiff is joint with his father and his brother; but just as there is no presumption that a loan contracted by a manager of a Hindu family is for a family purpose (as held in *Soiru Padmanabh* v. *Narayanrao* (2)), so there can be no presumption that a business carried on by a coparcener is a family business.

The case must go back, therefore, for a fresh finding on the issue whether there are any other partners in the firm on whose behalf the plaintiff has brought the suit. If at this fresh hearing the District Judge comes to the conclusion that there are other partners, we think that he ought to allow them to be brought on the record. There is no substantial difference between this case and that in *Kasturchand* v. *Sagarmal*.(3) There, too, as here, the plaintiff alleged that he was the sole partner, and the Court found he was not. And yet this Court held that the plaint ought to be allowed to be amended. It is true that in that case the plaintiff described himself as the manager of the firm suing, whereas the plaintiff in the present case describes himself as its owner. But that, in our opinion, is not material, for the word "owner" would be a mere surplusage if the suit was intended to be brought, as we have no doubt it was, on behalf and in the interests of the firm. Under section 27 of the Civil Procedure Code the plaintiff is entitled to an amendment.

(1) (1878) 7 Ch. D. 511 at p. 526. (2) (1893) 18 Bom. 520.
(3) (1892) 17 Bom. 413.

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We, therefore, reverse the decree and remand the appeal to the District Judge for a fresh decision, having regard to the above remarks. Costs to abide the result.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Aston; and on reference before Mr. Justice Chandavarkar.

1902. *December* 5.

BALABAI, LEGAL REPRESENTATIVE OF DECEASED MAHADEV NARAYAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANESH SHANKAR PANDIT AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sections 365, 367, 588 clause (18), and 591—Limitation Act (XV of 1877), schedule II, article 175A—Suit to recover possession—Death of the plaintiff pending suit—Legal representative—Practice—Procedure.

On 30th November, 1897, Mahadev Narayan sued to recover certain property from the defendants. He died on the 27th February, 1899, and his niece Balabai (his sister's daughter) applied to be put on the record as his heir and legal representative. It did not appear that the defendants had notice or knowledge of her application, and on the 5th June, 1899, her name was placed on the record under section 365 of the Civil Procedure Code (Act XIV of 1882). In July, 1899, Balabai applied to be allowed to prosecute the suit as a pauper. The defendants opposed this, but took no objection to her right to appear as Mahadev's representative. In August, 1899, the first defendant filed his written statement, in which for the first time he raised the question as to Balabai's right to represent the deceased plaintiff Mahadev. The case subsequently came on for hearing and issues were raised on the pleadings, the first issue being whether Balabai was Mahadev's legal representative. Evidence was taken on all the issues, and the Court found all of them in Balabai's favour, and passed a decree accordingly. The defendant appealed, and the Appellate Court, being of opinion that other issues were unnecessary until the issue as to Balabai's right to represent Mahadev was decided, raised only one issue upon that point. It found that Balabai was not the nearest heir and legal representative of the deceased plaintiff Mahadev, and thereupon it reversed the lower Court's decree and dismissed the suit. On second appeal,

Held, by *Chandavarkar* and *Batty*, JJ. (Aston, J., dissenting), reversing the decree and remanding the case for a decision on the merits, that the lower Appellate Court was wrong in going into the question as to Balabai's right to

* Second Appeal No. 34 of 1902.