PRIVY COUNCIL.*

REHMATUNNISSA BEGUM *v.* PRICE.

[On appeal from the High Court of Judicature at Bombay.]

1917.
October, 30; November 1; 26.

16 A.L.J. 513 =

Partnership—Right to sue for dissolution of partnership where it cannot be carried on except at a loss—Clause in partnership agreement stating date agreed upon for termination of partnership—Contract Act (IX of 1872), sections 252, 254, sub-section (6)—Right to protection of Court on equitable grounds—Discretion of Court to grant dissolution.

The defendants (respondents) a firm of contractors had undertaken the construction of the New Alexandra Dock in Bombay, and they required for the work a large supply of granite and other stone. For that purpose they formed a partnership with the plaintiff (now represented by the appellants) for the quarrying and supplying the required materials. By clause 4 of the deed of partnership it was agreed that "the working of the quarries, and the partnership should continue until the supply of granite or other stone for the construction of the dock was completed, and that the partnership should then terminate and be wound up." The plaintiff, finding after a time that the partnership could not be carried on except at a loss, brought a suit for its dissolution and for an account before the supply of granite and stone had been completed, and the defendants contended that the suit was premature.

Held (reversing on this point the decision of the Appellate High Court which had set aside that of the trial Judge) that, notwithstanding the terms of clause 4, the plaintiff was entitled on the ground alleged, and under the circumstances of the case, to have a dissolution under sub-section (6) of section 254 of the Contract Act (IX of 1872). There was nothing in section 252 of that Act to constitute a bar to such a suit. A partner's claim to a decree for dissolution rested, in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms on which the rights and obligations of the partners might have been regulated and defined by the partnership contract. There was no ground for questioning or disturbing the discretion given by the Act, and exercised by the original Court in making a decree for dissolution in the plaintiff's favour.

APPEAL 42 of 1916 from a judgment and decree (8th September 1914) of the High Court at Bombay on its Appellate side which varied a decree (28th March 1914) of a Judge of the same Court on its Original side.

* *Present.*—Lord Buckmaster, Sir John Edge, Sir Walter Phillimore, Bart., and Sir Lawrence Jenkins

The plaintiffs were the appellants to His Majesty in Council.

The suit which gave rise to this appeal was instituted on 14th October 1910 by the original appellant Nawab Kamal Yar Jung, now deceased and represented by the present appellants, against the respondents for the dissolution of a partnership formed between them under the name of the Hyderabad Granite Company, to supply granite and other stone to the respondents for the New Alexandra Dock in Bombay which the respondents had contracted with the Trustees of the Port of Bombay to construct. The plaint also asked for an account.

The facts are sufficiently stated in the judgment of their Lordships of the Judicial Committee.

The only question material to this appeal related to the terms of clause 4 of the deed of partnership which were "that the working of the quarries and the partnership should continue until the supply of granite for the construction of the dock was completed, and that the partnership should then terminate and be wound up."

This question was raised in issues (1) and (2) of those settled, viz.:—

(1) Whether the plaintiff had at the date of the filing of the suit any right to sue for a dissolution of the partnership, and whether the suit is not premature?

(2) Whether it is possible to take an account of the partnership before the termination of the adventure for which the partnership was formed?

The trial Judge (MACLEOD J.) decided both these issues in favour of the plaintiff. "The argument" he said "was that the partnership having been formed for a particular adventure, namely, to supply a certain quantity of granite and stone to the Dock Contractors,

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the partnership could not be terminated until the adventure was completed But it is clear that a partnership for a particular adventure is in the same category as a partnership for a fixed time or a partnership at will, in that any parties can apply to the Court for a dissolution under sub-section 6 of section 254 of the Indian Contract Act."

His decree was for a dissolution of the partnership, and for an account to be taken from 11th March 1908 to 14th October 1910.

An appeal by the respondents on the ground that issues (1) and (2) had been wrongly decided was heard by SIR BASIL SCOTT C. J. and DAVAR J., who on this point reversed the decision of MACLEOD J. The appellate Court held that it was clear not only from all the circumstances, but from the express wording of clause 4 of the partnership deed that it was agreed that the partnership should not be wound up until the work of the dock construction was completed; that section 254 of the Contract Act must be read in conjunction with section 252; and that both under that Act, and, in accordance with the law laid down by the Privy Council in the case of *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy*[1], the partners must be taken by this agreement to have expressly relinquished the rights they would otherwise have had to a dissolution if the partnership could not have been continued except at a loss; and that, apart from this, the jurisdiction under section 254 was discretionary, and in the circumstances of the case that discretion ought not to be exercised in favour of the Nawab The Appellate Court, therefore, held that the plaintiff was not entitled to have the partnership dissolved when the suit was brought, the work not having then been completed;

[1] (1876) 1 Bom. 468; L. R. 3 I. A. 200.

but that, as the work had been completed since, no useful purpose would be served by dismissing the suit on that ground. The Appellate Court further pointed out that there was an obligation on the defendants to take all the stone for the docks from the partnership and an express stipulation in the partnership agreement that the working of the quarries and the partnership should continue until the supply was completed and they held this stipulation to be binding on the parties and that the case, therefore, did not come within sub-section (6) of section 254 of the Contract Act. The Appellate Court varied the decree of the lower Court by directing that the account should be taken from 11th March 1908 down to the date when the work was completed, and by ordering the plaintiff to pay the costs of issues (1) and (2) to the defendants.

On this appeal,

Upjohn, K. C., and *Sir W. Garth*, for the appellants contended that neither the circumstances of the case, nor clause 4 of the partnership agreement justified the finding that the parties agreed to relinquish their right of dissolving the partnership if they found it could not be carried on except at a loss. The plaintiff, it was submitted, was entitled under section 254, sub-section(6) of the Contract Act (IX of 1872) to have the partnership dissolved as from the date when the suit was filed. The power of the Court under section 254 is not discretionary, and even if it were, the discretion should, under the circumstances, have been exercised in favour of the plaintiff. There was no ground for interfering with the discretion of the first Court; and his decision on the question raised by issues (1) and (2) was right. Reference was made to *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy* [1]; and Lindley on Partnership (8th edition), pages 502, 658.

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P. O. Lawrence, K. C., De Gruyther, K. C., and *E. B. Raikes* for the respondents contended that in view of the terms of the partnership agreement and its mutual obligations no dissolution could, or at any rate should, have been decreed until after the completion of the supply of stone for the construction of the dock. The plaintiff, it was submitted, had by the agreement in clause 4 of the partnership deed, renounced his right to sue for a dissolution until that date; and the case was governed by the provisions of section 252 of the Contract Act, and sub-section (6) of section 254 did not apply. In the case cited for the appellant, it was held that there was no provision in the partnership agreement by which the plaintiffs relinquished their right to sue for a dissolution before the date agreed upon; but the plaintiff had done so in the present case, it was contended, by clause 4 of the deed of partnership. The discretion not to dissolve the partnership was properly exercised; and the decision of the High Court was, therefore, for the reasons given in the judgment appealed from, right and should be upheld.

Upjohn, K. C., replied.

1917, November 26th :—The judgment of their Lordships was delivered by

SIR LAWRENCE JENKINS :—This is an appeal from a decree of the High Court at Bombay in its appellate jurisdiction, dated the 8th September 1914, varying a decree of that Court in its original jurisdiction passed on the 28th March 1914. The suit is for a dissolution of partnership. The original plaintiff was Nawab Kamal Khan, but he has died in the course of the suit and the present appellants are his representatives. The defendants, his partners, are the respondents in this appeal. The partnership

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was constituted on the 11th March 1908, and its terms are contained in an instrument of that date. To appreciate its purpose and legal effect it will be convenient to describe briefly the events that led up to its execution. The defendants, a firm of contractors, had undertaken the construction of the New Alexandra Dock in the island of Bombay, and they required for the work a large supply of granite and other stone. They accordingly made two contracts in 1906 for this supply, and in both of them the Nawab was either directly or indirectly interested.

For reasons, which need not be discussed, the supply of granite and stone under these contracts was so unsatisfactory that the defendants' manager complained, and declared that he would be compelled to look elsewhere if he could not get delivery according to contract.

In the end an arrangement was made for cancellation of the two contracts and the release of all claims for their breach by the Nawab and those interested with him, and for the formation of a new partnership between the Nawab and the defendants for the quarrying and supply of the requisite granite and other stone. The defendants insisted that the Nawab should be a sleeping partner without any voice in the control and conduct of the business, so his advisers naturally demanded the insertion in the partnership instrument of a provision which would secure him against the risk of extravagant working.

To this the defendants assented, and a clause was inserted which ultimately became the 25th in the instrument as executed. It is this clause that has given rise to much of the present dispute.

In the instrument, which is expressed to be made between the Nawab, of the one part, and the defendants

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(thereinafter called the contractors), of the other part, after a narrative of the events leading up to the partnership, it is recited that "for the purpose of carrying out the said terms and conditions and of working the said quarries and producing stone and granite therefrom, and rendering the said quarries remunerative and profitable to the parties thereto, and in consideration of the advances to be made by the contractors," it had been arranged that the agreement should be entered into.

The instrument then provided that the Nawab and the defendants should be interested in the working of the quarries at Lingampalli and Dharur, and should share the profits and losses half and half (clause 1); that the granite and stone produced from the quarries should be furnished to the defendants for their works at the dock in accordance with their requirements and sent, delivered, and paid for as therein provided (clause 3); that the working of the quarries and the partnership should continue until the supply of granite or other stone for the construction of the docks was completed, and that the partnership should then terminate and be wound up (clause 4); that the expenditure incurred in managing and supervising the quarries should not exceed the proportion of 10 per cent. on the cost of the work, including all charges (clause 17); that the royalty should be one of the expenses of working the quarries, to be defrayed out of the partnership funds or the income earned (clause 22); and "that the average rate of expense per cubic foot at which the stone has hitherto been quarried, exclusive of management and superintendence, shall not be exceeded in future except under extraordinary circumstances, when the rate of expense may be increased by 10 per cent." The work contemplated by the partnership was carried on, but with the one unvarying result of annual loss,

which amounted to upwards of three lakhs of rupees on the 30th June, 1910. In these circumstances the present suit was instituted in October 1912, praying for a dissolution on the ground that the business of the partnership had been, and only could be, carried on at a loss.

In the plaint extravagant charges of fraud were made, but they have been abandoned. While groundless charges of this type are to be deprecated, and may well attract the consequence of an adverse order as to costs, their Lordships cannot accede to the suggestion, somewhat faintly made, that the Nawab had by these charges forfeited his right to the protection of the Court if he otherwise had a good cause of action.

The matters now in contest are : (1) whether the suit is premature ; (2) what is the "average rate of expense" mentioned in clause 25 of the partnership instrument ; and (3) have there been "extraordinary circumstances" within the meaning of that clause ?

The Court of first instance decided in the Nawab's favour on the first and second of these points, and adversely to him on the third. The appellate Bench's decision was wholly adverse to the Nawab, but as the work on the docks had been completed before the hearing of the appeal, the Court directed that partnership accounts should be taken from the 11th March 1908, up to the end of the construction work of the docks.

The Court of Appeal's decision that the Nawab when he filed his suit was not entitled to claim a dissolution was based on the continuance of the partnership involved in the terms of the partnership agreement and on section 252 of the Contract Act. And the Court proceeded to express the opinion that, even if it had

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jurisdiction, it would have refused to declare the partnership dissolved at any period earlier than the completion of the work. The first and the more extreme of these propositions was not seriously pressed in argument before this Board, nor indeed could it be.

It is beyond controversy that at the institution of this suit the business of the partnership could only be carried on at a loss. This is conclusively shown by the firm's balance sheets, the profit and loss account for the period from the 1st March 1908, to the 30th June 1912, and the admission in the defendants' written statement. The condition described in section 254 (6) of the Indian Contract Act, 1872, is thus established, and it is provided that in this event the Court may, at the suit of a partner, dissolve the partnership. What, then, is there in the circumstances of this case to deprive the Court of its jurisdiction or the plaintiff of his right to seek the Court's assistance?

Their Lordships are unable to agree with the High Court's view that there is anything in section 252 that constitutes a bar; it appears to them to be directed to something wholly different.

A partner's claim to a decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract.

It was not, therefore, any contravention of that section for the plaintiff to seek a dissolution or for the Court to decree it though the partnership agreement contemplated the continuance of the partnership beyond the date at which the suit was instituted. No man can exclude himself from the protection of the Courts, and yet, if the view of the Appellate Bench is

to prevail, this is what the Nawab has done, for a decree for dissolution would be the protection appropriate in the circumstances of this case. It is no answer to say that this partnership was not terminable at will; it is to meet that precise predicament that the Court's power to decree dissolution is conferred in the events enumerated in section 254. For a partnership terminable at will no such provision would be required.

Their Lordships, therefore, are unable to affirm the decision of the Appellate Bench as to the competence of the suit. But this leaves open the question whether the Court's discretion should be exercised for or against the Nawab's claim. The Appellate Bench decided adversely to it, and it was urged in argument against interference with this decision that it is opposed to sound practice for an Appellate Court to substitute its discretion for that of the Court from which an appeal has been preferred. The justice of this argument is undoubted, but it was at least as relevant before the Appellate Bench as it is before this Board. And yet the Appellate Bench did not hesitate to express its readiness to substitute its discretion for that of the original Court, although in the view it took of the Court's jurisdiction the question could not arise.

In these circumstances the real question is whether there was or is any justification for questioning or disturbing the discretion exercised by the original Court when it passed the decree for dissolution in the Nawab's favour. It cannot be said that the Court acted capriciously or in disregard of any legal principle in this exercise of its discretion. On the contrary, there are elements in the case which can fairly be regarded as ample warrant for the first Court's decision, and for this it is enough to point to the dual position of the defendants, which brought their interests as contractors into sharp conflict with their duties as partners

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of the Nawab, and also to the prominence given in the recital to the common purpose that the quarries should be remunerative and profitable to the partners.

Their Lordships therefore hold that there is no sufficient ground for disturbing the original decree so far as it pronounced for a dissolution.

[The rest of the judgment dealt with questions of fact not material to this report.]

Their Lordships will accordingly humbly advise His Majesty to allow this appeal and to direct that the decree of the Appeal Court should be set aside and that of the original Court restored. Their Lordships do not wish to interfere with the discretion exercised by the original Court in its direction as to costs; and as to the costs of this appeal and the appeal to the High Court, they will recommend that there be no order save that each party bear his own.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents: Messrs. *Grundy, Kershaw, Samson & Co.*

Appeal allowed.

J. V. W.