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the petitioner in this petition wants us to decide is a matter directly connected with the election and affecting the merits of the question, and it is in this context that we come to the conclusion that our power under art. 226 to issue a writ has been taken away under art. 329 (*b*) of the Constitution. We also hold that even if we had the power, this is not a proper case where a writ of mandamus should be issued.

The result is that the petition fails and is dismissed. No order as to costs.

Rule discharged.

K. B. S.

APPELLATE CIVIL

Before Mr. Justice Vyas.

1951 Oct. 10

THE DHULIA-AMALNER MOTOR TRANSPORT, LTD., AMALNER (ORIGINAL DEFENDANT NO. 17), APPELLANT *v.* RAYCHAND RUPSI DHARAMSI SHET AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1-16), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), s. 100—Second appeal—Construction of document, not a document of title, whether point of law —Indian Partnership Act (IX of 1932), s. 43—Whether a mere proposal to dissolve a partnership amounts to notice of dissolution—Indian Companies Act (VII of 1913), s. 23—Incorporation of Company—Company, a person different from the shareholders—Motives of promoters irrelevant to determine the legality or otherwise of incorporation—Indian Trusts Act (II of 1882), s. 67—Whether relationship of Company with third persons fiduciary.

The question of construction of a document, which is not a document of title or otherwise the direct foundation of rights, is not a question of law that can be raised in second appeal.

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* Second Appeal No. 805 of 1949 with Second Appeal No. 829 of 1949.

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Midnapore Zamindary v. *Uma Charan Mandal*,[1] and *Gordhandas* v. *Dhirajlal*,[2] followed.

The notice for dissolution of partnership under s. 43 of the Indian Partnership Act, 1932, must express a final intention to dissolve the partnership and must be explicit and very precise. A mere proposal to dissolve the partnership, the dissolution depending upon the result of an enquiry to be made and information to be collected, does not amount to a notice of dissolution as contemplated by s. 43 of the said Act.

Mellersh v. *Keen*,[3] and *Watson* v. *Eales*,[4] relied upon.

A partnership firm consisting of 17 partners and known by the name of Dhulia-Amalner Motor Owners' Union was formed for plying buses on hire on certain routes. After the firm worked for some time, some of the partners (defendants Nos. 1 to 12 and 15) formed a private limited company and sold to the said company their buses which were till then being used by the Union. Under the terms of the partnership deed it was perfectly competent to a partner to sell to a third person his bus or buses which he had given to the Union for the business of the Union. The plaintiff, who was a partner in the Union but was not a shareholder in the private limited Company, sued the defendants for accounts of the income that may have been received by the defendants as a result of the formation of the Company.

Held, (1) that the private limited company was an independent person in the eye of law and the business of plying motor buses on the particular routes belonged to it and not to its shareholders;

(2) that as no fraud had been committed upon the officer who gave the certificate of registration of the company, the Company was legally incorporated and it must be treated like any other independent person with its rights and liabilities appropriate to itself and the motives of those who took part in the promotion of the company were absolutely irrelevant in discussing what those rights and liabilities were;

(3) that on the two sets of partners in the Union falling out on any question, one set cannot call upon the other set, who may have promoted a limited company, to render accounts of the business, which is neither the business of the first set of partners nor the business of the second set of them, but is the business of the company, a third person altogether;

(4) that defendants Nos. 1 to 12 and 15 as promoters of the company and share-holders thereof did not occupy any fiduciary position in relation to the plaintiff and defendants Nos. 13, 14 and 16; and s. 67 of the Indian Trusts Act, 1882, had no relevance to the facts of the case.

Salomon v. *Salomon & Co.*—*Salomon & Co.* v. *Salomon*,[5] *Ramkanai Singh Deb Darpashaha* v. *Mathewson*,[6] and *E. B. M. Company* v. *Dominion Bank*,[7] followed.

[1] (1923) 25 Bom. L. R. 1287, P. C.
[2] (1925) 28 Bom. L. R. 467.
[3] (1857) 23 Beav. 294.
[4] (1859) 27 Beav. 236.
[5] [1897] A. C. 22.
[6] (1915) L. R. 42 I. A. 97.
[7] [1937] A. I. R. P. C. 279.

Ahmed Musaji Saleji v. *Hashim Ebrahim Saleji*,[1] and *Ramlal Thakursidas* v. *Lukhmichand Muniram*,[2] discussed and distinguished.

Second Appeals against the decision of T. U. Chapatwala, Civil Judge (S. D) with appellate powers at Dhulia, reversing the decrees passed by R. A. Karandikar, Joint Sub-Judge at Dhulia.

On November 8, 1940, seventeen persons, viz., the plaintiff and defendants Nos. 1 to 16 in the suit, formed a partnership for plying buses for hire on the Dhulia-Amalner and Amalner-Marwad roads. Each of them was an owner of a bus or buses and the partnership firm was styled "The Dhulia Amalner Motor Owners' Union". They entered into an agreement of partnership on the aforesaid date. While the business of the Union was going on in pursuance of that agreement, Defendants Nos. 1 to 12 and 15, feeling dissatisfied with its working, entered into an agreement called a "Kararnama" on July 23, 1941 to the effect, that the Union should be dissolved and a private limited Company should be formed for doing the very business for which the Union had been formed. A general meeting of the members of the Union was held on August 24, 1941 which was attended by ten out of the seventeen partners of the firm. The meeting was not attended by the plaintiff and his colleagues (defendants Nos. 13, 14 and 16) who constituted a minority of the members of the partnership. A resolution was passed unanimously by the members present to the effect that as a Kararnama signed by the majority of the partners of the firm had been received by the manager of the firm suggesting dissolution of the partnership, enquiries should be made and information collected on the subject of the formation of a private limited company, whereafter the necessary permission of the Regional Transport Officer should be obtained and steps should be taken to form a private limited company. Subsequently three more general meetings of the Union were held at which several resolutions by a majority were passed. The Union held its final meeting on January 31, 1942 and a resolution was passed to the effect that the reserve fund should be distributed among the partners of the firm and an account of the firm should be made up to January 31, 1942 and the amounts should be distributed to the partners according to their shares. The President of the Union informed the R. T. O., Nasik that the business of the Union had been stopped from January 31, 1942

[1] (1915) 42 Cal. 914, P. C.

[2] (1861) Bom. H. C. R. Vol. I, Appx. p. 51 (52).

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and that the company started with effect from February 1, 1942. On February 14, 1942 the R. T. A., Nasik directed that the permit issued to the union be transferred to the name of the company which was called the Dhulia Amalner Motor Transport Limited.

On February 14, 1942 the plaintiff, Raychand Rupsi Dharamsi filed a suit (out of which Second Appeal No. 805 of 1949 arose) for a declaration that the formation of the private limited company was illegal and that the Union had not become dissolved but was in existence with a change in the name only. He also claimed several injunctions and an account of the income that may have been received by the defendants as a result of the formation of the company.

Laxmibai, another partner in the Union filed another suit (out of which Second Appeal No. 829 of 1949 arose) for accounts of her share in the partnership.

The trial Court held that the partnership firm Dhulia Amalner Motor Owners' Union had been dissolved, that the formation of the private limited Company (Dhulia Amalner Motor Transport Limited) by defendants Nos. 1 to 12 was legal and that the suit of Raychand Rupsi in its present form was not maintainable. As a result the suit was dismissed. In the companion suit filed by Laxmibai the trial Court held that the suit was maintainable and passed a decree for her share of the profits.

The plaintiffs in both the suits preferred appeals and the Civil Judge (S. D.) with Appellate Powers at Dhulia set aside the decree of the trial Court in Raychand Rupsi's suit and granted a declaration that the partnership firm known by the name of the Dhulia Amalner Motor Owners' Union had not been dissolved but had merely changed its name to the Dhulia Amalner Motor Transport Limited. He allowed an option to the plaintiff and his colleagues of paying a specified share capital and participating in the income and profits obtained by the Dhulia Amalner Motor Transport Limited upto the date of the decree. In default of the plaintiff making this option, the decree directed the accounts of the Dhulia Amalner Motor Transport Limited to be made on the basis of the said Company making such profits as may be attributable to the use of the permit, furniture, goodwill, etc., of the Union. For either sort of accounts a preliminary decree for taking accounts by a Commissioner was passed. In the other appeal arising out of

Laxmibai's suit the learned Judge directed a preliminary decree to be drawn up for taking accounts of the plaintiff's share in the Dhulia Amalner Motor Owners' Union and the plaintiff was given an option of becoming a share-holder on the same terms as in the companion suit.

The Dhulia-Amalner Motor Transport, Ltd. (defendant No. 17) appealed to the High Court against both the decrees.

R. B. Kotwal, for the Appellant (in Second Appeal No. 805 of 1949).

Purshottam Tricumdas, with *G. A. Desai,* and *G. N. Vaidya,* for respondent No. 1.

S. A. Desai, with *G. A. Desai,* and *S. A. Kher,* for respondent No. 17.

M. A. Kharkar, for respondents Nos. 2, 4 to 7, 9, 11 and 16.
R. B. Kotwal, for the appellants (in Second Appeal No. 829 of 1949).

Respondents served.

VYAS J. These appeals arise out of an appellate decision of the Civil Judge (Senior Division) with Appellate Powers at Dhulia by which he disposed of two appeals, namely, Appeals Nos. 144 and 145 of 1943, which had arisen out of Suits Nos. 82 and 63 respectively of 1942. In Appeal No. 144 of 1943 the learned Judge of the lower appellate Court set aside the judgment and decree of the trial Court and granted a declaration that the partnership firm known by the name of the Dhulia-Amalner Motor Owner's Union had not been dissolved but had merely changed its name to the Dhulia-Amalner Motor Transport, Limited. He allowed an option to the plaintiff and his colleagues, the minority members of the partnership firm, of paying a share capital of Rs. 800 each with interest at 6 per cent. from February 21, 1942, onward and "participating in the income and profits obtained by the Dhulia-Amalner Motor Transport, Limited, up to the date of the decree." On the plaintiff failing to make the option, the appellate decree directed the accounts of the Dhulia-Amalner Motor Transport, Limited to be made on the basis of the said company "making such profits as may be attributable to the use of the permit, furniture, goodwill, etc.. of the Union." The learned Judge went on to say: "For either sort of accounts a preliminary decree for taking accounts by a Commissioner is passed." In the other appeal (No. 145 of 1943) which arose out of Suit No. 63 of 1942

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the learned Judge directed a preliminary decree to be drawn up for taking accounts of the plaintiff's share in the Dhulia-Amalner Motor Owners' Union from July 22, 1941, up to the date of the suit. The plaintiff in the said suit (defendant No. 13 of the other suit No. 82 of 1942) was also given an option to become a shareholder of the limited company on payment of Rs. 800 together with interest at 6 per cent. per annum from February 21, 1942, onward.

Now, the facts from which these appeals have arisen may briefly be stated: Originally the individual bus owners used to ply their buses on hire on the Dhulia-Amalner route and the Amalner-Marwad route. That used to be done under the superintendence of the District Superintendent of Police. In due course the Regional Transport Authorities were established for the various regions and the control and supervision over the buses plying on hire in the various regions passed to the respective Regional Transport Authorities. The two routes in question—the Dhulia-Amalner route and the Amalner-Marwad route—were situated within the jurisdiction of the Regional Transport Authorities, Nasik. A certain amount of correspondence ensued between the Regional Transport Authority, Nasik, and the manager of the motor service which used to ply buses of the individual bus owners on the above mentioned routes. Exhibits 148, 149 and 146 are amongst some of the letters which passed between the two. The Regional Transport Authority strongly recommended the formation of collective bodies in preference to individual enterprise for carrying on the passenger transport by roads. Ultimately on November 8, 1940, a partnership firm consisting of 17 partners and known by the name of the Dhulia-Amalner Motor Owners' Union was formed. It was registered on November 11, 1940. The partnership deed is exh. 167. In the words of the learned trial Judge the terms of the said partnership were:

> "It was one of the fundamental terms of the partnership agreement (exhibit 167) that the disputes between the partners *inter se* were to be decided by a two-third majority, with a right to appeal to an independent tribunal of three persons to be appointed by the Union from time to time. The individual owners of the buses were to remain the owners and were liable to spend for any repairs to their buses, or for such spare parts and accessories as were necessary to maintain their buses in a roadworthy condition. Such was in brief the constitution of the union....
> .....The Union had decided to run ten buses at a time. After every one of the ten buses had made one trip and a touring car had completed two return trips on these roads, 'a circle' was said to become complete

and after 4 or 5 such circles, accounts were made and the income distributed among the partners. Out of the earnings a Reserve Fund at the rate of one anna per rupee was set apart and out of this collection one-half was to remain as the Reserve Fund for the Union and the other half was to go towards the payment by way of remuneration. Two owners of cars were to attend for duty at the Dhulia and the Amalner stands....."

It is to be remembered that it was a partnership at will. Within a short time difficulties were experienced in the working of the partnership business and, on July 23, 1941, what Mr. Kotwal for the appellant calls a *kararnama* was passed. That document is exh. 166. It describes itself as a *kararnama*, but in fact is a letter which was written by 13 partners of the firm to the manager of the firm. Therein, amongst other things, it was stated:

"सदरहू धुळे अमळनेर मोटार युनियन ही संस्था यापुढें आपण लिहून ठेवलेल्या भागिदारीपत्राप्रमाणें न चालवितां लिहून ठेवलेले भागिदारीपत्र रद्द करुन प्रायव्हेट लिमिटेड कंपनी करून चालवावी".

In other words it was suggested in this *kararnama* that in future the partnership firm should not be carried on in accordance with the partnership deed, that the said partnership deed should be cancelled and that a private limited company should be formed. Thereafter a notice exh. 136 dated August 19, 1941, was sent out to the members of the Union for convening a general meeting. On August 24, 1941, the general meeting was held. It was attended by ten out of the seventeen partners of the firm and an important resolution which was unanimously passed by the members present was resolution No. 4 which stated amongst others:

करारनामा मॅनेजरकडे आला त्यावरून आपले भागिदारीपत्र रद्द करून प्रायव्हेट लिमिटेड कंपनी करण्याकरितां जी कांहीं माहिती हवी असेल ती गोळा करून तसें करण्याबद्दल रिजनल ट्रॅन्सपोर्ट आफिसरची परवानगी घेऊन शक्य तितक्या लवकर सदरहू युनियन प्रायव्हेट लिमिटेड कंपनी करून टाकावी."

In other words the resolution said that as a *kararnama* signed by the majority of the partners of the firm had been received by the manager of the firm suggesting dissolution of the partnership, enquiries should be made and information collected on the subject of the formation of a private limited company, whereafter the necessary permission of the Regional Transport Officer should be obtained and steps should be taken to form a private limited company as quickly as possible. It is to be noted at this stage that if we turn to the resolution there is nothing to show that the plaintiff and his colleagues who constituted a minority of the members of the parnership

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attended this general meeting. If we turn to the notice exh. 136 by which this meeting was convened, we find again the signatures thereon of those who had received the notice in token of the receipt. A curious circumstance in this connection is that whereas the signatures of all the members who constituted the majority in the Union were written in ink, only the alleged signatures of the plaintiff and his colleagues are to be found in pencil. Whereas all the other signatures are to be found at the foot of the notice itself, the five alleged signatures of the plaintiff and his colleagues are to be found on the reverse of the notice. The least that may be said about these features is that the circumstance of these five signatures only being in pencil and appearing on the reverse is a suspicious circumstance. It is categorically alleged by the plaintiff that this notice was never received by him. On a careful consideration of the above mentioned circumstances I am not really satisfied that the plaintiff and his colleagues who were in a minority in the partnership firm on the question of its dissolution did really know that a general meeting was to be convened on August 24, 1941, and I think it was therefore that they could not attend that meeting. This aspect of the case will have an important bearing when we shall proceed to the consideration of the question whether the resolution passed at the meeting of August 24, 1941, could amount to a statutory notice within the meaning of s. 43 of the Indian Partnership Act. The next general meeting of the partnership firm was held on December 25, 1941, and the pertinent resolution was resolution No. 1 which stated that immediate steps should be taken for making a valuation of the buses and for taking possession of the buses. The next general meeting of the Union was held on January 5, 1942, and it is contended for the appellant that it was an important meeting. My attention was drawn to resolution No. 1 which was passed then and which stated:

"कंपनीकडून गाड्या ताब्यांत घ्याव्यात व व्हॅल्युएशन करून शेअर्स देण्यांत यावेत".

In other words the resolution stated that a company was to be formed, the buses were to be handed over to the company after making the valuation and shares were to be issued on the basis of the said valuation. It may be noted that this meeting was attended by all the partners of the firm. Eleven persons were in favour of the resolution and five remained neutral. Those who remained neutral were the present plaintiff and his colleagues. The last general meeting of the Union, which was referred to in the arguments in these appeals, was held on January 31, 1942,

and resolution No. 3 which was passed then is said to be an important one. It stated that the reserve fund should be distributed amongst the partners of the firm and account of the business of the firm should be made up to January 31, 1942, and the amounts should be distributed to the partners according to their shares. On these facts, regard being had to the *kararnama* exh. 166 dated July 23, 1941, the notice exh. 136 dated August 19, 1941, and the resolutions passed at the general meetings dated August 24, 1941, December 25, 1941, January 5, 1942 and January 31, 1942, it is contended by Mr. Kotwal for the appellant that the partnership firm had ceased to do its business from January 31, 1942, onward, i. e., the firm was dissolved from that date and the private limited company had begun its business from February 1, 1942.

Mr. Purshottam for the respondents who constitute a minority section in the partnership firm has strenuously contended that the partnership firm has not been dissolved but is still continuing, that the requisite procedure for the dissolution of a partnership as prescribed by ss. 40 and 43 of the Indian Partnership Act was not followed, that the business which was done by the private limited company was the same business which was done by the Union and that the company was really the same entity as the Union but under a different name. Relying on s. 37 of the Indian Partnership Act Mr. Purshottam has contended that the majority section of the partnership firm are using the artificial creation of the company as their agent for doing the business with the property of the partnership firm and are therefore liable to render to the minority section an account of the profits made by them and attributable to the use of the shares of the minority section in the property of the firm which is used by them (majority section). In the alternative Mr. Purshottam has relied on s. 67 of the Indian Trusts Act and has contended that as the majority section of the members of the partnership firm who have promoted the private limited company were trustees of the partnership property and as they had wrongfully employed the said trust property in doing a business of their own under the name of the artificially created company, they were liable to render accounts to the minority section of the profits made by them in the business done under the name of the company.

Now, the first submission of Mr. Purshottam in resisting Appeal No. 805 of 1949 is that the finding of the learned Judge of

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the lower appellate Court that the partnership firm has not been dissolved is a finding of fact and therefore conclusive and it is not open to the Court in second appeal to go behind that finding. Now, it is true that although the learned appellate Judge in his judgment has not specifically raised an issue on the point of the alleged dissolution of the partnership firm and has not recorded in specific terms any finding in regard thereto, it seems implicit in the order passed by him that his view is that the Union has not been dissolved but has continued its existence under a changed name. Mr. Purshottam has characterised this part of the lower appellate Court's order as a finding of fact and has relied on the decisions in *Midnapore Zamindary* v. *Uma Charan Mandal*[1] which is a Privy Council case, and *Gordhandas* v. *Dhirajlal.*[2] In *Midnapore Zamindary* v. *Uma Charan Mandal*[1] it was held that the ascertainment of the date at which a particular holding first began as a definite holding, was essentially a question of fact, even if it was entirely dependent on documentary evidence and no second appeal lay to the High Court from the decision of the District Judge on appeal upon such a question, unless it could be shown that he had misdirected himself in point of law in dealing with it. Relying on this authority Mr. Purshottam has argued that the finding whether the existence of a particular partnership was ended on a particular date or continued even thereafter was a finding of fact and no second appeal against that finding of the lower appellate Court lay to the High Court even if the decision was dependent entirely on documentary evidence. In the body of their Lordships' judgment in the Privy Council case which was delivered by Lord Sumner it was observed as under (p. 1287):

> ".....Now to ascertain the date, at which a particular holding first began to be held as a definite holding, is essentially a question of fact, and must depend on evidence. That evidence may be, and naturally is, documentary, but the documents admitted in evidence upon that question are really historical materials, and although they have to be construed, and if possible understood, they are not to be treated as involving issues of law merely because they have to be construed. It is not as though they were being construed as instruments of title, or were contracts or statutes, or otherwise the direct foundation of rights."

In *Gordhandas* v. *Dhirajlal* it was held that the question of construction of a document which was not a document of title or otherwise the direct foundation of rights, for the purpose of ascertaining whether it contained an admission in favour of a

(1) (1923) 25 Bom. L.R. 1287, P.C. (2) (1925) 28 Bom. L.R. 467,

party's case, was not a question of law that could be raised in second appeal. Mr. Justice Fawcett who delivered the judgment of the division bench of the Court in that case observed (p. 469):

"The sole question in such a case is one of the weight that is to be attached to such an implied admission, and unless the District Judge has misdirected himself in law as to how he should deal with that particular question, I do not, for myself, think that we would be justified in second appeal in upsetting his decree on the ground that we might take a different view as to the weight to be attached to the evidence."

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Relying on these two decisions it is argued for the contesting respondents by Mr. Purshottam that the finding of the lower appellate Court on the question of the alleged dissolution of the partnership firm was arrived at by the Court as a result of careful consideration of the various notices and resolutions recorded at the general meetings of the partnership firm and the other written material in the case, and although it might be possible for the High Court to arrive at a different conclusion from the one arrived at by the learned Judge on the examination of the same material, it would not be open to this Court to do so, as the finding of the lower appellate Court would be a finding of fact and therefore, conclusive. Mr. Purshottam is right in his contention. The various documents, upon a consideration of which the lower appellate Court came to the conclusion that the Union was still continuing, are not the instruments of title, nor do they contain the direct foundation of rights, and therefore, they would not fall within the category of the exceptions contemplated by their Lordships in *Midnapore Zamindary* v. *Uma Charan Mandal.* That being so, I agree with Mr. Purshottam that it would not be open to the appellant to ask the Court to go behind the conclusion of the lower appellate Court which is implicit in its judgment and decree, namely, that the Union has not been dissolved but is continuing.

Nevertheless, as the arguments based on the various documents have been advanced and heard at very considerable length in these appeals and since it may be possible to take the view that it is a matter of legal inference to be drawn from the resolutions whether they amounted to a declaration, on the part of those in favour of the resolutions, of their intention to dissolve the Union, I have decided to deal with the question.

Now, in support of his contention that the partnership firm (the Union) had already been dissolved before the date of the suit, Mr. Kotwal is relying on ss. 40 and 43 of the Indian

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Partnership Act. I shall first deal with his contention based on s. 40 of the Act. Now, s. 40 says:—

"A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners."

There is no question of course in this case of any dissolution with the consent of all the partners of the firm. The plaintiff and his colleagues constituting a minority section of the firm have never consented to the dissolution. It therefore falls to be considered whether any dissolution of the Union in accordance with a contract between the partners has taken place. In this context Mr. Kotwal is relying on cl. 9 of the partnership deed exh. 167 read with the *kararnama* exh. 166 dated July 23, 1941. If we turn to cl. 9 of the partnership deed, we find that it laid down that if any dispute of whatever description arose between the partners of the Union, it was to be decided by a two-thirds majority of the members of the Union. Now, says Mr. Kotwal, a disagreement on an important question such as a dissolution of the partnership was certainly a matter of dispute between the partners of the Union, and therefore if two-thirds of the members of the Union decided to dissolve the Union, that would be a decision in accordance with the contract connected with the deed of partnership and would satisfy the requirements of s. 40 of the Indian Partnership Act which lays down a procedure for the dissolution of a partnership firm. In this connection it becomes necessary to turn to what is called a *kararnama* exh. 166. This document, although it is designated a *kararnama*, is really a letter written by 13 of the partners of the firm to the manager of the firm. In it there was a suggestion by the 13 partners that in future the conduct of the partnership firm should not be carried on in accordance with the deed of partnership, that the said deed should be cancelled and that a private limited company should be formed. The *kararnama* was naturally signed by only 13 of the partners of the Union. Now, the question is whether this *kararnama* exh. 166 could be said to be a decision by a two-thirds majority of the members of the Union, and I have no doubt that by no stretch of imagination could it be said to be such a decision of a matter in dispute. In the first place, a decision by a two-thirds majority of the members of the Union would naturally require a meeting of the members of the Union. Unless there is a meeting of the members of the Union, I fail to understand how there could come into existence a decision by a two-thirds majority of the members of the Union. In any case, the minority section of the

Union must at least know that a certain disputed matter was going to be decided by the opposite section, namely, the majority section. If, for instance, the minority section did not know anything at all about this *kararnama* exh. 166, I cannot understand how the *kararnama* could be said to be a decision by a two-thirds majority of the members of the whole Union. It is to be noted that what was embodied in the *kararnama* was not any decision but a suggestion or proposal by 13 of the partners of the Union that the business of the Union was to be conducted in future not in accordance with the terms of the partnership deed, that the deed should be cancelled and that a private limited company should be formed. I am not prepared to agree with Mr. Kotwal that a mere suggestion or proposal, however, strongly worded, would amount to a decision in accordance with the terms of a contract embodied in clause 9 of the partnership deed so as to fall within the ambit of s. 40 of the Indian Partnership Act. The *kararnama* was simply a letter which 13 of the partners of the Union wrote to the manager of the firm expressing their views and making their proposal. There is nothing whatever to show that the minority section, namely, the plaintiff and his colleagues, knew that such a letter was being drafted or written by the majority section and was being forwarded to the manager of the Union. Why should it not be assumed—I should think it would be a perfectly natural assumption—that if the minority section had known about this *kararnama,* they would probably have sent in a dissenting letter. In the circumstances, I cannot agree with Mr. Kotwal that in this *kararnama* exh. 166 there was a compliance with the provisions of cl. 9 of the partnership deed, namely, a compliance with a contract that a matter in dispute was to be decided by a two-thirds majority of the members of the Union. Accordingly, I am of the opinion that the provisions of s. 40 of the Indian Partnership Act would not come into operation in this case at all and it would be impossible to hold that the Union was dissolved in accordance with s. 40 of the Act.

Next, we proceed to s. 43 of the Indian Partnership Act, on which also Mr. Kotwal relied for submitting that the dissolution of the Union had taken place already before the institution of the suit. Now, s. 43 of the Act says:—

"(1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm."

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The section requires three things: (1) the giving of a notice, (2) the notice has to be in writing, and (3) the notice must express an intention to dissolve the firm. Unless these three requisites are complied with, the provisions of s. 43 of the Act would not come into operation at all. Now, therefore, what we have got to see is whether a notice such as is required by s. 43 of the Act was given in this case by any partner or partners of the firm for the dissolution of the firm (Union). In this connection reliance is put by Mr. Kotwal on the various notices by which the various general meetings were convened and on the resolutions of the general meetings themselves, namely, the general meetings held on August 24, 1941, December 25, 1941, January 5, 1942, and January 31, 1942. Now, if we turn to the notices convening the meetings, we find that in all of them, except exh. 136, there is no reference whatever to the item of the dissolution of the partnership firm as one of the items in the agenda to be discussed at the general meeting. If we turn to the notice exh. 136, which was a notice for convening a general meeting on August 24, 1941, we find that the third item on the proposed agenda was mentioned as

"कांहीं गाडयांना कोल जनरेटर बसविण्याबद्दल विचार करणें व भागीदारी मोडून प्रायव्हेट लिमिटेड कंपनी करणें".

Now, it is strenuously contended by Mr. Purshottam for the contesting respondents that the words

"भागीदारी मोडून प्रायव्हेट लिमिटेड कंपनी करणें".

occurring in item 3 of the proposed agenda are a subsequent interpolation and were not written in the notice as it was originally issued. I feel that there is considerable substance in Mr. Purshottam's contention. In the first place, the words in question are to be found at a place which is not a natural place for them. The two items together which form item 3 of the proposed agenda are utterly disjointed and have no connection one with the other. The first item relates to an installation of a coal generator on the buses and the second item is about the dissolution of the partnership. Surely, no two items could be further removed from each other in point of logical connection than the items of a coal generator and dissolution of a partnership. If the question of the dissolution of the firm was intended to be brought before a general meeting on August 24, 1941, there could have been no objection whatever on the part of the manager of the Union to mention it as a fifth item in the proposed agenda. But of course if the notice had already been issued,

sent out and received back with the signatures of those to whom it had been sent, and if the item about the dissolution of the partnership had not been written in it from the inception, it could not have been subsequently added as a fifth item. In that case, the only possible course open to the interpolator would be to show it along with one or the other of the items of the proposed agenda and, in my opinion, there is no doubt that it was subsequently shoved in as a part of the item No. 3. There being no logical connection whatsoever between a coal generator and the dissolution of the partnership firm, I am afraid no other conclusion is possible except that the words quoted above are a subsequent interpolation. Further more, if we carefully look at the words "भागीदारी मोडून प्रायव्हेट लिमिटेड कंपनी करणें" we find that they are distinctly smaller in size than the rest of the words preceding them in item No. 3. For all these reasons, I have no doubt that this notice exh. 136 is utterly useless for the purpose of making out a case that it contained a declaration of intention on the part of one or more partners of the firm to dissolve the firm.

We proceed next to the resolutions of the general meetings dated August 24, 1941, December 25, 1941, January 5, 1942, and January 31, 1942, and what we have got to see is whether any of these resolutions amounted to a statutory notice of intention to dissolve the firm as required by s. 43 of the Partnership Act. In the first place a statutory notice as contemplated by s. 43 is a totally different thing from a resolution which is merely a record of the deliberations and the result of the said deliberations arrived at by a majority of votes at a particular meeting. A resolution passed at a meeting cannot amount to an explicit notice by one or more partners of the firm to dissolve the firm from a definite date. Even so, let us turn to the various resolutions and consider whether they amount to a notice of intention to dissolve the firm. The first in order comes the resolution of a general meeting which was held on August 24, 1941, and the relevant resolution is resolution No. 4. I have already referred to it in the previous part of this judgment. It was merely a proposal that enquiry was to be made and information was to be collected on the subject of the dissolution of the partnership firm and the formation of a private limited company. Such a proposal cannot amount to a definite declaration of intention to dissolve the firm. It would all depend on the result of the enquiry made and the information collected. The result might be favourable to the proposal to dissolve the Union and form a

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company or might be adverse to it. That being so, obviously a mere proposal that information may be collected and enquiry may be made for the purpose of giving effect to a proposal which was contained in the *kararnama* exh. 166, namely, the proposal to dissolve the firm and form a limited company cannot amount to a notice within the meaning of s. 43 of the Partnership Act. The next resolution in point of time is the resolution passed at a general meeting held on December 25, 1941. It is resolution No. 3. It merely stated that the valuation of the buses was to be made and possession thereof was to be taken. Surely, such a resolution cannot amount to a notice of the dissolution of the firm. It is possible that a purchase of some additional buses for the Union was contemplated and a valuation was to be made in that behalf. Unless the valuation is made, possession of the buses cannot be taken. The point is that merely because the resolution stated that the valuation of the buses was to be made and possession thereof was to be taken, we cannot conclude that the persons present at the meeting gave a notice of an intention to dissolve the firm. Next in point of time comes the meeting of January 5, 1942. This is a much made of meeting and let us therefore, see whether resolution No. 1 passed then would amount to a notice within the meaning of s. 43 of the Partnership Act. Resolution No. 1 stated:—

"कंपनी कडून गाड्या ताब्यांत घ्याव्यात व व्हॅल्युएशन करून शेअर्स देण्यांत यावेत."

Here again, it is impossible to conclude from the resolution that it was a declaration of intention to dissolve the firm. It is certainly open to any partners of the partnership firm to promote a private limited company. There is no disability on the members of the partnership firm which would prevent some of them from promoting a private limited company. It is also to be noticed that in the deed of partnership a distinct right was reserved to the partners who had given their buses for the use of the firm to sell those buses to a third party. In those circumstances, if some of the partners of the firm desired to promote a private limited company and also desired to withdraw the use of their buses from the firm and sell them to the private limited company which was to be formed and if with that view a valuation was to be made for the purpose of issuing shares to the promotors of the company, surely it could not be said that those facts would make out a case of dissolution of the firm. We thus see that the much made of resolution of the much made of meeting of January 5, 1942, falls far short of the requirement of s. 43 of the Act. Lastly, there is a resolution of

the meeting of January 31, 1942. It said (1) that the reserve fund of the partnership firm was to be distributed amongst the partners and (2) that an account of the business of the firm was to be made up to January 31, 1942. Now, as far as the making of the accounts of the Union up to January 31, 1942, is concerned, it cannot furnish proof of the dissolution of the firm. Surely during the existence of the firm accounts can be made from time to time, and if it was resolved to make accounts up to January 31, 1942, it could not mean that the Union was sought to be dissolved thereby. It is no doubt true that the reserve fund was resolved to be distributed amongst the members of the firm, but it is not stated in the resolution why the distribution was to be made. If the distribution was to follow the dissolution of the firm, the resolution ought to have stated in terms that as the Union was to be dissolved the reserve fund should be distributed. The net result, therefore, of the examination of the various resolutions to which my attention was drawn by Mr. Kotwal for the appellant is that they singly and conjointly fall far short of the requirement of s. 43 of the Partnership Act. None of them amounts to a notice such as is contemplated by s. 43 and therefore it could not be said that by virtue of these resolutions the Union was dissolved.

In this context it is of great importance to remember that when I asked Mr. Kotwal a question whether there was anything in any of the resolutions relied upon by him to show that the Union was dissolved from a definite date, he experienced considerable difficulty in answering the question and submitted that each one of the resolutions was a step-in-aid of the final stage which was reached on January 31, 1942. When the question was repeated to him after some time, Mr. Kotwal stated that the resolution No. 1 of the general meeting of January 5, 1942, definitely amounted to a declaration of intention to dissolve the Union, but again went on to say that in any case the resolution of January 31, 1942, would amount to a notice within the meaning of s. 43 of the Act. It is, therefore, patently clear that Mr. Kotwal himself, appearing for the appellant, is not able to point unhesitatingly to any particular resolution and contend that it amounted definitely to a notice of intention to dissolve the Union within the meaning of s. 43 of the Act.

While on the question of what would be or would not be a proper notice under s. 43 of the Indian Partnership Act, my attention was invited by Mr. Purshottam for the contesting

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respondents to Lindley on Partnership, 11th edn., at page 676, where the learned author has observed:

".....A notice that the partnership shall be dissolved must, to be effectual, be explicit, and be communicated to all the partners.....A proposal to dissolve on terms which are not accepted, does not amount to a dissolution."

My attention was also invited to the case of *Mellersh* v. *Keen*,[1] where it was held that a notice by two partners to a third that "we shall dissolve the partnership" on December 31 operated as a dissolution on that day. In this context it is further important to observe that in Lindley on Partnership at page 515 the learned author has said:—

"A notice to dissolve on a given day of the week, and a given day of the month, is bad if there is any mistake in either date; *e.g.* a notice to dissolve on Monday, the 9th, is bad, if the 9th falls on a Friday."

And in this connection the learned author has relied on the decision in *Watson* v. *Eales*.[2] If we turn in this connection to Halsbury's Laws of England, 2nd edn., Vol. XXIV, at page 493, this is what we find stated in article 938:—

"The notice must amount to an unambiguous intimation of a final intention to dissolve the partnership, and must be served on all the partners unless the articles otherwise provide."

The net result of the examination of the above mentioned authorities on the point of notice is that a mere proposal to dissolve, the dissolution depending upon the result of the enquiry to be made and information to be collected, would not amount to a notice of dissolution. The notice must express a final intention to dissolve the partnership. It should be explicit and should be precise. Even a mistake in date would invalidate the notice. For instance, if a notice says that the partnership is to be dissolved with effect from Monday, the 9th, it would be a bad notice if the 9th was a Friday, and not a Monday. This is an instance to show what extent of precision is required of a notice. Such an amount of precision is altogether absent from all the resolutions to which my attention was drawn by Mr. Kotwal for the appellant. In fact, the degree of precision which is required of a notice would require the expression of an intention to dissolve with effect from a particular point of time. In short as a result of consideration of the various notices and resolutions which are on the record of this case, I am altogether unable to come to a conclusion that there was a compliance with s. 43 of the Partnership Act.

(1) (1859) 27 Beav. 236. (2) (1857) 23 Beav. 294.

As a matter of fact, not only the various notices and resolutions fall far short of proving the dissolution of the partnership firm on or before January 31, 1942, but there is a considerable bulk of written material in this case to show definitely that the Union was continuing even after that date; and such material is comprised of exhs. 115, 133, 153, 154 and 210. If we turn to exh. 115 which is a reply dated March 29, 1942, of defendant No. 1 to the Regional Transport Authority, we find that this is what was stated by defendant No. 1:—

"I have the honour to state that the complaint is against the transformation of a Union formed under the Partnership Act into a limited company under the Company's Act and not against any transfer of permit from one body to another."

In other words the position taken up by defendant No. 1 was that the company was not a body different from the Union, but that the two were the same entity, or that the Union was transformed into a company with only a change in the name. The Regional Transport Authority was never given to understand by defendant No. 1 that there was a change in the constitution of the association which was plying the buses on the two routes. Even the A and B permits were not altered. I agree with Mr. Purshottam that exh. 115 dated March 29, 1942, would clearly support a case of the non-dissolution of the partnership firm. Then there is exh. 154 dated May 25, 1942, which is an application by defendant No. 1 to the Regional Transport Authority for "*changing the name of the Union into a limited company.*" It is of particular importance to note that in this application it was stated by defendant No. 1: "Since only change in the name of the Company is to be effected and there is no transfer of ownership no fee is chargeable." This is as strong a piece of evidence as conceivable to show that the entity of the Union and the company was the same, that there was no transfer of buses from one body to another and that therefore no fees were chargeable for the transfer of the buses from the the name of the Union to the name of the company. The whole point is that the position taken up by defendant No. 1 at a point of time much later than January 31, 1942, was that the Union had not been dissolved but was continuing only under a different name and that, therefore, there did not arise any question of transferring the business from one entity to the other. If we turn to the permit exh. 210, we find that defendant No. 1 is mentioned as a managing partner. If we turn to the date of expiry of this permit we find that it was September 23, 1943 In other words in the permit, which was to be operative till

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September 23, 1943, defendant No. 1 was mentioned as a managing partner which must certainly suggest that the Union was continuing to exist till that date and had not been dissolved on January 31, 1942.

The next important material on which it is contended for the plaintiff that the Union has not been dissolved is furnished by the proceeding sheet of the meeting of the Union dated January 25, 1942, exh. 153. It states:—

"व्हॅल्युएशन वगैरे न करितां युनियननें ७ गाड्या विकत घेण्याचें ठरविलें आहे व त्यांच्या किंमती खालील प्रमाणें ठरविण्यांत आल्या आहेत त्या येणें प्रमाणें.

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,,	५६२	,,	,,	१४००	०	०
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Surely, if the Union had already been dissolved with effect from January 5, 1942, or was about to be dissolved with effect from January 31, 1942, it would never have bought on January 25, 1942, as many as seven buses costing Rs. 10,300. I am of the opinion that this proceeding sheet of the meeting dated January 25, 1942, delivers an effective death-blow to the case of the appellant that the Union was dissolved in all probability on January 5, 1942, but in any case from January 31, 1942.

For the reasons stated above, I am in agreement with the view of the learned Judge of the lower appellate Court that the Union (partnership firm) is continuing to exist and was never dissolved. Although on the question of the alleged dissolution of the Union which goes by the name of the Dhulia-Amalner Motor Owners' Union my decision is thus against the appellant, it is impossible to confirm the decree of the lower appellate Court which is based on a complete ignorance of the legal position. It is ignorance of law embodied in the statute—the Indian Companies Act—to say that the difference between the Union and the private limited company in this case lay merely in the

change of name from "the Dhulia-Amalner Motor Owners' Union" to "the Dhulia-Amalner Motor Transport Limited." The fundamental basis, which was a wrong basis, of the decree passed by the lower appellate Court was as though the business done by the private limited company was a continuation of the business done by the Union; or else the decree for accounts which has been passed would be a manifestly absurd decree. Now, it is to be noted that the limited company, in substance and in form, was *not* the same entity as the Union with merely a changed name. The company has a distinct entity of its own, quite different from the entity of the Union and the entities of the shareholders, and the business which was done by it was not the same business as was done by the Union, nor was it a continuation of the same business. The business which was done by the company was distinctly its own business. It was not the business of its shareholders either. What happened in this case was this: After the partnership firm worked its way for sometime, some of the partners, i. e. defendants Nos. 1 to 12 and defendant No. 15, formed a private limited company, which they could do under the law even while the partnership continued to be a running concern. Such of the partners of the Union, who formed a limited company, sold to the company their buses which were hithertofore being used by the Union. Under the terms of the partnership deed (vide clause 6 of ext. 167) it was perfectly competent to a partner to sell to a third person his bus or buses which he had given to the Union for use for the business of the Union. The company was the said third person to whom defendants Nos. 1 to 12 and defendant No. 15, who were partners in the Union, sold their buses after withdrawing them from the Union. Now, if two parties fall out, how can one of them call upon the other to render to it the accounts of a business done by a third party? The buses, with which the company was doing its business, were the property of its own. They were not the property of the Union. They were never the property of the Union. The Union had only the use of them. The proprietary interest in them had always belonged to such partners as were the owners thereof before the Union was formed. The said buses had become the property of the company by purchase from defendants Nos. 1 to 12 and defendant No. 15, to whom it was open under the partnership agreement to sell their buses to any person they liked after withdrawing their use from the partnership firm. Therefore, it is a crux of the matter to remember (1) that the buses which the company was plying were not the property of the

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partnership firm, nor the property of any of the partners of the firm, nor the property of the shareholders, but the property of the company itself; (2) that the business of the company was not the business of the Union; and (3) that the company was a corporate body whose entity was entirely different from the entities of its shareholders or the entities of the Union and its members. Such being the position in law which the learned Judge of the lower appellate Court failed completely to appreciate, how can one set of partners of the partnership firm call upon another set of partners to render accounts of a business done by a third person altogether, and yet that is what in substance and effect has been done by the decree of the lower appellate Court.

Now, it is a well settled principle of law that a limited company has a distinct entity of its own, which is created by the statute, in this case the Indian Companies Act. If we turn to the Indian Companies Act, s. 23 thereof lays down:

"(1) On the registration of the memorandum of a company, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited.

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act."

It is thus clear that a limited company is a body corporate which has an entity of its own, with a perpetual succession and a seal of its own.

It is contended for the plaintiff Raychand Rupsi Dharmsi Shet that the private limited company's name "the Dhulia-Amalner Motor Transport Limited" is merely an *alias* for "the Dhulia-Amalner Motor Owners' Union," that in reality the company is no different concern and is not a different entity from the Union itself and that the business which was done by the company was the same as was done by the Union, and on that basis he has asked for certain declarations and injunctions and also for accounts of the business done by the company and for a share in the profits made by the company and attributable to the use, by the company, of the vehicles, etc., which, says the plaintiff, are the property of the Union, which

has not been dissolved. Now, in *Salomon* v. *Salomon & Co.*: *Salomon & Co.* v. *Salomon*[1] Lord Halsbury L. C. in his address to the House of Lords said (p. 29):

"My Lords, the important question in this case, I am not certain it is not the only question, is whether the respondent company was a company at all—whether in truth that artificial creation of the Legislature had been validly constituted in this instance; and in order to determine that question it is necessary to look at what the statute itself has determined in that respect. I have no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sale guide must be the statute itself.

Now, that there were seven actual living persons who held shares in the company has not been doubted. As to the proportionate amounts held by each I will deal presently; but it is important to observe that this first condition of the statute is satisfied, and it follows as a consequence that it would not be competent to any one—and certainly not to these persons themselves—to deny that they were shareholders.

.....Still less is it possible to contend that the motive of becoming shareholders or of making them shareholders is a field of inquiry which the statute itself recognises as legitimate.....

I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence—quite apart from the motives or conduct of individual corporators. In saying this, I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to shew that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some proceeding in the nature of scire facias you could not prove the fact that the company had no real legal existence. But short of such proof it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.....I can only find the true intent and meaning of the Act from the Act itself; and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence.

Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not."

Now, with great respect, these are very weighty observations which establish beyond any doubt the fact that the Dhulia-Amalner Motor Transport Limited (the private limited company) was an independent person in the eye of law, a legal

[1] [1897] A. C. 22.

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entity, and the business of plying motor buses on Dhulia-Amalner route and Amalner-Marwad route belonged to it and not to its shareholders. Here also, the sole guide for determining whether the Union and the company are the same entity or different entities is the statute itself namely, the Indian compnies Act, and all that we have got to see is whether the "artificial creation of the legislature," i.e., the company, was validly constituted or not. Here also, it is not disputed that several actual living persons are holding shares in the company. We are not concerned with the proportionate amounts held by each, but the important point is that the first condition of the statute is satisfied, and it would be futile for any one to deny that some of the partners of the partnership firm are shareholders in the company. The plaintiff alleges dishonesty of motive against defendants Nos. 1 to 12 and defendant No. 15 who were responsible for promoting the company, but the motive for becoming shareholders is not a field of inquiry which is recognised as legitimate by the Indian Companies Act. The law recognises the existence of the company, quite irrespective of the motives, intentions, schemes or conduct of the individual shareholders. There is no allegation whatever in this case that any fraud had been committed upon the officer who gave the certificate of registration of the company and therefore the following observations of Lord Halsbury are particularly appropriate (p. 30).

> ".....But short of such proof (*i. e.*, proof of fraud in getting the certificate of registration) it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."

As his Lordship put it tersely (p. 31):

> "Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not."

There is thus no substance in the argument urged for the plaintiff that those who promoted an artificial creation in the shape of this company did so to employ the said creation as an agent for their own business. There is also no force in the plaintiff's contention that there is a company in the sense that the majority section of the partners of the partnership firm are employing it as an agent to do their own business and that

there is no company in the sense that the entity of the Union and the company is the same with only a change in the name. As Lord Halsbury said, you cannot say at the same time that there is a company and there is not.

In *Ramkania Singh Deb Darpashaha* v. *Mathewson*,[1] a patni lease actually granted was challenged and one of the grounds of the challenge was that the transaction which was sanctioned was a transaction of a grant of a patni lease to Robert Watson & Co., in other words to a firm of individual men, and not to Robert Watson & Co., Limited, i.e., a different and incorporated persona. In considering that objection to the grant of the patni lease their Lordships of the Privy Council observed (p. 101):

"This demands careful consideration. There is this to be said for the objection, that the persona in the latter case (i. e., in the case of Robert Watson & Co., Limited) is different from the persona in the former (i. e., in the case of Robert Watson & Co.,) and that a change in the lessee or patnidar ought to be treated as a change in essentials."

On the authority of this decision also, there would be no difficulty in holding that the persona of the company is different from the persona of the partnership firm (Union), in other words the company is a persona altogether different from the partners in the firm or from the shareholders who promoted the company. It is a third person.

In *E. B. M. Company* v. *Dominion Bank*,[2] also it was held:

"The distinction should be clearly marked, observed and maintained between an incorporated company's legal entity and its actions, assets, rights and liabilities on the one hand, and the individual shareholders and their actions, assets, rights and liabilities on the other hand."

It is thus clear that the legal entity, actions, assets, rights and liabilities of the company are quite different from those of the individual shareholders. The business of plying motor buses on the routes in question and the assets of the said business (buses, etc.,) belong thus to the company and not to the shareholders. That being so, on the two sets of partners in the Union falling out on any question, one set cannot call upon the other set, who may have promoted a limited company, to render accounts of the business, which is neither the business of the first

[1] (1915) L. R. 42 I. A. 97, s. c. 17 Bom. L. R. 449.

[2] [1937] A. I. R. P. C. 279.

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set of partners nor the business of the second set of them, but is the business of the company, a third person altogether.

Mr. Purshottam for the plaintiff has referred the Court to s. 37 of the Indian Partnership Act, s. 67 of the Indian Trusts Act, certain observations at pages 444 and 448 of Aggarwala's Indian Trusts Act and decisions in *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji*,[1] and *Ramlal Thakursidas* v. *Lakhmichand Muniram*.[2] In my opinion, however, the references to the above sections and authorities are altogether beside the point. Section 37 of the Partnership Act can obviously not apply to the facts of this case for the simple reason that the business of the company is not the business of the shareholders who are partners in the partnership firm and are also the promoters of the company. It is impossible to say in this case that the business which is done by the company is the business which certain of the partners of the partnership firm are doing with the property of the firm or that the profits which accrue from the business are the profits of the above mentioned partners or the firm attributable to the use, by them, of the property of the firm. Section 67 of the Indian Trusts Act also has no relevance here, since there is no question at all of any trust or fiduciary relationship between the company and the minority section of the partners in the firm (plaintiff and his colleagues defendants Nos. 13, 14 and 16) and no question at all of any breach of trust by the company.

In *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji*,[1] on which Mr. Purshottam has relied, it was observed by their Lordships of the Privy Council (p. 96):

> ".....It is well settled that in certain cases, when on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he may be ordered to account for these assets with interest thereon, and this apart from fraud or misconduct in the nature of fraud."

These observations, weighty as they are with great respect, have no relevance in the present case. In the first place, this

[1] (1915) L. R. 42 I. A. 91, s. c. 42 Cal. 914, s. c. 17 Bom. L. R. 432.

[2] (1861) 1 B. H. C. R. Appx. 51, 52.

is not a case in which the dissolution of the firm has taken place. Secondly, this is not a case in which any of the partners of the Union are continuing the business, with the assets of that firm, for their own benefit. There is hardly any need to repeat that the business of the private limited company is its own and could not be called the business of any of the partners of the partnership firm. Clearly, therefore, the decision in *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji* has no application to the facts of this case.

The next case which was relied upon by Mr. Purshottam was the case of *Ramlal Thakursidas* v. *Lakhmichand Muniram*, and I fail to understand how this decision could possibly apply in the present instance. It was a case where the surviving partners of a firm, in the absence of a representative of a deceased partner, adjusted the partnership accounts and agreed to hand over a portion of the partnership property to one of the partners in compromise of his claim, and the partner whose claim was so agreed to be compromised prayed for a dissolution of the firm upon the basis of such compromise; it was held that a representative of the deceased partner was a necessary party to the suit, and it was further observed that surviving partners were treated as trustees of the partnership property for the benefit of the representative of a deceased partner; and an agreement entered into by such surviving partners in the absence of the representative of the deceased partner which was inconsistent with the nature of such trust—to deal with the partnership assets only by way of sale—would not be specifically enforced. There is no question in this case of defendants Nos. 1 to 12 and defendant No. 15 employing the company as their agent for doing business as trustees of the partnership property for the benefit of the remaining partners of the partnership firm. That being so, the decision in *Ramlal Thakursidas* v. *Lakhmichand Muniram* is beside the point for the purpose of these appeals.

At page 444 of Aggarawala's Indian Trusts Act we find that this is what is stated:

"If a trustee pay trust-money into a bank to the account of himself, not in any way earmarked with the trust, and also keep private money of his own to the same account, the Court will disentangle the account,

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and separate the trust from the private money, and award the former specifically to the *cestui que trust*. In the case of a person occupying a fiduciary position, although not an express trustee, as a factor or agent, the same rule is equally applicable."

Here again it is to be noted that defendants Nos. 1 to 12 and defendant No. 15 as promoters of the company and shareholders thereof did not occupy any fiduciary position in relation to the plaintiff and defendants Nos. 13, 14 and 16, and therefore also the observations relied upon by Mr. Purshottam would not help him.

For the above mentioned reasons, although I am in agreement with the conclusion of the learned Judge of the lower appellate Court that the partnership firm has not been dissolved in this case, I find myself unable to confirm the judgment and decree of the learned Judge. The plaintiff has no legal right, and cannot sue, for accounts of the business done by the Dhulia-Amalner Motor Transport Limited. If he has any remedy at all, and I am expressing no opinion on that point, against any of the partners of the firm for breaches, if any, of the terms of the partnership agreement, that remedy is to sue in damages such partners as may have committed a breach of the terms of the agreement. But surely the remedy is not to sue an altogether third person, an independent person, namely, the company, for accounts of the business done by it, a business which does not belong to any of the members of the partnership firm and does not also belong to any of the shareholders of the company. In these circumstances, therefore, Appeal No. 805 of 1949 is allowed, although I hold, on a question of fact, that the partnership firm known as the Dhulia-Amalner Motor Owners' Union has not been dissolved. On the question of costs, I think it would be proper to make no order as to costs in this appeal, since on a point on which a very considerable amount of argument was advanced by both sides, namely, a point of alleged dissolution of the partnership firm, the appellant has lost.

As far as the other Appeal No. 829 of 1949 also is concerned, it must be allowed. By the judgment and decree of the lower appellate Court, which are the subject-matter of that appeal, a preliminary decree has been ordered to be drawn up in suit No. 63 of 1942 for taking accounts of the plaintiffs' share in the

Dhulia-Amalner Motor Union from July 22, 1941, to March 31, 1942, and for this I have no doubt there is no justification. It is to be noted, as the learned Judge has pointed out in his judgment, that as far as the accounts of the firm (Union) up to July 22, 1941, were concerned, the amount which fell due to the share of Laxmibai (respondent in this appeal) was taken away by her husband Sadashiv Kondaji or a certain other person Nathu Bhikaji after signing a receipt on Laxmibai's behalf. Even subsequent to July 22, 1941, accounts of the firm were made from time to time and all other partners of the firm, except Laxmibai only, accepted their respective shares and signed in token of the receipt of the said shares till December 31, 1941. This would show that as many as sixteen partners of the firm had no reason to doubt the correctness and acceptability of the accounts of the firm till December 31, 1941. As to the accounts for the month of January 1942 also we find that with the exception of the plaintiff of the two suits (Nos. 82 and 63 of 1942) and with the further exception of Kalusing Devising, defendant No. 15, all other partners of the firm accepted the payments of their share in the profits of the firm and signed in token of the said acceptance. Such being the state of affairs with respect to the accounts of the firm for the period from July 22, 1941, to the end of January 1942, I am in entire agreement with the observations of the learned trial Judge:

"Where the accounts have been made from time to time at certain regular intervals and the various persons interested in them have ungrudgingly accepted the payments found due to them on such account, it will be a sheer harassment of all, to direct taking them afresh at the instance of one out of the seventeen partners. Besides, after the account books were produced in Court it is not shown that there is anything wrong or unbelievable about them."

The learned Judge of the lower appellate Court has said in paragraph 23 of his judgment:

"It is also allowable to a partner to impeach the settled account on a ground of fraud or mistake. The plaintiff Laxmibai has not been given or explained the accounts from April 22, 1941. In my opinion, it is open to plaintiff or every partner to scrutinize the accounts and find out if there is any mistake or fraud. It is, therefore, necessary to pass a preliminary decree in suit No. 63 of 1942."

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In my opinion, there was no warrant for these observations. The case of fraud or mistake was not even pleaded by the plaintiff Laxmibai herself in her plaint; much less were any particulars of the fraud stated by her. There was no issue about it and that being so, at the very latest stage, it would be incorrect to order the taking of accounts on the ground of a possible fraud or mistake. Besides, it is impossible to appreciate the learned appellate Judge's remark that Laxmibai has not been given or explained the accounts from April 22, 1941. As I have pointed out above, her own husband or another person Nathu Bhikaji on her behalf actually accepted the amount of her share which fell due to her up to July 22, 1941, and, that being so, there is no substance in the learned Judge's observation that Laxmibai was not given or explained the accounts from April 22, 1941.

For the above mentioned reasons, the decree of the learned Judge of the lower appellate Court passed by him in Appeal No. 145 of 1943 and which is the subject-matter of the present Appeal No. 829 of 1949 is set aside and Appeal No. 829 of 1949 is also allowed. As far as the costs of this appeal are concerned, the appellants will get their costs from the respondent who will bear her own.

No order is necessary in Civil Application No. 1155 of 1949 in view of my judgment in Appeal No. 828 of 1949.

Appeals allowed.

K. B. S.