Leading cases

Steel brothers and co. Ltd. Verses. Cit

(the entire deed must be considered to decide the existence of partnership.)

Facts

Prior to november 29,1928, steel brothers and co. Ltd. ("steels") and ellerman's arracan rice and trading co. Ltd. ("ellermans") carried on trade in burma rice and 'or its by-products in burma, in london and elsewhere. Both these companies had rice milling machines and produced rice from paddy. There was another company known as the burma co. Ltd. ("burma"). All the shares of this company were held by steels, who were also its managing agents. On or about november 29, 1928, an agreement was entered into between the steel, burma and ellermans to provide for the amalgamated working of the burma rice business in burma and london of all the three companies under the management of steels. The combined of the three parties was referred to as "combination". The profit or loss of the business of the combination carried on at the designated places was to be shared by and divided between steels and ellermans in a fixed ratio. The agreement could be terminated by any of the three parties by giving notice to that effect to others by a certain date. The agreement was signed by all the three parties.

For assessment year 1943-44 and 1944-45, the combination ('the assessee') made application to the ito for registration of their partnership said to be constituted by steels and ellermans. The ito refused registration of partnership on the ground that the application for registration was signed by two partners, steels and ellermans, whereas the partnership deed showed that it was a partnership of three partners.

Issue

Whether on a proper construction of the agreement dated november 29, 1928, and having regard to the relevant facts and circumstances of the case, there was a partnership between steels, ellermans and burma?

Decision of the supreme court

On a true construction of the agreement dated november 29,1928, the supreme court came to the conclusion that burma was a partner along with steels and ellermans in the combination and had a joint venture with the steels in the profit or loss of the combination. The court said: "it was entitled to terminate the partnership by giving notice to the other partners as specified in the agreement. It had also a right to refer all the disputes arising between the partners to be decided by arbitration.... There was a sharing of the profit or loss of the business of the combination and there was also an agency insofar as steels were to manage and carry on the business on behalf of all the partners of the combination. Thus all the ingredients of partnership were satisfied and it is futile to urge that the agreement was a hybrid document which was a tripartite agreement in-so-far as the business of the combination was concerned and was a partnership agreement only between two partners *viz.* Steels and ellermans. There is not the slightest doubt, whatever be, that burma was a partner with steels and ellermans in the business of combination and the partnership was entered into under the terms of the agreement was a partnership between three partners *viz.* Steels, burma and ellermans. The fact that all the shares of burma were owned by steels really explains why burma was not given any specific rights like ellermans in the agreement dated 29,1928, for the protection of its interests, inasmuch as the interests of burma was absolutely safe in the hands of steels and no provision was required to be made for the protection of burma's interests as such.

K.d. Kamath & co. Verses. Cit (1971)

(the entire deed must be considered to decide the existence of partnership.)

facts

The appellant was a firm consisting of k.d. Kamath (party no. 1) and five other persons (parties nos. 2 to 6) and the partnership was constituted under the document, dated march 20, 1959. There were sixteen clauses in the deed. The business of the partnership, as recited in the partnership deed, was stated to have been carried on in partnership from october 1, 1958. The partnership was registered under the indian partnership act, 1932 on or about august 11,1959. For the assessment year 1959-60, corresponding to the previous year ending march 31, 1959, the appellant filed an application to the into under the income-tax act for registration of the partnership in the name of m/s k.d. Kamath and company. The into declined to grant registration on the ground that there was no genuine partnership brought into existence by the deed of march 20, 1959 and the claim of the firm having been constituted was not genuine. The ito further held that the business should be held to be the sole concern of k.d. Kamath.

Issue before the high court

Whether, on the facts and in the circumstances of case m/s k.d. Kamath & co. Could be granted registration under the income-tax act for the assessment year 1959-60?

Decision of the high court

The high court answered the question against the assessee and held that there was no relationship of partners between the parties *inter se.* The high court gave its decision on the basis of five circumstances. These circumstances were based on consideration in particular of clauses 8, 9 and 10. The following were the circumstances, which according to the learned judges militate against holding in favour of the assessee: "(1) the management as well as control of the business is entirely left in the hands of the alleged first partner k.d. Kamath; (2) the other partners work under his directions and share in the profits and losses in accordance with the proportions mentioned in clauses (5); (3) it is not within the powers of the parties nos. 2 to 6 to act as agent of the other partners; (4) the said parties cannot accept any business except with the consent of k.d. Kamath; and (5) those parties cannot raise any loan or pledge the firm's interest, directly or indirectly except under the written authority of k.d. Kamath. In view of all these circumstances, the high court held that there was no mutual agency among the parties and therefore there was no partnership.

Decision of the supreme court

The supreme court reversed the decision of the high court and held that all the ingredients of partnership were satisfied under the partnership deed dated march 20, 1959.

Under the partnership deed, the sole proprietary concern of k.d. Kamath was converted as partnership concern by admitting parties nos. 2 to 6 as working partners contributing labour, along with party no. 1 and party no. 1 being the main financing and managing partner of the business. Net profits and losses were shared by the parties in the proportion of the shares specified in clause 5. Apart from the managing partner, k.d. Kamath, operating the bank accounts, any other partner authorised by him was also eligible to operate the bank accounts. The deed entitled a partner, when he ceased to be a partner to be paid his share of profit or loss, up to the date of his so ceasing to be a partner. Books of accounts were to be properly maintained and each partner had a right at all times to have free and equal access to them. Each partner were to be just and faithful to the other partners in all matters relating to the business of the firm and each of them had got a duty to diligently attend the business of the firm. Each of them had also an obligation to give a true account and information regarding the business of the firm. Partners were

entitled to withdraw the amounts in anticipation of profits falling to their individual share; and in case of loss, each of them was also liable to make good the same in proportion to his share in the partnership. Partners were to carry on the affairs of the firm for mutual gain and benefit.

The supreme court held that the aforesaid provisions in the partnership established that the sole proprietary concern of k.d. Kamath had vanished. *The above provisions also established the right of each partner to share profits and also to bear the losses in the proportion of their shares mentioned in clause* 5. Therefore, one of the essential ingredients to constitute partnership, namely, that there should be an agreement to share the profits and losses of the business was more than amply satisfied in the case.

The legal requirement to constitute a partnership in law are: (/) *there must be an agreement to share the profits or losses of the business; and* (2) *the business must be carried on by all the partners or any one of them acting for all* there is implicit in the second requirement the principle of agency. A mere nomenclature given to a document is by itself not sufficient to hold that the document in question is one of partnership. *The fact that the exclusive power and control, by agreement of the parties, is vested in one partner or the further circumstance that only one partner can operate the bank account, or borrow money on behalf of the firm are not destructive of the theory of partnership provided the two essential conditions, mentioned earlier, are satisfied.*

The court said: "as the control and management of business can be left by agreement in the hands of one partner to be exercised on behalf of all the partners, the other consequences by way of restriction on the rights of the other partners lose all significance. In fact the clauses providing that the working partners are to work under the directions of the managing partner and the further clause restricting the right to accept business or raise any loans or pledge the firm's interest except with the consent of the managing partner, k.d. Kamath, have all to be related with the agreement entered into by the partners regarding the management and control by k.d. Kamath,

We are of the opinion that under the partnership deed the relationship which has been brought into existence between the six parties is a relationship of partners who have agreed to share the profits and losses of business carried on by all or any one of them acting for all and it satisfies the definition of "partnership" under section 4 of the partnership act."

The court further said: "it is open to the parties under section 11 to enter into an agreement regarding their mutual rights and duties as partners of the firm and that can be done by contract, 'which in this case is evidenced by the deed of partners hip. Further section 18 will have to be read along with section 4. If the relationship of partners is established as a "partnership" as defined in section 4, and if the necessary ingredients referred to in that section are found to exist, there is no escape from the conclusion that in law a partnership has come into existence. It is in the light of these provisions that section 18 will have to be appreciated. Section 18 only emphasizes the principle of agency which is already incorporated in the definition of "partnership" under section 4. *It should be remembered that so far as the outside world is* concerned, so long as the parties nos. 2 to 6 are held out as partners of the firm, as has been done under the partnership deed, then acts would bind the hole partnership."

The supreme court reversed the decision of the high court. Thus the entire deed must be considered to decide the existence of partnership.

K. Jaggaiah verses. K. Venkatasatyanarayana

(a single venture capable of being carried on by two or more persons may be treated as business,)

Facts

In 1965 three persons agreed to jointly carry on a single contract with the government for maintenance work to be carried on from the mile stone 17/10 to 267 4 in guntur narsaraopet road. The contract was taken in the name of one of them (the first defendant). The plaintiff invested a sum of rs.1 1,000 and the second defendant invested rs. 3,000. Management of the work and maintenance of account was left to the first defendant. But he refused to show the accounts. Hence the suit was filed.

Issue

Whether a single contact with the government can be the subject matter of partnership?

Decision of the a.p. High court

The word "business" is defined in section 2(b) of the indian partnership act, 1932, which includes every trade, occupation and profession. The court observed that the definition is not exhaustive. Relying on *re abenheim,* (1913) 109 lt 219, 220 and *lindley on partnership* 14th edition, page 116 it was held that *"business" would include a single commercial venture.* The court said: *"the test is whether there is any activity capable of being described it as a business for that venture. It is not necessary that there must be more than one transaction or venture. It is enough even if a single venture is capable of being carried on by two or more persons.*

In the present case road building activity even though is a single contract it is spread over a particular period and the firm must employ certain workers, supervise the work and get the approval from the government and finally must receive the bills. Thus the transaction is capable of the subject-matter of a venture under a partnership.

Dissenting from the decision of the. Allahabad high court in *nathi lal verses sri* a/a/, air 1940 all 230, the a.r high court held that a single transaction, if considering its activity capable of being participated by more than one individual, falls within the definition of business as given in section 4(2) of the indian partnership act, 1932. The court also cited the opinion of the learned commentator in *pollock and mulla on sale of goods and partnership act* 4th edition that the decision given in *nathi lal verses srimal,* air 1940 all 230, is not a good law.

The court he id that there was a valid partnership between the parties within the meaning of section 4 of the act.

Helper girdharbhai verses saiyed mohmad mira saheb kadari

(sharing of profits and contributing to losses are not the only elements of partnership', existence of agency is essential; and whether there is a partnership or not is a mixed question of law and fact, depending upon the varying circumstances in different cases).

Facts

The appellant was the tenant of the impugned premises situated at raikhad ward, ahmadabad. The respondent was the landlord of the premises. The respondent alleged in the suit that the appellant was his tenant, in the suit premises, which were leased out to him for conducting the business of manufacturing cloth in the name of ahmadabad fine and weaving works. It was further alleged by him that appellant 1 had closed the business and he was not using the said premises for the purposes for which it was let to him. It was the case of the appellant that in respect of the suit premises he was carrying on his business with respondents 2,4 and 5 in the name of defendant 2 m/s bharat neon signs (respondent 2). There were more than one partnership deeds. The partnership deeds entitled the petitioner to share in the partnership. However, the bank accounts were not to be operated by the appellant, and it was further provided that irrespective of the profit a fixed percentage of profit were to be given to the partner appellant 1. The appellant was not to share the losses. The appellant was to bring his asset being the tenant of the premises in question for use of the partnership.

Issue

Whether the appellant had sublet the premises to defendant 2 (bharat neon signs) or whether the appellant being a partner of the said firm had permitted the said firm (bharat neon signs) to use the premises in question?

Decision of the supreme court

Whether there was partnership or not may in certain cases be a mixed question of law and fact, in the sense that whether the ingredients of partnership were there in a particular case or not must be judged in the light of the principles applicable to partnership.

The following important elements must be present in order to establish partnership: *(1) there must be an agreement entered into by all parties concerned,* (2) *the agreement must be to share profits of business; and (3) the business must be carried on by all or any of persons concerned acting, for all.*

It was held that the deeds gave the appellant the right to share the profits and made him agent for certain limited purposes of the firm and there was evidence that the partnership deeds were acted upon. The petitioner was completely excluded in operating the bank accounts etc. There is nothing inherently illegal or improbable in making a provision of such a type. In the eye of law, such a clause is really neutral providing neither the existence nor non-existence of a genuine firm.

Sharing of profits and contributing to losses were not the only elements in a partnership. Existence of agency was essential and whether there was a partnership or not is a mixed question of law and fact, depending upon the varying circumstances in different cases.

The persons were held to be partners. The suit for possession of the premises under the bombay kents, hotel and lodging houses kates control act, 1947 was accordingly dismissed.

Commissioner of sales tax verses. K. Kelukutty (1985) 4 scc 35

(an agreement between the partners to carry on a business and share the profits may be followed by a separate agreement between the same partners to carry on another business and share the profits therein.)

Facts

There were two businesses, a business in timber and a business in saw dust. Both the businesses were carried out by the same partners, one as a partnership firm k. Kelukutty, and the other under the name k.k.k. Sons saw mills, said to be a separate partnership firm. The sales tax officer took the view that as both k. Kelukutty and k.k.k. Sons saw mills consisted of identical partners, the two businesses carried on respectively by them be treated as the business of a single partnership firm and, therefore, the turnover of the sale of sawdust had to be included in the earlier assessments made on the respondent firm.

Issue whether when the partners constituting a partnership firm carrying on one business-constituted another partnership firm carrying on a separate and distinct business were there two distinct partnership firms in whose hands the turnover of the two businesses fell to be respectively assessed or was there in law only a single partnership firm liable to assessment on the turnover of both the businesses?

Decision of the supreme court

For taxing purposes a partnership firm is treated as an entity distinct from the persons who constituted the firm. It means *that for the purposes of assessment to tax* income of the partnership firm has to be assessed in the hands of the firm as a single hand, the firm itself being treated as an assessable entity separate and distinct from the partners constituting it. However the tax law does not confer a corporate personality on the firm.

In every case when the assessee professes that it is a partnership firm and claims to be taxed in that status, the first duty of the assessing officer is to determine whether it is in law, and in fact, a partnership. But, for determining whether there is a firm, the assessing officer will apply the partnership law, subject of course to any specific provision in that regard in the tax law modifying the partnership law. If the tax law is silent, it is the partnership law only to which he will refer. Having decided the legal entity of the assessee, that it is partnership firm, he will then turn to the law and apply the relevant provisions for assessing the partnership income. In the present kerala general sales tax act contains no provision which bears on the identity of a partnership firm. Therefore, recourse must be had for that purpose to the partnership law alone. Where it is claimed that they are not one but two partnership firm constituted by the same persons and carrying on different businesses, the assessing authority must test the claim in the light of the partnership law.

The court held that "each partnership agreement may constitute a distinct and separate partnership and therefore distinct and separate firm. That is not to say that a firm is a corporate entity or enjoys personality in that sense. The firm name is only a collective name for the individual partners. But each partnership is a distinct relationship. The partners may be different and yet the nature of the business may be the same, the business may be different and yet the partners may be the same. An agreement between the partners to carry on a business and share the profits may be followed by a separate agreement between the same partners to carry on another business and share the profits therein. The intention may be to constitute two separate partnership and therefore two distinct firms or to extend merely a partnership, originally constituted to carry on one business, to the carrying on of another business. It will depend on intention of the partners. The

intentions of the partners have to be decided with reference to the terms of the agreement and all the surrounding circumstances, including evidence to the interlacing or interlocking of management, finance and other incidents of the respective business." the supreme court reminded the case for examination by the authorities constituted under the kerala general sales tax act.

Mahabir cold storage *verses.* Cit

(a partners hip firm registered under the indian partnership act, 1932 is neither a person nor a legal entity. Firm cannot be a partner of another firm though its partners can be in their individual capacity. Either under the repealed income tax act or the income tax act$_9$ 1961 a firm is liable to be separately assessed to tax as well as all its partners in their capacity as individuals if they have taxable income.)

Facts

A partnership firm m/s priyagchand hanumanmal consisting of priyachand and hanumanmal as partners with 50% share each started its business with its head office at calcutta and a branch office at purnea. The branch office at purnea carried on the business in the name and style of shri mahabir cold storage. The partners had taken loan from periwal & co. Pvt. Ltd. For erection of cold storage and for its running capital. Later the company was taken as a partner for better management and financial assistance. Priyagchand and hanumanmal each had 25% and periwal & co. Pvt. Ltd. Had the remaining 50% shares in the profits of the newly constituted partnership m/s mahabir cold storage at purnea. The new partnership also obtained separate registration under section 26a of the income tax act. In the assessment year 1959-60. M/s priyachand hanumanmal installed machinery in shri mahabir cold storage. The plant and machinery was wholly used for the purposes of cold storage business carried on by the original firm m/s priyachand hanumanmal and also by the appellant. The new partnership m/s mahabir cold storage which is the assessee-appellant claimed development rebate. The ito and an appeal aac disallowed the claim on the finding that the new firm had neither inherited the claim as a transferee, nor it amounted to a succession. On second appeal, the tribunal held in favour of the appellant. The high court decided in favour of the revenue and against the assessee with the reasoning that old firm retained its identity carrying on its business separately calcutta. The whole firm was not reconstituted.

Issue

Whether the appellant owned the plant and machinery purchased and erected as a part of the capital asset to run the cold storage business by m/s priyachand hanumanmal?

Decision of the supreme court

Under both section 10(2) (vi-b) of the income tax act, 1922 and section 33(1) of the income tax act, 1961 two conditions precedent are required to be fulfilled for entitlement to development rebate, namely, a new ship acquired or new machinery or plant installed must be (1) owned by the assessee and (2) is wholly used for the purpose of the business carried on by him during the previous year in question. Thus there must exist unity in ownership and it must be used in the business. But when unity of ownership and use of the asset in the business is disrupted or a branch of an earlier business is taken over by a new firm which exists simultaneously with the other branches of the old business, the benefit of development rebate does not extend to either firm.

The court said:

"under the indian partnership act, 1932 the partnership firm registered there under is neither a person nor a legal entity. It is merely a collective name for the individual members of the partnership. A firm as such cannot be a partner in another firm in their individual capacity. Both under the 1922 act and the 1961 act a firm is liable to be separately assessed to tax as well as all its partners in their capacity as individuals if they have taxable income. The appellant is separately registered and assessed to tax.

There is no reconstitution of the original firm prayagchang hanumanmal inducting periwal & co. Pvt. Ltd. As its partner. Thus it is clear that the appellant assessee is a new identity under the act. It is not a successor interest of the old firm as per the provisions of the act." therefore, it was held that the appellant was not entitled to the development rebate under section 33(1) of the income tax act, 1961.

Bhagwanji morarji goculdas **verses.** ***Alembic chemical works***

[*agreement by a company with individuals constituting firm*]

Sir john beaumont – 9. Their lordships think that the decisions of the courts in india upon this point were right. 10. Before the board it was argued that under the indian partnership act, 1932, a firm is recognized as an entity apart from the persons constituting it, and that the entity continues so long as the firm exists and continues to carry on its business. It is true that the indian partnership act goes further than the english partnership act, 1890, in recognizing that a firm may possess a personality distinct from the persons constituting it; the law in india in that respect being more in accordance with the law of scotland, than with that of england. But the fact that a firm possesses a distinct personality does not involve that the personality continues unchanged so long as the business of the firm continues. The indian act, like the english act, avoids making a firm a corporate body enjoying the right of perpetual succession. The agreement of 7th december, 1907 was made between the company and four named individuals, and when all of those four individuals had ceased to be members of the firm, there was no privity between the company and the firm as it then existed.

12. In the trial court and before this board some reliance was placed on s. 87b (c), companies act. That sub-clause was introduced into the companies act by the amending act of 1936. The sub-clause renders a transfer of his office by a managing agent void unless approved by the company in general meeting, but there is a proviso removing from the operation of the sub-clause any change in the partners of a managing agent's firm, so long as one of the original partners continues to be a partner in such firm, and "original partners" are defined to mean, in the case of managing agents appointed before the commencement of the amending act, 1936, partners who were partners at the date of the commencement of the act.

So for the purposes of the proviso, the appellant was to be regarded as an original partner. Their lordships agree with the learned trial judge that this section of the companies act has no application to the present case. It places the appellant in the position of an original partner for the purposes of the proviso but does not make him an original partner for the purposes of the 'managing agents' agreement. For these reasons their lordships will humbly advise his majesty that this appeal be dismissed with costs.

Nanchand gangaram verses mallappa mahalingappa

(the indian partnership act, 1932 governs only that relation of partnership which arises from contract and not from status such as the one obtaining among the members of a joint hindu family carrying on business. These two types of institutions differ fundamentally and resemble only superficially.)

Facts

The respondents were hindus governed by mitakshara school of hindu law. Mohalingappa, the prepositus of the family died in 1922, survived by three sons, namely, mallappa, defendant no. 1, appa-saheb, defendent no. 2, neelkanth, the eldest son of mohlingappa. During the life time of mahalingappa, the family consisting of mahalingappa and his sons, was a joint hindu family trading in tobacco. After the death of mahalingappa, the surviving co-parceners continued to be joint, and neelkanth, the eldest son of mahalingappa managed the family business as *karta* till november, 1945. The appellant had business dealings in tobacco and money dealings with the defendants' joint family. It was contended that even if the joint status of the family stood disrupted from november 1945, then also, on the principle of section 45 of the partnership act the acknowledgement of rs. 75,000/- made by mallappa, defendant no. 1 and appa-saheb, defendant no. 2 in 1952 regarding the amount due to the appellant, would in the absence of public notice to the traders in general or particular notice to the plaintiff, be binding on the all the erstwhile members of the joint family.

Issues

1. Whether section 45 of the partnership act is applicable to joint hindu family?

2. Whether an acknowledgement made by the karta of an erstwhile joint hindu family after its severance, would extend limitation against all the former members of that family?

Decision of the supreme court

It was held that the legislature has, in its wisdom, excluded joint hindu trading families from the operation of the partnership act. Section 4 of the act defines 'partnership' as the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Section 5 further makes it clear that this act governs only that relation of partnership which arises from contract and not from status such as the one obtaining among the members of a joint hindu family trading partnership.

Section 21 of the limitation act provides:

"where a liability has been incurred by or on behalf of a hindu undivided family as such, an acknowledgement or payment made by or by the duly authorised agent of, the *manager of the family for the time being* shall be deemed to have been made on behalf of the whole family." sinterpreting the above the apex court said:

"the key words in this clause are 'the manager of the family for the time being'. The words unerringly indicate that at the time when the acknowledgement hand, the firm itself being treated as an assessable entity separate and distinct from the partners constituting it. However the tax law does not confer a corporate personality on the firm.

In every case when the assessee professes that it is a partnership firm and claims to be taxed in that status, the first duty of the assessing officer is to determine whether it is in law, and in fact, a partnership. But, for determining whether there is a firm, the assessing officer will apply the partnership law, subject of course to any specific provision in that regard in the tax law modifying the partnership law. If the tax law is silent, it is the partnership law only to which he will refer. Having decided the legal entity of the assessee, that it is partnership firm, he will then turn to the law and apply the relevant provisions for assessing the partnership income. In the present kerala general sales tax act contains no provision which bears on the identity of a partnership firm. Therefore, recourse must be had for that purpose to the partnership law alone. Where it is claimed that they are not one but two partnership firm constituted by the same persons and carrying on different businesses, the assessing authority must test the claim in the light of the partnership law.

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Section 21 of the limitation act provides:

"where a liability has been incurred by or on behalf of a hindu undivided family as such, an acknowledgement or payment made by or by the duly authorised agent of, the *manager of the family for the time being* shall be deemed to have been made on behalf of the whole family."

Interpreting the above the apex court said: "the key words in this clause are 'the manager of the family for the time being'. The words unerringly indicate that at the time when the acknowledgement

Dhruv advanced a sum of rs. 10 lacs to tara to enable him to carry out a contract with a railway company. In order to secure the loan, a deed was executed between them, which contained the following provisions:—

(1) that dhruv should receive 10% interest on the money advanced and 10% of the net profits of the contract;

(2) that tara should apply all the money advanced in carrying on the works;

(3) that if tara should become bankrupt, dhruv might enter and complete the works;

(4) that in calculating the net profits dhruv should be allowed to draw out rs. 2 lacs a year for his services.

Letters passed between them in which the money advanced was spoken of as 'capital' and expressions were used showing that both parties had a common interest in the works.

Lachman das verses. Cit

(if a stranger can enter into partnership with reference to his own property, with a joint hindu family through its karta, there is no sound reason to withhold such opportunity from a coparcener in respect of his separate and individual property.)

Facts

There was a hindu undivided family of messers lachman das and sons (including daulat ram) as represented by its *karta* lachman das. This hindu undivided family entered into partnership with one of its members daulat ram. The question was raised about the validity of a partnership between *karta* of the hindu undivided family representing it on the one hand and a member of that family in his individual capacity on the other. Daulat ram had brought in his separate capital.

Issue

Whether in the circumstances of this case, there could be a valid partnership between lachman das as representing a hindu undivided family on the one hand and daulat ram, a member of that undivided family in his individual capacity, on the other?

Decision of the supreme court

There can be a valid partnership between *karta* of a hindu joint family as representing the undivided family on the one hand and a member of that undivided family in his individual capacity on the other. In such a case the latter, who has put his separate property into the partnership, retains his share and interests in the property of the family, while he simultaneously enjoys the benefit of his separate property and fruits of its investment, and to be able to do this, it is not necessary for him to separate himself from his family.

Their lordships said:

"whatever the view of a hindu joint family and its property might have the early stage of its development, their lordships think that it is now firmly established that an individual coparcener, while remaining joint, can possess, enjoy and utilize, in any way he likes, property which was his individual property, not acquired with the aid of, or with any deteriment to the joint family property. It follows from this that to be able to utilize his property at his will, he must be accorded the freedom to enter into

contractual relations with others, including his family, so long as it is represented in such transactions by a definite personality like its manager.... The error of the income tax officer lay in his view that, before such a contractual relationship can validly come into existence, the natural family relationship must be brought to an end.... In this view of the hindu law it is clear that if a stranger can enter into partnership, with reference to his own property with a joint hindu family through its *karta,* there is no sound reason to withhold such opportunity from a coparcener in respect of his separate and individual property."

Chandrakant manilal shah verses c1t

(labour and skill are separate property of the person possessing them. Therefore, a coparcener can enter into a partnership with karta of huf contributing only his labour and skill.)

Facts

Chandrakant manilal shah was the *karta* of a hindu undivided family (huf) and the family was carrying on business of cloth. Naresh chandrakant, one of the sons of chandrakant manilal shah, joined the business on a monthly salary of rs. 100 since about 1959. It was asserted that with effect from november, 1959 the business had been converted into a partnership between chandrakant manilal shah as *karta* representing the undivided family on the one hand and naresh chanderkant on the other. The deed of partnership executed in this behalf on november 12,1959 indicated that naresh chandrakant had been admitted as a working partner with effect from november 1, 1959 having 35% share in the profits and losses of the firm and the remaining 65% share was to be held by chandrakant manilal shah as *karta* of huf. An application was made for registration of partnership firm under the income tax act for assessment purposes.

The application was dismissed by the income tax officer (ito) on the ground that there was no valid partnership. The appellate assistant commissioner (aac) upheld the decision of the ito. The income tax appellate tribunal also came to the same conclusion that there was no valid partnership and the business consequently must be taken to continue in the hands of the joint family.

Issue before the high court

Whether on the facts and in the circumstances of the case, there was a valid partnership between shri chandrakant, as the karta of the huf and shri naresh, a member of the family?

Decision of the high court

The high court answered the question in the negative, i.e. In favour of the revenue and against the assessee.

Decision of the supreme court

The aim of business is earning of profit. When an individual contributes cash asset to become a partner of a partnership firm in consideration of a share in the profits of the firm, such contribution helps in the achievement of the purpose of the firm namely to earn profit. The same purpose is, undoubtedly, achieved also when an individual in place of cash asset contributes his skill and labour in consideration of a share in the profits of the firm. Just like a cash asset, the mental and physical capacity generated by the skill and labour of an individual is possessed by or in possession of such individual. Indeed skill and labour are by themselves possessions. *Labour and skill are separate property of the person possessing them. Hence a coparcener can enter into a partners hip with karta of huf contributing only labour and skill as his separate capital.* Under the hindu law there can be a valid contract between the undivided members of the joint family. Therefore, an undivided member can, by contributing separate capital, enter into a partnership with the karta *qua* the family business. It cannot be said that when a coparcener enter into a partnership with the karta of huf and contributes only his skill and labour, no contribution of any separate asset belonging to such partner is made to meet the requirements of a valid partnership.

Under the hindu gains of learning act, 1930, the definition of the term "learning" is very wide and almost encompasses within its sweep every acquired capacity which enables the acquirer of the capacity "to pursue any trade, industry, profession or avocation in life". The dictionary meaning of "skill", *inter alia,* is: "the familiar knowledge of any science, art or handicraft, as shown by dexterity in execution or performance; technical ability" and the meaning of "labour" *inter alia* is: physical or mental exertion, particularly for some useful or desired end". Skill and labour involve as well as generate mental and physical capacity. This capacity is in its very nature an individual achievement and normally varies from individual to individual. It is by utilization of this capacity that an object or goal is achieved by the person possessing the capacity. Achievement of an object or goal is a benefit. This benefit accrues in favour of the individual possessing and utilizing the capacity. Such individual may, for consideration, utilize the capacity possessed by him even for the benefit of some other individual.

Champaran cane concern verses state of bihar

(co-ownership is not necessarily the result of agreement, whereas partnership is.)

facts

A large tract of land (farms in champaran) used for growing cane was jointly purchased by two persons (padampat singhania having one-fourth share and lala bishundayal jhunjhunwala having three-fourth share). They were residents of uttar pradesh at very long distance from the farms in champaran. They appointed one s.k. Kanodia as common manager for facility of cultivation and management. The common manager looked after and managed the aggricultural operations. It was named as champaran cane concern. The champaran cane concern was assessed as a partnership firm for three years 1948-49,1950-51 and 1951-52. The assessee claimed that it was a co-ownership. The concern carried on agricultural operations in six farms consisting of a little over acres 2000 of land out of which about 1600 were purchased jointly and 483 were purchased in the name of a mill of which the aforesaid two persons were owners. Later on, the forms were separated from the mill and the land in their entirety were cultivated by the concern.

Issue

Whether, on the facts and circumstances of the case, an inference of partnership within the meaning of the indian partnership act, 1932 followed?

Decision of the supreme court

Partnership or no partnership is a mixed question of fact and law in the sense that if the authorities who have to asertain questions of fact apply a wrong principle of law in instructing themselves as to what they have to find, then their finding of fact is not conclusive because they have done it according to wrong principles.

S.k. Das j concluded that the arrangement of the kind prevailing in the present case can consistently go with co-ownership. He said:

"two co-owners may appoint a common manager for facility of cultivation and management without entering into a partnership and the fact that the profits or even the losses are distributed in accordance with the shares of the two owners does not necessarily establish a partnership within the meaning of the partnership act, 1932. In **lindley on partnership** (12th ed., p. 57) the main differences between co-ownership and co-partnership have been compared. *One* of the principal differences is that co-ownership is not necessarily the result of agreement, whereas partnership is. In the cases before us there is nothing in the record to show that these was any agreement between the two proprietors to form a partnership firm. The *second* difference is that co-ownership does not necessarily involve community of profit or of loss, but partnership does. In the cases before us there is a finding that there is community of profit. A *third* difference is that one co-owner can without the consent of the other, transfer his interest etc. To a stranger. A partner cannot do this. About this point there is no evidence nor any finding that the two proprietors padampat singhania and bishundayal jhunjhunwala could not transfer their interests in the concern without the consent of each other. The greatest difficulty which faces the respondent in the present cases is that it cannot point to any fact or circumstance from which it can be inferred that one proprietor was the agent, real or implied, of the other. In a partnership each partner acts for all. In a co-ownership one co-owner is not as such the agent, real or implied, of the other. There is a complete absence of any fact or circumstance establishing a relation of agency between the two proprietors in the present case; nor have the taxing authorities come to any finding that there was such arealtion."

Laxmibai and another verses roshan lal (plaintiff)

(mode of determining the existence of partnership)

Facts

Roshan lal filed a suit against laxminarain (laxminarain died during the pendency of the appeal and he was substituted by his widow laxmi bai and his son madan lal as appellants) for dissolution of partnership and rendition of accounts. Roshan lal contended that he and laxminarain had entered into a partnership orally for taking building contracts, to share the profits and losses in equal proportion and to get interest at the rate of 6% per annum on the amount invested by them. It was alleged that laxminarain withdrew the amount of bill submitted by the firm for constructing selavi railway station but did not render account of the partnership business to the plaintiff roshan lal. The suit was resisted by the defendant laxminarain on the ground that an oral agreement of the alleged partnership between the parties ever took place; that he alone had taken the contract; the plaintiffhad agreed to finance him and there was only a relation of a debtor and a creditor between them and the plaintiff was employed by him on the payment of a lump sum of rs. 150.

Issue

Whether there was a partnership between roshan lal and laxminarain?

decision of the court of munsif and district court

The learned munsif held that the partnership as alleged by the plaintiff roshan lal between him and the defendant laxminarain was proved and that each of them had half share in the profits and losses of the partnership. On appeal the district judge confirmed the decree of the trial court. The defendant came to the high court in second appeal.

Decision of the high court

Relying on the decision of the supreme court in *champaran cane concern* verses. *State of bihar,* it was held that whether partnership is proved is a mixed question of fact and law which can be examined in second appeal. The supreme court had observed in that case that "partnership or no partnership is ordinarily a question of fact...but it is a mixed question of fact and law in the sense that if the authorities who have to ascertain questions of fact apply a wrong principle of law in instructing themselves as to what they have to find, then their finding of fact is not conclusive because they have done it according to wrong principles."

The following three elements must be present for the existence of partnership:—

1. There must be an agreement entered into by all the persons concerned.

2. The agreement must be to share profits of a business.

3. The business must be carried on by all or any of the persons concerned acting for all from which it can be inferred that each of the persons alleged to be partners was the agent, real or implied, of another.

The court said, "a loan to a person engaged in any trade upon a contract with such person that the latter shall receive interest and also a share of the profits does not of itself constitute the latter a partner. It is also true that the mere use of the words 'partner' or 'partnership' in an agreement does not necessarily show that there was a partnership, the parties may call themselves partners but if it appears that one party is to do nothing more than advance money to the other and is to be paid along with interest by a share of the profits, they cannot be treated as partners but must be treated only as creditor and debtor. In the present case there was no written document of partnership. However, this is not material. **Lindley** in his work.on partnership, twelfth edition, says at page 124:

"as partnership, even for a long term of years very often exist in this country without any written agreement, the absence of any direct documentary evidence of any agreement for a partnership is entitled to very little weight. As between the alleged partners themselves the evidence relied ont where no written agreement is forthcoming, is their conduct, the mode in which they have dealt with each other, and the mode in which each has with the knowledge of the other, dealt with other people. This can be shown by books of accounts, by the testimony of clerks, agents, and other persons, by latters and admissions, and in short, by any of the modes by which facts can be established. " the court accepted the evidence of statements made by roshan lal and his brother joharimal who was present at the time of the talk between roshal lal and laxminarain. It held that statements that each partner had half share in the partnership business the witnesses clearly conveyed nothing else but that they agreed to share profits and losses half to half. The court did not find any substantial reason to reject the testimony of these witnesses regarding the oral agreement of partnership alleged to have taken place between roshan lal and laxminarain on 23rd june, 1956, more so, when both courts below have accepted this testimony.

As regards the existence of element of mutual agency between the two the court accepted the evidence of munshi lal and jus bhai to the effect that the plaintiff used to participate in the construction work, when jus bhai wanted to take a sub-contract he had a talk with laxminarian as well as roshan lal in that connection though he was not successful in getting the sub-contract. Thus it

was concluded that roshan lal did act as an agent for the other partner laxinarain in the business of building contract. The involvement and participation of roshan lal in the building work was admitted even by laxminarain though he had tried to give the same a different colour by stating that roshan lal had been engaged to look after the work in lieu of payment of rs.150/-. The court did not accept the contentions of the appellents.

The court further accepted the statements of bhagwan das and bhaboot mal who stated that they had been approached by roshan lal and laxminarain to mediate between them to settle the accounts of the partnership business of the parties. Kanakram, who used to bring sand and concrete in connection with the construction work also corroborated the fact of the existence of partnership between the parties. Devi shanker, who was a clerk in the divisional office of the western railway further stated that madan lal on behalf of his father laxminarain and chaganlal on behalf of his uncle roshan lal used to come to him for settlement of the bills in connection with the construction work, and that on inquiry from madan lal, he came to know that laxminarain and roshan lal had both shares in that work. Lastly, the court said that the plaintiff gave a notice to laxminarain for rendition of accounts before filing the suit but the defendant gave no reply.

Thus the court held that the existence of partnership as alleged by the plaintiff was fully established.

Cox verses. Hickman (plaintiff)

(only those persons can be held as partners on whose behalf the business has been done.)

Facts

Smith and smith carries on business of iron merchants. After having got into difficulties they executed a deed of agreement in favour of their creditors. The three parties to the deed of arrangement were: smith and smith of the first part, five of the creditors (including cox and wheatcroft) of the second part, and the general body of creditors of the third part. The terms of the deed provided: (i) that the parties of the second part, i.e., the five creditors, were to carry on the business of smith and smith as trustees for creditors of smith and smith under the name and style of "the stanton iron company", hereinafter referred to as the company; (ii) that the net income of the business, after paying the expenses, was to be divided among the general creditors of smith and smith but it had to be considered in the first instance as the property of smith and smith; (iii) that the creditors in majority, in value, had the power to make rules as to the mode of conducting the business in question or to order its discontinuance, and (iv) that after the debts had been paid the trustees had to hold the property assigned under the deed in trust for smith and smith instead for the creditors of smith and smith. Out of the parties of the second part of the deed of arrangement cox never acted and wheatcroft resigned after six weeks as trustee and the business of the company was managed by the other three trustees only. While the business was being managed by the three trustees; one hickman drew three bills of exchange for the goods supplied by him to the company. The bills were accepted by one of the trustees on behalf of the company. Hickman sued cox and wheatcroft on those three bills and contented that cox and wheatcroft were liable upon the bills as partners in the business of the company because they were two of the five creditors who were the original parties of the second part to the deed of arrangement.

Issues

1. Whether the deed of arrangement created partnership between the parties to the deed?

2. Whether cox and wheatcroft could be held liable as partners of the stanton iron company?

Decision

The house of lords held that the deed did not create any partnership, and that therefore cox and wheatcroft could not be sued as partners in the business, and they were not liable to hickman at all.

Lord cranworth said:

> It is often said that the test, or one of the tests, whether a person not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This no doubt, is in general, a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations and entitled to its profits, or a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on his behalf i.e., that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred and under whose management the profits have been made. Taking this to be the ground of liability as a partner, it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor, or the trustees." *thus the house of lords laid down that the receipt by a person of a share of the net profits of a business is prima facie evidence of the existence of partnership, but "it is not a conclusive evidence, and other circumstances must also be considered in deciding whether in fact there is a partnership or not.*

Mollwo, march *&* co. (plaintiff) **verses the court of wards**

(a mere right to participate in the profits by a lender is not sufficient to constitute partnership.)

Facts

A contract was made between rajah pratap chander singh of the one part and two merchants of calcutta carrying on import and export business in partnership under the name style of "w.n. Watson & co." of the other part. In consideration of moneys advanced and to be'advanced by rajah from time to time to the firm, it was agreed on 27th august, 1863 that rajah was to receive a commission of 20% on the net profits of the business and large powers of control were given to him. While the advances remained unpaid the merchant (w.n. Watson and to. Watson) bound themselves not to make shipments, or other consignments, or sell goods without his consent. No money was to be drawn from the firm without his sanction, and he was to be consulted with regard to the office business of the firm. It was also agreed that the shipping documents should be at his disposal, and should not be sold or pledged, or the proceeds applied without his consent. All the proceeds of the business were to be hancted over to him, for the purpose of extinguishing his debt. But the rajah, had no power to direct transaction. He had no right to direct what shipments should be made, or consignments ordered, or what should be the course of trade. Nor he had any power to require the merchants to continue in trade or to remain in partnership.

In 1865 the merchants fell into difficulties. At that time the amount owing to the rajah exceeded three lacs of rupees. On 3rd march, 1865 an arrangement was made between rajah and the merchants under which the rajah, upon the merchants executing to him formal mortgage of the tea plantations, to secure the amount of his advances in his favour, released the merchants from all his right to commission and interest under the 1863 agreement and all other claims against them. In point of fact, the rajah upto that time had neither received possession of any property or moneys from the firm, nor any of the proceeds of the business or any commission.

The actions which gave rise to the present appeal was brought by messers mollwo, march & co., the plaintiff-appellant, against the rajah to recover a balance of nearly three lacs of rupees claimed to be due to them from the merchants. During the pendency of the suit the rajah died and the defence was continued by the court of wards, on behalf of his minor heir.

Issue

Whether the agreement entered into between the merchants and the rajah created partnership between them so that the rajah could be held liable as partner of the merchants for the plaintiff-appellant claim?

Decision

The court, in the first instance, held that the rajah was not a partner by holding out. It said: "no liability can in this case be fastened upon the rajah on the ground that he was an ostensible partner, and, therefore, liable to third persons as if he was a real partner. It is admitted that he did not so hold himself out; and that a statement made by one of the watsons to the plaintiff to the effect that he might in law be a partner, by reason of his right to commission on profits, was not authorized by the rajah."

The court held that the primary object of the agreement was to give security to the rajah as a creditor of the firm. The agreement, on the face of it, was an arrangement between the rajah, as creditor, and the firm consisting of the two watsons, as debtors, by which the rajah obtained for his past advance: and in consideration forbearance, and as an inducement to support the watsons by future advances, it was agreed that he should receive from them a commission of 20% on profits and should be invested with the power of supervision and control.

The court held it too artificial that the rule of construction involved in the contention of the plaintiff appellant that a participation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that presumption arose sufficient to establish, as regards third parties, that relation. It took only one term of the contract and at once raised a presumption upon it, whereas whole scope of the agreement, and all its terms, ought to be looked at before any presumption of intention could properly be made at all. The court held that though one time it had been understood as a positive rule of law that participation in net profits of a business made the participant liable as a partner to third persons, but the rule was evidently arbitrary. *After cox.* Verses *hickman,, it has been "now established that although a right, to participate in the profits is a strong test of partnership, and that there may be cases where from such participation alone, it may, as a presumption, not of law but of fact, be inferred; yet whether that relation does or does not exist must depend on the real intention and conduct of the parties"* to constitute a partnership the parties must have agreed to carry on the business and to share the profits in some way in common.

Their lordships said that the "rajah had no initiative power; he could not direct what shipments should be made or consignments ordered, or what should be the course of trade. He could not require the watsons to continue to trade, or even to remain in partnership; his powers however large, were powers of control only." by the agreement, "the parties did not intend to create a partnership, and that their relation to each other under the agreement was that of creditor and debtor. *The wastons evidently wishes to induce the rajah to continue his advances, and for that purpose were willing to give him the largest security they could offer; but a partnership was not contemplated, and the agreement is really founded on the assumption, not of community of benefit, but of opposition of interest. "*

The court also held that "there was no sufficient ground for holding that the business was carried on for rajah as principal or in any other character. He was not, in any sense, the owner of the business, and had no power to deal with as owner. None of the ordinary attributes of principal belonged to him. The watsons were to carry on the business; he could neither direct them to make contracts, nor to trade in the manner which he might desire; his powers were confined to those of control and security and subject to those powers, the watsons remained owners of the business and

of the common property of the firm. The agreement in terms and, as their lordships think, in substance, is founded on the relation of creditor and debtors, and establishes no other."

Thus the rajah was held not liable for the debts of the firm wn watson & co.

Abdul latiff (plaintiff) **verses. Gopeshwar chattoraj**

(servant or agent receiving a share of profit is not a partner in a partnership firm)

Facts

The plaintiff undertook a contract of loading and unloading railway wagons for a steel company. He appointed the defendant to carry on and look after the business. It was agreed between them that defendant would receive advances from the steel company and make advances from his own pocket whenever necessary, would keep "proper accounts of all income and expenditure and explain the same to the plaintiff, and would be liable to make good to plaintiff all losses that would accrue by reason of negligent performance of the work, and that the profits would be divided half and half between the parties, but the loss, if any would be borne entirely by the defendant. The work was to be done in the name of the plaintiff and there was nothing to show that the steel company was going to hold anybody else liable for any loss that might be caused. There was no evidence that the defendant was to have any voice in determining what work was or was not to be undertaken or when the work was to be stopped or whether the contract with the company was to be renewed on the expiry of its term or any other matters of that description. The defendant worked under this arrangement from 1st november, 1919, till 15th april, 1921. During this period the defendant was found negligent in his work and also guilty of misfeasance, and did not render accounts. The

plaintiff wrote to the company withdrawing the powers conferred on the defendant including power to receive payments and to do other acts on his behalf.

The plaintiff sued the defendant for not rendering of accounts and for a decree for such amount as might be found due as a result of accounting. The defendant took various pleas and asserted that the relationship between him and the plaintiff was not that of agent and principal, but it was a partnership and the suit was not maintainable in the form presented by the plaintiff.

Issue

Whether there was partnership between the plaintiff and the defendant?

Decision

In this case there was no document evidencing the contract nor any direct oral evidence beyond what the plaintiff and the defendant themselves have given as witnesses examined in the case. There was some evidence proceeding from witnesses who have spoken to what they afterwards heard from the parties themselves and inferences have also to be drawn from their subsequent conduct.

The court gave reference of *ross* verses. *Parkyns,* (1875) and quoted a paragraph from the judgement of jessel, m.r. (given in the proceeding case). It said that though the receipt by a person of a share in the profits of a business is a strong test of partnership, yet whether the relation of partnership does or does not exist depends upon the whole contract between the parties and that circumstances is not conclusive.

The court stated that "a more certain test is to find out whether not only was there a common business but common interest of all the parties in it, whether the common business was to be carried on by the defendant on behalf of the plaintiff, so that the plaintiff could be regarded as the principal. On this point there is not, nor indeed could there be any direct evidence, so long as the terms were not put into writing. But there are the following facts, *viz.*, the plaintiff was to take the contract in his own name and there is no evidence that he was under any obligation to disclose the name of the defendant to the company; the work was to stand in his own name so far as the company was concerned and there is nothing to suggest that the company was going to hold anybody else liable for any loss that might be caused. There is no evidence suggesting that anybody else than the plaintiff was to have a voice in determining what work was or was not to be undertaken or when the work was to be stopped or whether the contract with the company was or was not to be renewed on the expiry of its period or other matters of that description".

In the present case from the above facts the court found that there was no common interest between the plaintiff and the defendant. The court further held that division of work or delegation of powers in the case of partnership is done for the sake of mutual convenience by mutual consent and not founded on an assertion of a right and to the exclusion of the others, as it appeared to have been in the present case.

Thus the court held that the relation between the plaintiff and the defendant was that of principal and agent and not that of partnership. The plaintiff was held entitled to a decree for accounts for the period in suit.

Holme verses hammond

(receipt of profits of a 'partnership business by the widow or child of a deceased partner)

Facts

Three persons agreed to become partners for a certain period, and to share the profits and losses equally, and they further agreed that in case of death of a particular partner, the other two partners should continue the business and pay to the executors of the deceased partner the same share of profits, which he would have had if living. One of the partners died; he had no capital in the firm but on his death the firm was indebted to him in respect of undrawn profits and other matters. After his death the business was carried on by the survivors; his executors took no part in the management of the business, but they claimed their share of the profits made since his death, and they were furnished with accounts in which they were credited with such profits. The plaintiff sued the executors in respect of a contract made by the surviving partners on behalf of the plaintiff after the 'death of the deceased partners.

Issue

Whether the defendants (executors) were partners of the surviving partners at the time of entering into the contract by survivors on behalf of the plaintiff?

Decision

It *was held that in order to constitute partnership there must be an agreement, express or implied. In the absence of an agreement, express or implied, the executors of a deceased partner cannot be said to have become partners with the surviving partners merely by receiving a share of the profits. In the present case there was no evidence whatever to establish a contract of partnership between the executors of the deceased partner and the- surviving partners and therefore the action was not maintainable. The surviving partners were not agents of the defendants.*

Badri prasad and others verses nagarmal and others

(illegal associations: the courts cannot adjudicate in respect of contracts which the law declares to be illegal.)

Facts

During the time of cloth control in rewa state, 25 cloth dealers of budha, a town in rewa state, formed an association to collect the quota of cloth to be allotted to them and sell it on profit, wholesale or retail. The members of the association contributed towards the initial capital of rs. One lac of the association. No formal article of association were written, nor was it registered. The association worked through a president and some others; they kept accounts and distributed profits. Nagarmal was the president of the association from january 1946 to june 1946. After nagarmal, one badri prasad became the president till the end. On june 25, 1949 thirteen out of 25 members of the association brought a suit alleging that nagarmal had given an account of income and expenditure for the months of january, fabruary and march 1946 but had given no account for the months of april, may and june, 1946. They prayed that nagarmal be ordered to give account for april to june 1946, and to pay the amount found due to him, alongwith interest due on such amount till the amount was realized. It was found by the courts below that the real dispute was that once 390 bales of cloth were allotted to the association out of which nagarmal had given the association

benefit of the share of 106 bales only and the plaintiff wanted the share of profits made by nagarmal on the remaining 284 bales of cloth allotted to the association.

Against the above plaint, nagarmal took a preliminary objection to the effect that the association was an illegal association by the reason of the provisions of sec. 4(2) of the rewa state companies act, 1935 and hence the suit was not maintainable. Section 4(2) of the rewa state companies act, 1935 laid down that "no company, association or partnership consisting of more than 20 persons shall be formed for the purpose of carrying on any other business that has for its object the acquistion of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this act or is formed in pursuance of a charter from the durbar". (at present a provision on almost similar lines is found in section 11 of the indian companies act, 1956).

Issue

Whether the association was legal association by reason of section 4 (2) of rewa state companies act, 1935?

Decision

It was contended on behalf of nagarmal that the association was not a legal association because it violated section 4(2) of the rewa state companies act, 1935. The association was formed for the purpose of carrying on a business which had for its object the acquisition of gain by the individual members thereof, and further it was neither registered as a company nor was it formed in pursuance of a charter from the durbar.

On behalf of the plaintiff-appellant it was argued that: (1) a preliminary objection should not be allowed to be raised at that late stage; (2) even though the association was illegal, a suit for the recovery of the contributions made by the plaintiff appellant and also for accounts was maintainable: and (3) on the analogy of section 69(3) of the partnership act, 1932 the appellant had a right to bring a suit for accounts of the dissolved association.

The court accepted the contention of nagarmal and rejected all the contentions of the plaintiff-appellant. The court held, firstly, the rewa state companies act, 1935 was a public statute which no court can exclude from its consideration, section 4(2) of the rewa state companies act, 1935 being prohibitory in nature could not be excluded from consideration even though the bar of that provision had been raised at that late stage. Secondly, the reliefs asked by the plaintiff-appellant necessarily implied a recognition by the court that an association existed of which accounts ought to be taken. When the association is itself illegal, a court cannot assist in getting its account made. The most important consequence of illegality in contract of partnership is that the members of partnership have a remedy against each other for contribution or apportionment in respect of the partnership dealings and transaction. Thirdly, under the partnership act an un-registered partnership is not illegal. *The present suit was not one for accounts of an unregistered dissolved firm but for accounts of an illegal association, or say partnership, which was not in existence at the relevant period for which accounts were asked. The court refused to apply analogy of section 69 (3) of the partnership act to the present case.*

The court held that the preliminary objections of nagarmal must succeed and thus the plaintiff-appellant's suit was not maintainable.

Narayanlal bansilal pittie verses tarabai motilal

(the partnership agreement was entered into initially for one year and it was extended by one year by mutual agreement, but thereafter there was no extension of the partnership for three more years.)

Facts

Narayanlal bansilal pittie ('pittie') was the son-in-law of tarabai, widow of motilal. Tarabai carried on business in cotton-seed and cotton bales in the name and style of narayandas chunilal in bombay and also in jalna within the former state of hyderabad. Tarabai, pittie and one chogmal entered into a partnership on october 25, 1925 to cany on business at jalna in cotton, cotton-seed and cotton bales initially for a period of one year (samvat year 1982) which was extended by one (sam vat year 1982) by mutual agreement. Their profit sharing ratio was 3 : 3 : 2. It was contended by tarabai that the partnership agreement was extended for three more years which was denied by pittie. The transaction of the partnership resulted in a profit of rs. 5,2577-(approximate) in the first year and a profit of rs. 27,0477- (approximate) in the second year. According to tarabai the partnership suffered heavy losses in the next three years and after giving credit for the profits earned in the first

two years, the total loss suffered by the partnership was rs. 2,08.9607-. Tarabai filed a suit in 1945 for a decree of rs, 2,84,3087- (including interest). Pittie contended that no account was ever sent to him and that no demand was made of him and the claim made against him was false and frivolous and was filed after he had filed a suit against tarabai in the high court of bombay in respect of the amount of rs. 5,63,8217- (approximate) due at the foot of mutual, open and current account which suit was settled on february 2, 1944 and tarabai agreed to pay and did pay rs. 5,21,9067- in two instalments. He also contended that in view of the consent decree passed in the suit filed by him in the high court of bombay in which suit tarabai had not raised any contention about her claim was barred as res judicata. After the death of tarabai, the suit was prosecuted by his adopted son and her daughters.

Trail court dismissed the suit holding that tarabai failed to prove that the partnership agreement was by mutual consent extended for a period of three years, after the first two years. The high court of bombay reversed the decree passed by the trial court.

Issue

Whether, on the facts and in the circumstances of the case, the partnership agreement was extended for three years, after two years?

Decision of the supreme court

After considering the evidence on record the supreme court was of the view that the high court was in error in holding that the settlement alleged between tarabai and pittie in november, 1927, in which pittie agreed to continue to remain a partner in the business of the jalna firm to the extent to which it related to the business in cotton, cotton-seed and cotton bales and that he agreed to pay in november, 1939, rs. 93,827-4-6 was not proved. Therefore, the appeal was allowed. The decree passed by the high court was set aside and the decree passed by the trial court restored.

The court said:

"there was no agreement of partnership in writing. There was no written record of the extension of the partnership as was set up in the reply to the written statement. There was no correspondence between the parties evidencing the settlement of accounts and extension of the partnership. The case of extension of the agreement of partnership after samvat year, 1983, was not set up in the plaint and was set up to meet by way of reply to the letter, dated november 13, 1927, disclosed by pittie and was sought to be supported by oral evidence of goverdhandas. He is the only person who speaks about the partnership agreement and its extension at the end of samvat year 1983. He said that the accounts were prepared and copies of statements of account were sent to the partners. In respect of this settlement no attempt was made to take the signatures of the contracting parties in acknowledgement of their correctness. Under the settlement, according to the plaintiffs pittie and tarabai agreed to discharge a part of the liability of chogmal. No attempt was made at the trial to tender in evidence the statement of account alleged to have been prepared at the settlement. No attempt was made even to tender in evidence the mortgage deed obtained from chogmal which it was claimed was in satisfaction of liability for a part of the loss suffered by him. The parties though closely related were accustomed to do business transactions and invested them with some formality. They were living at different places, and during the course of samvat years 1982 and 1983 when the partnership was admittedly subsisting there was correspondence in relation to its dealings. After november 13, 1927, there is complete absence of correspondence. Not even a letter was addressed to pittie by tarabai, demanding the amount claimed to be due to her. There is no evidence that any statement of account was sent from jalna to bombay in respect of the partnership after the alleged settlement. The partnership did not maintain separate books of accounts, entries were posted only in the books of account of the jalna firm of narayandas chunilal, for, it was only in respect of the cotton, cotton-seeds and cotton bales transactions in which the defendant pittie was a partner."

"conduct of tarabai between 1930 and 1945 also throws a great doubt upon the veracity of her claim. If pittie was liable in a sum of rs. 93,827-4-6 payable with interest at the rate of 12 annas per cent per mensem there would have been a demand made in writing during a period of 15 years which elapsed before the suit was filed. It is admitted on all hands that no such demand was ever made. In 1943 pittie filed a suit against tarabai in the high court of bombay claiming a sum exceeding rs. 6 lakhs at the foot of a mutual, open and current account in respect of transactions between pittie's firm and the firm of narayandas chunilal conducted by tarabai."

"a clinching circumstances is that tarabai made no claim, when the parties negotiated a settlement of the suit filed by pittie on the mutual, open and current account and paid the amount settled in two instalments without demanding that her claim against pittie may be given credit for. If there was truth in the story of tarabai and pittie had agreed to pay rs. 93,827-4-6 with interest, such a claim could naturally have been made in the course of the settlement. The conduct of tarabai and the great delay in institution of the suit coupled with the absence of any documentary evidence which may even indirectly support the case of the plaintiffs raise great doubt *upon* the truth of the story set up in her plaint."

mohd. Uduman verses mohd. Aslum

(duration of partnership expressly provided in the deed and hence partnership was not at will.)

Facts

A partnership was constituted and registered at pondicherry in 1962 as per the provisions of the french law and the business was carried on. Clause (4) of the partnership deed provided that 'the partnership will be brought to an end at will". Clause (5) provides: "the partnership will continue till there are two partners, even in the case of one or several partners withdraw themselves or die the partnership will continue between the two partners, will remain owners of all the capital, on condition that they should pay back to the withdrawing partners and to the heirs of the deceased partners, only the amount of their right according to the last inventory." one of the partners, the respondent, filed a suit for dissolution of the partnership and for accounting on the basis that the partnership was at will and by issue of notice

dissolving the partnership, it stood dissolved with effect from the date of the receipt of the notice by the appellants.

Issue

Whether the partnership was at will?

decision of the supreme court

Section 7 of the partnership act contemplates two exceptions to a partnership at will. The first one is where there is provision made in the deed of partnership for the duration of the partnership; or secondly where there is provision in the contract for the determination of partnership; in either of these cases, the partnership is not at will. Duration of partnership may be express or may in given circumstances be implied.

In the present case the duration of partnership has been expressly provided in the deed, namely, that the partnership will continue "till there are two partners " and therefore, it is not a partnership at will. Thereby, the respondent has no right to dissolve the partnership except to seek accounting for the period of the dispute or his right to withdraw or retire from partnership and to take the value of his share in the partnership either by mutual agreement or at law in terms of the partnership deed.

Note: in *shiv mohan mehra* verses *veena bathla,* clause 18 specifically mentioned that the partnership shall be at will and may be dissolved by mutual consent. The high court of delhi was of the opinion that the partnership was at will.

Chandrika prasad agarwal verses vishnu chandra

(partnership at will)

Facts

The three defendants-appellants and the plaintiff respondent entered into a partnership for carrying on the business of manufacturing brickets from coke-breeze.

The instrument of partnership was executed on 18-12-1975. There was a change in the term of the partnership with effect from 1 -6-1976. The first defendant was entrusted with the responsibility of keeping accounts. The firm suffered heavy losses. There was a loss of faith between the partners. The plaintiff served a notice dated 20-11-1976 dissolving the partnership on 23-11-1976. The plaintiff also asked the first defendant to render accounts. He did not pay any heed. The three defendants admitted the partnership, but denied that it was "at will". They pleaded that under clause

20 of the instrument of partnership, as amended on 1-6-1976 no partner could retire from the firm until the loan taken from the canara bank was paid off. Clause 7 of the instrument of partnership provides that if any of the parties dies then in that case the partnership shall not be dissolved, but his sons will become partners of his share and that person will become partner who may have been nominated by the deceased partner. Clause 18 provides that if any party wants to separate from the business of partnership he can do so by giving one month's notice to the other partners, but in that case the partnership will not be dissolved and if the majority of the partners are unable to pull on with any partners, then the majority of the partners will have the right to expel that partner if they consider just after asking his explanation. Clause 20 provides that no partner can withdraw from the partnership so long as the loan taken from the canara bank is not repaid.

Issue

Whether the partnership was at will or for a fixed duration?

Decision of the allahabad high court

The partnership was not a partnership at will. Clause 7 provides against the contingency of the dissolution of the partnership by the death of a partner under section 42(c) of the partnership act. It is thus a provision made by contract between the partners for the 'duration' or for the 'non-determination' of the partnership in spite of death of one of them. Clause 18 is clearly a provision made by contract between the partners for the non determination of the partnership between all the partners at the instance of one partner only. Similarly, clause 20, as it originally stood, clearly implied that no partner could withdraw from the partnership before the end of a year and even if he did, his capital would not be paid back by the firm. That was clearly a provision fixing by contract the duration of the partnership at least one year. The amended clause 20 extended that period of one year to such time as the loan taken from canara bank was repaid.

Gherulal parakh verses mahadeodas ma1ya

(the partnership was constituted to carry out wagering contracts with specified persons during a particular season and as the said contracts were closed, the partnership was dissolved. Section 69 was not bar to the present suit as the court was required only to go into the accounts of the said business. A wager is void hut illegal.)

Facts

The appellant (gherulal parakh) and the first respondent (mahadeodas maiya), managers of two joint families entered into a partnership to carry on wagering contracts with two firms of hapur. It was

agreed between the partners that the said contracts would be made in the name of the respondents on behalf of the firm and that the profit and loss resulting from the transactions would be borne by the two partners in equal shares. In implementation of the said agreement, the first respondent entered into 32 contracts, with one of the two and 49 contracts with the other and the net result of all these transactions was a loss, with the result that the first respondent had to pay to the hapur merchants the entire amount due to them. As the appellant denied his liability to bear his share of the loss, the first respondent along with his sons filed a suit in the court of the subordinate judge, darjeeling, for recovery of half of the loss incurred in the transaction. The appellant and his sons, *inter alia,* pleaded in defence that the agreement between the parties to enter into wagering contracts was unlawful under section 23 of the indian contract act, that as the partnership was not registered, the suit was barred under section 69(1) of the indian partnership act.

The subordinate judge held that the object of the agreement was forbidden by law and opposed to public policy. He further held that the partnership was between two joint families and there could not be in law such a partnership and therefore section 69 of the indian partnership act was not applicable. Consequently, he dismissed the suit with costs.

the high court held that the partnership was not between two joint families but was only between the two managers of the said families and therefore it was valid. It was further held that the partnership to do business was only for a single venture with each one of the two merchants of hapur and for a single season and that the said partnership was dissolved after the season was over and therefore the suit for accounts of the dissolved firm was not hit by section 69(1) and section 69(2) of the indian partnership act. The learned judges further held that the object of the partners was to deal in differences and that though the said transactions, being in the nature of wager, were void under section 30 of the indian contract act, the object was not unlawful within the meaning of section 23 of the said act. Therefore, the high court gave a deuce to the first respondent for a sum of rs. 3807-8-0.

Issue

1. Whether the partnership was only in respect of forward contracts with specified individuals and for a particular season?

2. Whether the said agreement of partnership was unlawful within the meaning of section 23 of the indian contract act?

Decision of the supreme court

The partnership was only in respect of forward contracts with two specified individuals and for a particular indicate any period limiting the operation of the partnership, but from the attitude adopted by the defendants in the earlier suit ending in an award and that adopted in the present pleadings, the nature of the transactions and the conduct of the parties, no other conclusion was possible than that arrived by the high court. If so, section 42 of the partnership act directly applies in this case. Under that section in the absence of a contract to the contract, a firm is dissolved, if it is constituted to carry out one or more adventures or undertakings, by completion thereof. In this case, the partnership was constituted to carry out contracts with specified persons during a particular season and as the said contracts were closed, the partnership was dissolved."

The suit partnership was not unlawful within the meaning of section 23 of the indian contract act.

The supreme court said:

"section 30 of the indian contract act is based upon the provisions of section 18 of the gaming act, 1845, and though a wager is void and unenforceable, it is not forbidden by law and therefore the

object of a collateral is not unlawful under section 23 of the contract act;..... Partnership being an agreement within the meaning of section 23 of the indian contract act, it is unlawful, though its object is to carry on wagering transactions." the supreme court further said:

"the common law of england and that of india have never struck down contracts of wager on the ground of public policy; indeed they have always been held to be not illegal notwithstanding the fact that the statute declared them void. Even after the contracts of wager were declared to be void in england, collateral contracts were enforced till the passing of the gaming act of 1892, and in india, except in the state of bombay, they have been enforced even after the passing of the act 21 of 1848, which was substituted by section 30 of the contract act. The moral prohibitions in hindu law tests against gambling were not only legally enforced but were allowed to fall into desuetude. In practice, though gambling is controlled in specific matters, it has not been declared illegal and there is no law declaring wagering contracts illegal. Indeed, some of the gambling practices are a perennial source of income to the state. In the circumstances it is not possible to hold that there is any definite head or principle of public policy evolved by courts or laid down by precedents which would directly apply to wagering contracts. Even if it is permissible for courts to evolve a new head of public policy under extraordinary circumstances giving rise to incontestable harm to the society, we cannot say that wager is one of such instances of exceptional gravity, for it has been recognised for centuries and has been tolerated by the public and the state alike. If it has any such tendency, it is for the legislature to make a law prohibiting such contracts and declaring them illegal and not for this court to resort to judicial legislation." interpreting the word "immoral" in section 23 the supreme court said:

"precedents confine the concept only to sexual immorality and no case has been brought to our notice where it has been applied to any head other than sexual immorality. In the circumstances, we cannot evolve a new head so as to bring in wages within its fold." therefore, the suit partnership was held not unlawful within the meaning of

Section 23 of the indian contract act. The appeal was dismissed.

Chennuru gavararaju chetty ĸ chenneru sitamamurthy chetty

(partnership property—there is no absolute rule of law or equity that a renewal of a lease by one partner, must necessarily ensure for the benefit of all the partners.)

Facts

The contesting parties used to carry on the business of salt manufacture in accordance with the rules laid down by government under the madras salt act, 1889. It was not permissible to manufacture salt otherwise than under the provisions of the act. The land and the factory where salt used to be manufactured by the parties were government property. The lease (given to the highest bidder) was for 17 years from january 1926 to december, 1942. There was no stipulation in the partnership deed that the partnership business would continue even after the expiration of the 17 years which was the term of the partnership.

In or about the year 1939, differences arose between the parties. In august, 1941, in accordance with the changed policy of the government, this substituted the practice of settling salt leases by renewal of the lease in favour of those lease holders whose conduct had been satisfactory in the opinion of the relevant department of the government, for the old practice of settling salt leases to highest bidders. A fresh lease of 25 years was granted to the appellant-defendent and other defendants on april 15, 1943 for a period from january, 1943 to december, 1967 the term of the previous lease and the licence to manufacture and sell salt—which was the partnership business was to expire at the end of december, 1942, one of the contesting defendants, served a notice upon the one of the plaintiffs to the effect that as the partnership was expiring at the end of the month, the partners should settle their accounts and make arrangements for the disposal of stock of salt. The suit was instituted in january, 1943.

Issue

Whether the plaintiffs were entitled to treat the new lease as an asset of the dissolved partnership?

Decision of the supreme court

The supreme court held that the partnership stood automatically terminated at the end of the year 1942. The actual grant of the lease in question was made in april, 1943, and the permanent licence to manufacture and sell salt was granted in 1945. Hence, strictly speaking, when the suit was instituted in january, 1943, legally there was no lease in existence, nor could the business of manufacture and sale of salt be effectively carried on until the grant of the permanent licence. The plaintiffs could have a cause of action in respect of the renewed lease if their substantive case of continuing partnership had been established. But that case has failed. Therefore, they were held not entitled to claim an interest in the renewed lease as an asset of the partnership business. The fiduciary character as between the partners had ceased on the termination of the original lease of the partnership business. On such a termination, there was no interest of the partners, which the contesting defendants were bound to protect.

In the course the judgement **b.p. Sinha, j.,** said:

"on a close examination of the english precedents, it will be found that there is no absolute rule of law or equity that a renewal of a lease by one partner, must necessarily ensure for the benefit of all the partners. There is a presumption of fact as distinguished from a presumption of law, that there is equity in favour of the renewal of the lease ensuring for the benefit of all the partners. But such a presumption being one of fact, is rebuttable, and must therefore; depend upon the facts and circumstances of each case. The indian legislature has substantially adopted the english law while enacting the rules laid down in the indian trusts act. In the instant case, the facts that the parties deliberately chose to fix the term of the partnership as coterminus with the term of the lease and licence ending with the year 1942; that they did not, in express terms, or by necessary implication, make any provision for extending the period of the partnership or for obtaining renewal of the lease and the necessary licence; that there was no averment or proof of any clandestine acts on the part of the contesting defendants in the matter of obtaining the renewal of the lease; that the plaintiffs themselves made attempts, though unsuccessful, to get themselves

included in the category of grantees at the time of the renewal of the lease; that the special nature of the business required personal efficiency and good conduct on the part of the actual managing agents; that no funds of the expiring partnership or any goodwill of the partnership was utilized for obtaining the fresh lease; that the fresh lease and licence were granted to the contesting defendants in consideration of their personal qualities of good management and good conduct; that the parties were not on the best of terms during the last few years of the partnership, and finally, that the lease and the permanent licence were actually granted after the partnership stood automatically dissolved at the end of 1942; are all facts and circumstances which point to only one conclusion namely, that the renewal of the lease was not intended to be for the benefit of all the quondam partners. Those facts and circumstances amply rebut any presumption of fact that the lease should ensure to the benefit of all the parties."

Miles verses clarke (1953)

(partnership property—a mere use of a property by the partnership for its business does not make the property as belonging to the partnership.)

Facts

The defendant started a business in commercial and fashion photography on a leased property in june, 1948. At the beginning he made a very considerable loss. He took a professional photographer with good connection in that particular work as a partner in april 1950. The result was a very successful business. However, later on there was quarrel between the two partners. Terms were not settled between the partners except that they were entitled to equal share of the profits and the plaintiff was entitled to draw £ 125 a month on account of his share of the profits.

Issue

Whether (1) the lease of the premises where the business was carried on, (2) the furniture and fitting in the studio, (3) the equipment of the studio, (4) stock in trade such as films brought in by the defendant (5) stock of negatives brought in by the partners at the outset, (6) the defendant's goodwill and (7) the plaintiffs goodwill had become partnership properties?

Decision

It was held that the consumable items of stock such as stocks of films, which was actually used in the business, should be treated as a partnership asset notwithstanding that it was brought in by the first partner (the defendant) only, but all other assets, including the lease of the premises, equipment of the studio and the personal goodwill should be treated as being the property of the partner who brought them in.

The stock in trade, such as stock of films, must be assumed to be put into the pool, and cannot be taken out again, must become part of the partnership assets. The stock of negatives which each of the partners brought in was for the use of the business so long as it was going on. There is no difficulty in separating them after the dissolution of the firm. However, the stock of negatives of photographs taken during the course of the partnership must be a partnership asset. The parties never agreed upon to quantify the plaintiffs connection or goodwill, his connection nor the defendant's connection should be treated in any way as being a partnership asset. After the dissolution of the firm, the plaintiff will take away his own connection and his clients and the defendant will keep his own. The lease, furniture and fittings and the equipment of the studio did not form part of the partnership property. Therefore, the plaintiff will not contribute to wear and tear on those assets.

arjun kanoji tankar verses. Santaram kanoji tankar

(partnership property—there is no rule that whatever is brought by a partner in the partners hip firm and is continued to be used by the members is presumed to have become the partnership property.)

Facts

Santaram (the plaintiff-respondent) was carrying on a business of printing press in bombay. He started this business in 1937. He admitted his younger brother arjun (defendant-appellant) as a partner by an agreement dated march 16, 1953. The defendant was admitted as a partner with equal share in the profits and losses of the business, but without any interest in the machinery, goodwill and the premises which were to be utilized for the purpose of partnership. Disputes arose between the parties and business could not be carried on and, the plaintiff served a notice, dated april 19, 1957, terminating the partnership.

Issue

Whether the plaintiff, when entering into a partnership with the defendant, surrendered his individual interest in the assets brought by him into the business?

Decision of the supreme court

The supreme court held that there was no evidence that the plaintiff when entering into a partnership with the defendant, surrendered his individual interest in the assets brought by him into the business, or had admitted that the defendant was to be the owner in equal share with him in all the assets brought into the partnership. The right of the defendant to share in the assets brought into the business depended upon the terms of the agreement of partnership. The court said: "there is no rule that whatever is brought by a partner in the partnership and is continued to be used by the members is presumed to have become the property of the partnership"

In lindley on partnership, 12th edn., it is stated at p. 365:

"again it by no means follows that property used by all the partners for partnership purposes is partnership property. For example, the house and land in and upon which the partnership business is carried on often belongs to one of the partners only, either subject to lease to the firm, or without any lease at all. If however a partner brings such property into the common stock as part of his capital it becomes partnership property, and any increase in its value will belong to the firm. The only true method of determining as between the partners themselves what belongs to the firm, and what not, is to ascertain what agreement has been made upon the subject. But this is by no means always an easy method.

In *miles verses clarke*, the defendant started the business of a photographer and then admitted the plaintiff—a successful free lance photographer— as a partner. The leasehold premises, furniture and studio equipment belonged to the defendant. It was intended to record the terms of partnership into a formal agreement, but no terms were ever settled, except that the partners were to share the profits equally. On dissolution of the partnership it was held that no terms ought to be implied except such as were essential to business efficacy and that only the consumable items of stock-in—trade were to be regarded as assets of the partnership, and the lease of the property, equipment and personal goodwill were to be treated as being the property of the partners who brought them into the business.

Facts

The tenanted premised were sub-let to the sole proprietor eng chick wong of a business concern, who later on with other two individuals constituted a partnership firm. The firm's trade name was woldorf restaurant. The appellants ("the landlord") started eviction proceedings against the tenant.

The landlord obtained a compromise decree of eviction against the tenant (allen berry & company). Subsequently the tenant instituted a separate suit for eviction against the firm.

Issue

Whether in such a situation the tenanted premises held by eng chick wong as erstwhile sole properties would become a partnership property or not?

Decision of the supreme court

It was held that in the absence of an agreement to the contrary, property exclusively belonging to a person, on his entering into partnership with others, does not become a property of the partnership merely because it is used for the business of partnership. It would depend upon the terms of the partnership agreement. There was no evidence to prove that the tenanted promises of which the sole proprietor was the sub-tenant, become the asset or property of the firm from the year 1954 when the partnership was registered. The mere carrying on of a partnership business of which the tenant is a partner in leased premises belonging to that partner does *not per se* amount to subletting unless it is shown that he withdraw his control of the leased premises and parted with the possession of the property and surrendered his individual tenancy rights in favour of the partnership firm.

(1) write notes on any two of the following—

(a) there can be any number of partners in a firm *(see* previous chapter)

(b) implied authority of a partner of the firm. *(see* chapter: relation of partners to third parties)

(c) property acquired with the money of the firm, is the property of the partnership

(2) mere use of property by a partnership firm does make such property as partnership property. Examine.

(3) rohit started a business as photographer in the premises of which he was the owner. He had no skill in photography and the business was not prosperous. He invited rajat, a successful free lance photographer with his own connections in the trade, to join him as a partner. Rajat agreed and brought with him his connections which were considerable and thus the business flourished. The only agreement made between them was that the profits of the business were to be shared equally. The partners subsequently quarreled and dissolved the firm. Rajat has sued rohit for accounts and contends that the business premises was the property of the firm while rohit insists that the said promises is his personal property decide?

Gattu lal verses. Gulab singh

Facts

Gattu lal entered into a partnership for a period of five years from june 28,1943 with jagdeo singh for working a forest to manufacture coal and each of them had eight annas share therein. The forest was taken on lease from thakur lallu singh. But after about three months jagdeo singh assumed exclusive control of the forest and altogether excluded gattu lal from any benefit in the partnership. On july 13, 1944, gattu lal entered into sub-partnership with thakur gulab singh aged about 19 to 20 years, the son of thakur lallu singh for a period of five years. The arrangement was really with thakur lallu singh but in the name of thakur gulab singh. Each was to have half share in the profit and losses. Gulab singh was to supply the funds whenever gattu lal so demanded. If gulab singh refused or hesitated to supply the funds, gattu lal had the right to break the partnership. If gattu lal was to take legal action against jagdeo singh, gulab singh was to bear all expenses which were to be adjusted half and half at the time of making of accounts. Gattu lal had to file a suit against jagdeo singh for dissolution of partnership and, rendition of accounts and a final decree for rs. 2,86,078.62 was passed in favour of gattu lal. Neither lallu singh nor gulab singh contributed a single pie towards the expenses of litigation. In fact only a sum of rs. 251/- for meeting the expenses was paid at the time of formation of so called sub-partnerships and no other amount was ever paid by gulab singh or lallu singh to gattu lal, unashamedly gulab singh filed a suit against gattu lal for a share of the amount which had been decreed in favour of gattu lal.

The suit was dismissed by the trial court on the ground that whatever rights gulab singh had under the deed of sub-partnership had been abandoned by him. But his finding was reversed by the high court.

Issue

Whether gulab singh was entitled to a share of the amount decreed in favour of gattu lal?

Decision of the supreme court

The supreme court agreed with the trial court and set aside the judgement of the high court. Thus the appeal was allowed with costs throughout. Gulab singh did not spend a single pie towards the litigation started by gattu lal against jagdeo singh. His father lallu singh deliberately gave false evidence denying knowledge of the very partnership between gattu: lal and jagdeo singh which in turn was the basis of sub-partnership. The court fully agreed with the principle enunciated in the following passages from **lindley on partnership**.

"independently of the statutes of limitation a plaintiff may be precluded by his own laches from obtaining equitable relief. Laches pre-supposes not only lapse of time, but also the existence of circumstances which render it unjust to give relief to the plaintiff; and unless reasonable vigilance is shown in the prosecution of a claim to equitable relief, the court, acting on the maxim *vigilant bus non dormientibus subveniunt leges,* will decline to interefere."

"the doctrine of laches is of great importance where persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, comes forward and claims a share of it. In such cases as these, the plaintiffs conduct lays him open to the remark that nothing would have been heard of him had the joint venture ended in loss instead of gain; and a court will not aid those who can be shown to have remained quiet in the hope of being able to evade responsibility in case of loss, but of being able to claim a share of gain in case of ultimate success.

Trimble verses. Goldberg

Facts

A,b, and c as partners, bought the property of h consisting of plots and land and share in a company. The said company was also entitled to other plots of land laid off for building, in the same locality. B and c, apart from a, purchased, the company's other plots of land and made profits. A claimed an account of these profits.

Issue

Whether b and c were accountable to a for the profits made by them in the latter transaction?

Decision

A contended that though the purchase of the plots by b and c was not within the scope of the business of the partnership between all of them yet it was indirectly connected with it and the purchase by b and c was secret and injurious to the common interest. It was held by the court that purchase was neither within the scope of the partnership, nor made in rivalry with it nor, forbidden by the articles of partnership; and that even if the purchase had been forbidden by the partnership articles it did not necessarily follow that the third partner could claim the share in the profits.

Pulin bihari roy verses. Mahendra chandra ghosal

Facts

A,b,c and d started a business in partnership for the purpose of importing salt from foreign ports and selling it at chittagong. A entered into certain transaction in salt on his own account. His transaction in salt was found to be of the same nature as the business carried out by the partnership.

Issue

Whether a was liable to account for to the firm for the business in salt done by him?

Decision

It was stated by the court that a partner cannot, without the consent of his copartners, lawfully carry on for his own benefit, either openly or secretly, any business competing with that of partnership. Since, in the present case, the business of a was of the same nature as was carried on by the partnership; a was held liable to account for to the firm for the business so done by him.

Rhodes verses. Moules,

(section 27- an act may not be within the ordinary course of the jinn's business but it may be within the scope of his apparent authority.)

Facts

R (rew), a member of a firm of solicitors, was employed by a client (rhodes) of the firm to obtain for him a loan upon mortgage of his estate. R obtained the loan, but falsely stated to the client that mortgages required collateral security, the client accordingly handed to r some share warrants payable to bearer to be used as collateral security. R subsequently misappropriated the share warrants and absconded; his partners had no knowledge of the deposit of the warrants and were innocent of fraud. The firm had on former occasions received through r the same share warrants from the same client in order to obtain loans for him, and the firm were in the habit of receiving from and holding for clients bonds payable to bearer. [see section ll(a) english partnership act and section 27 of the indian partnership act 1932].

Issue

Whether all the partners of the firm were liable for the value of the shares misappropriated?

Decision

It was held that under the circumstances the transaction was clearly a partnership transaction, and that r's partners were liable for the value of the shares misappropriated. The client (plaintiff rhodes) was justified in treating, and entitled to treat the transaction as a transaction with the firm which rendered, not r (rew) only, but the firm responsible if the shares received under the circumstances were misappropriated. On previous occasions the firm had acted for the client in negotiating loans, and in receiving from him these very securities and transmitting them to lenders.

The court distinguished this case from the case *of cleather verses. Twisden* decided by the same court in 1884. In that case it was held that it was not part of the business of a solicitor to take over for custody bonds payable to bearer. But in the present case the bonds were not handed to him in connection with a mortgage transaction which he was carrying out. The circumstances of the two cases were different. In the present case the firm had acted for the client on previous occasions also in negotiating loans and in receiving from him the securities and transmitting them to lenders. In *cleather verses twisden* also it was stated that it was not part of the business of a solicitor to take over for custody uonds payable to bearer, but it may be brought within the ordinary scope of the business of solicitors by special circumstances.

Thus the partners of the firm were held liable for the value of shares misappropriated.

Hamlyn verses. John houston & co. (1903)

(section 26—one of the two partners, without the knowledge of the other partner bribed the clerk of a competing firm to obtain information relating to contracts. The other partner was also held liable for this wrongful act of his co-partner.)

Facts

The plaintiff, hamlyn, and the defendant, john houston & co. Were grain merchants. Defendant firm consisted of houston and strong. Strong had left the conduct of the business of the firm to houston. Plaintiff had a clerk and one of the terms of his employment was that he should not divulge any secrets relating to his employer's business. Houston induced plaintiffs clerk, by bribes, to give him information as to the names of the plaintiffs customers, and as to contracts made or tendered for by the plaintiff also to allow him to have possession of one of the plaintiffs books containing entries as to contracts.

Issue

Whether the defendant firm is liable to the plaintiff for the wrongful act of houston, one of the defendant firm's partners, in inducing the plaintiffs clerk to break his contract of service by disclosing confidential matters with regard to the plaintiffs business whereby damages had been caused to the plaintiff?

Decision

It was found, among other facts, by the court of appeal that it was in the ordinary course of the business of the defendant firm to obtain by legitimate means information in regard to the contracts made or tendered for by competing firms. The court held that houston was authorised to obtain information as to the contracts and tenders made" by competing firms by legitimate means. He did obtain such information by illegitimate means. It being within the scope of houston's authority to procure the information, it is immaterial for the present purpose whether the acts which he committed in order to procure it were fraudulent or even criminal or not.

It was held, that the defendant firm, and consequently both the partners of the firm, were liable to the plaintiff for damages for the action of houston, one of defendant firm's partners.

Tower cabinet co. Ltd verses. Ingram, (1949)

(section 28—holding out)

Facts

The defendant (ingram) retired from a partnership, the business of which was carried on by the remaining partner (christmas) in the firm name, after the retirement, the plaintiff company, which had no previous dealings with or knowledge of the firm received an order from the firm which, by mistake, was written on the firm's old note

Paper showing the defendant as the partner.

issue

Whether the defendant was liable under section 14 or 36 of the (english) partnership act, 1890 (section 28 or 32 of the indian partnership act, 1932, respectively)?

Decision

It was held that a retiring partner cannot be said to have knowingly suffered himself to be represented as a partner merely because at the time of his retirement he was careless in not seeing that all the notepaper which bore his name as a partner had been destroyed where subsequently, without his knowledge or authority, the firm placed an order on some of this notepaper. Thus the mere fact that on his retirement, the retiring partner does not concern himself to see that all the firm's notepaper which bears his name as a partner is destroyed, will not, of itself render him liable to new creditors with whom communications are made on that notepaper. The court stated that "the words are "knowingly suffers" not being negligent or careless in not seeing that all the notepaper had been destroyed when he left." therefore the retiring partner (defendant) was held not liable to the plaintiff company under section 14 of the (english) partnership act, 1890 (section 28 of the indian partnership act, 1932).

As regards the liability under section 36 of the (english) partnership act, 1890 (section 32 of the indian partnership act, 1932) it was held that the defendant was not liable since at the date of his retirement the provisions of section 36 (3) of the partnership act, 1890 were satisfied and consequently those provisions relieved the defendant from liability in respect of subsequent transactions entered into by the firm section 36 (3) is reproduced below:

"(3) the estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively."

In the instant case the plaintiff company had no knowledge that the defendant was a partner prior to the date of the dissolution. That being so, the defendant was brought directly within the words of sub-section (3) of section 36 and was, therefore, under no liability to the company in respect of the debts subsequently incurred by christmas at a time when he was not a partner. In the course of his judgment lynskey,

J., observed:

> "if the person dealing with the firm did not know that ^he particular partner was a partner, and if that partner retired, then, as from the date of his retirement, he ceases to be liable for

further debts contracted by the firm with that person. The fact that the person dealing with the firm may discover he was a partner seems to me to be irrelevant, because the date from which the sub-section operates is the date of the dissolution. If the person who subsequently deals with the firm had no knowledge prior to the dissolution the retiring partner, then sub-section (3) comes into operation, and, in effect, relieves the person retiring from liability."

Cit verses. Dwarkadas khetan & co.

(section 30~a minor cannot become a full-fledged partner in an existing firm. Any document which goes beyond the provisions of section 30 cannot be regarded as valid for purposes of recognition of the partnership firm for assessment as a partnership.)

Facts

Prior to 1st january, 1945, there was a firm called dwarkadas khetan and co. On that date the firm ceased to exist because the other partners had previously withdrawn and it came to be the sole proprietary concern of dwarkadas khetan. On 27th march, 1946 dwarkadas entered into a partnership with three others, namely viswanath purumal, govindram khetan, and kantilal kasherdeo. Though kantilal was a minor, he was admitted as a full partner and not merely to the benefits of partnership as required under section 30 of the partnership act. The instrument of partnership described kantilal as full partner in all its intent and purpose, i.e. For sharing of profits and losses of the business attending to business, management of the business, inspection of account books, and voting right etc. In short, no distinction was made between adult partners and the minor. Registration of the firm was sought under section 26-a of the income tax act, 1922. The income tax officer refused to accord registration on the ground that a minor had been admitted as a partner contrary to law and that deed could not, therefore, be registered. The appeal to the appellate assistant commissioner and the tribunal failed. But high court differed from the tribunal and hence the appeal to the supreme court was made by the commissioner of income tax.

Issues involved

Whether the instrument of partnership created a deed of partnership?

decision

The definition of "partner" in section 2 of income tax act, 1922 is designed to confer equal benefits upon the minor by treating him as a partner, but it does not render a minor competent and full partner. For that purpose, the law of partnership must be considered, apart from the definition in income tax act. Section 30 of the partnership act clearly lays down that a minor cannot become a partner though with the consent of adult partners, he may be admitted to the benefits of partnership. Any document which goes beyond this section cannot be regarded as valid for the purpose of registration. Registration can only be granted of a document between persons who are parties to it and on the covenants set out in it. If income tax authorities register the partnership as between adults only, which is contrary to the terms of the document executed by the parties, in substance a new contract is made out. It is not open to the income tax authorities, or even a court for that purpose, to register a document which is different from the one actually executed and asked to be registered.

Appeal by the commissioner of income tax was allowed.

Shivagouda ravji patel (plaintiff) verses. Chandrakant neelkanth sadalge

(section 30—a minor after attaining majority cannot elect to become a partner of a firm which has ceased to exist.)

Facts

M and n carried on the business of commission agents and manufacturing and selling certain goods. The partnership deed between them was executed in 1946 and c who was a minor at that time, was admitted to the benefits of partnership became indebted to s, the appellant. The partnership between m and n was dissolved on 18th april, 1951. C became major subsequently and he did not exercise option not to become a partner of the partnership under section 30 (5) of the partnership act, 1932. The appellant, s, filed an application on the three respondents as insolvents on the basis of their debts. C opposed the application on the contention that he had not become a partner of the firm and thus was not liable for the debts.

Issue involved

Whether c, a minor who was admitted to the benefits of partnership and who attained majority subsequent to the dissolution of the firm and did not exercise his option not to become a partner, could be adjudicated insolvent?

Decision

It was contended on behalf of the appellant, s, that "first respondent c, had become a partner of the firm by reason of the fact that he had not exercised his option not to become a partner of the firm under section 30(5) of the partnership act and, therefore, was liable to be adjudicated insolvent along with his other partners, respondent nos. 2 and 3.

Under section 30 (1) of the partnership act, 1932, a minor cannot become a partner of the firm but he may be admitted to the benefits of partnership. Under subsection (2) and (3) of the same section he is entitled only to such shares upon the properties and of the profits of the firm as may be agreed but he has no liability for any acts of the firm, though his share is liable for the same. But under section 30 (5) a minor admitted to the benefits of partnership at any time within six months of his attaining majority or his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, such person may give notice that he has elected, to become or not become a partner in the firm. If he fails to give such a notice, he becomes a partner in the firm after the expiry of the said period of six months. Under section 30(7) where such person becomes a partner, his rights and liabilities as a minor continue upto the date on which he becomes a partner, but he also becomes personally liable to the third parties for all acts of the firm done since he was admitted to the benefits of partnership. It would follow from the above that a minor who has opted to become a partner of the firm, or after the expiry of six

months in the case of one who has not given any option, would thereafter become liable to the debts of the firm and could be adjudicated insolvent for the acts of insolvency committed by the other partners.

In the present case, the partnership was dissolved and the firm ceased to exist before the respondent no. 1, c, became major. Under section 45 of the partnership act the partners continued to be liable, but it applies only to partners of the firm. "when partnership itself was dissolved before the respondent c, become major it is legally impossible to hold that he had become a partner of the dissolved firm by reason of his inaction after he become major within the time prescribed under section 30 (5)." all clauses of section 30 of the partnership act presupposes the existence of a partnership. It is implicit in the terms of section 30(5) that the partnership is in existence. A minor after attaining majority cannot elect to become a partner of a firm which has ceased to exist. "the entire scheme of section 30 posits the existence of a firm and negatives any theory of its application to a stage when the firm has ceased to exist. One cannot remain or become a partner of a firm that does not exist."

The court held that respondent no. 1, c, was not a partner of the firm when it was dissolved and he cannot be adjudicated insolvent for the act of insolvency committed by respondent nos. 2 and 3, the partners of the firm,,

Cit verses. Shah mohandas sadhuram,

(section 30—a partnership deed that attempts to make a minor a full-fledged partner is invalid to that extent.)

Facts

The respondent firm (assessee) claimed registration under the income-tax act on the strength of a partnership executed on april 1,1952. For the assessment year 1953-54 the income-tax officer rejected the application on the ground that in the case of the assessee, the minors were made parties to a contract by the eldest brother acting an their behalf. The minor had actually been debited with a share of loss. According to the partnership deed two majors decided to form a partnership, admitted two minors to the benefits of partnership. All the four partners were entitled to one-fourth share and capital contribution of each partner would be equal.

Issue

Whether the assessee could be granted registration under the income-tax act, 1922?

Decision

The court referred to the case of *cit verses. Dwarkadas khetan & co.,*where it was held that section 30 of the indian partnership act was designed to confer equal benefits upon the minor by treating him as a partner but it did not render a minor a competent and full partner, and any document which made a minor full partner could not be regarded as valid for the purpose of registration.

The court held that a minor cannot be made liable for losses. A minor is entitled to sever his connection with the firm and if he does so, the amount of his share has to be determined by evaluation made, as far as possible, in accordance with the **rules** given in section 48, which section visualizes capital having been contributed **by** partners. This severance may be done on behalf of a minor by his guardian. A **minor** may or may not know that he has been admitted to the benefits of partnership. A guardian can do all that is necessary to effectuate the conferment and receipt of the benefits of partnership. Therefore as long as a partnership deed does not make a minor full partner a partnership cannot be regarded as invalid on the ground that a guardian has purported to contract on behalf of a minor if the contract is for the purposes mentioned above.

The court held that the partnership deed, reasonably construed, only conferred benefits of partnership on the two minors and did not make them full partners. Thus the firm was entitled to be registered under s.26-a of the income-tax act, 1922.

Syndicate bank verses r.s.r. Engineering works

(section 32—liability of a retiring partner can be discharged by an agreement between the retiring partner, third party and partners of reconstituted firm).

Facts

The plaintiff-appellant bank advanced money in the year 1974 to the first respondent firm, respondents 2, 3 and 4 were its partners. Respondents 2, 3 and 4 jointly executed various documents in favour of the appellant in this respect. Thereafter the firm was alleged to have been dissolved on 28-7-1976, and the fourth respondent look over the entire liability. It was contended on behalf of the appellant that dissolution of partnership on 28-7-1976 will not affect the liability of the second and third respondents to discharge the suit claim. Respondents 2 and 3 contended that the appellant was aware of the dissolution of the partnership and therefore they are not liable for any payment under the suit.

Issue

Whether respondents 2 and 3 are liable to the appellant bank for the suit claim.

Decision of the supreme court

The supreme court held that the plaintiff-appellant had every right to proceed against all the respondents in the suit. In the instant case, at the time when the partners entered into the agreement in the overdraft facility, they were members of the partnership firm. Respondents 2 to 4 jointly executed an agreement and obtained loan from the bank. Subsequent retirement of defendants 2 and 3 is of no consequence unless there is a subsequent contract between these members of the partnership firm and the plaintiff. The court said:

"under sub-section (2) of section 32, the liability of the retiring partner as against third party would be discharged only if there is an agreement made by the retiring partner, with the third party, and the partners of the reconstituted firm. Of course, an agreement could be implied by the course of dealing between such third party and the reconstituted firm, after retirement of a partner. In the instant case, there was no agreement between the appellant bank and respondents 2 and 3 as regards their liability in respect of the dissolved firm. There is also no evidence to show that there was an implied contract between the appellant and respondent 4 who allegedly agreed to discharge the liabilities of respondents 2 and 3. It is also pertinent to note that there was no public notice under subsection (3) of section 32 of the indian partnership act by respondents 2 and 3. Even if there was a public notice, it may not alter the position as the alleged liabilities of respondents 2 and 3 were incurred by them prior to the so-called dissolution of the firm."

In **lindley on partnership** (16th edn.) Pages 358-359, the law in this aspect is stated as under:

> "it is perhaps self-evident that a creditor's rights will not normally be prejudiced by an agreement transferring an accrued liability from one partner to another unless the creditor is made a party to the agreement or assents to its operation. Otherwise the agreement will, as regards him, be strictly *res inter alias acta.* Lord lindley illustrated this proposition by the following example:

'..... Let it be supposed that a firm of three members a, b and c, is indebted to d; that a retires, and b and c either alone, or together with a new partner, e, take upon themselves the liabilities of the old firm. D's right to obtain payment from a, b and c is not affected by the above arrangement, and a does not cease to be liable to him for the debt in question. But if, after a's retirement, d accepts as his sole debtors b and c, or b, c and e (if e enters the firm), then a's liability will have ceased and d must look for payment to b and c or to b, c and e, as the case may be'".

Pamuru vishnu vinodh reddy verses chillakuru chandrasekhra reddy

(section 32 and section 3 7*—retirement of a partner does not comprehend dissolution.*)

Facts

One pamuru rama subba reddy filed a suit for dissolution and accounting of the partnership assets of the firm vijay mahal theatre. The defence set up to resist the suit was that the plaintiff and the 4th defendant retired from firm on 5-4-1971 with the consent of all the partners and, therefore, the plaintiff was not entitled to seek dissolution of the partnership and the settlement of the accounts. The high court found that the plaintiff has retired from the partnership firm, after selling his share to m. Subba reddy (the 12th defendant), on 5-4-1971 and the partnership firm had been reconstituted thereafter. The defendants have not paid the value of the share of the plaintiff pursuant to the agreement from retiring from the firm. Pursuant to the directions of the high court and the trial court appointed a commissioner for ascertaining the value of the share of the plaintiff. The plaintiff died during the pendency of the suit and his minor son pamuru vishnu vinodh reddy, represented by his natural guardian was added as the legal representative of the deceased plaintiff.

Issue

Which is the relevant date for the purpose of ascertaining the value of the share of the plaintiff in the partnership firm i.e. Whether 5-4-1971 or the date on which the commissioner made the valuation of the share of the plaintiff.

Decision of the supreme court

The supreme court said:

"use of the word "retire" in section 32 of the act is confined to cases where a partner withdraws from a firm and the remaining partners continue to carry on the business of the firm without dissolution of partnership as between them.

Where a partner withdraws from a firm by dissolving it, it shall be dissolution and not retirement. Retirement of 3 partner from a firm does not dissolve it, in other words, it does not determine partnership *inter se* between all the partners. It only severs the partnership between the retiring partner and continuing partners, leaving the partnership amongst the latter unaffected and the firm continues with

the changed constitution comprising of the continuing partners. Section 32 provides for retirement of a partner but there is no express provision in the act for the separation of his share and the intention appears to be that it would be determined by agreement between the parties. Section 37 deals with rights of outgoing partners. Although the principle applicable to such cases is clear but at times some complicated questions arise when disputes are raised between the outgoing partner or his estate on the one hand and the continuing or surviving partners on the other in respect of subsequent business. Such disputes are to be resolved keeping in view the facts of each case having due regard to section 37 of the act. Section 48 deals with the mode of settlement of accounts between the partners after dissolution of the partnership firm."

The supreme court held that a mere non-payment of a retiring partner's share does not take away the legal effect of retirement from the partnership firm. The court further held that the cause of action of the plaintiff arose on the date of his retirement from the partnership firm and on which date the liability of the defendants also arose. In this view, the plaintiff could certainly claim the value of his share as on 5-4-1971 with interest till the payment was made. The supreme court quoted with approval the following paragraph from the judgement of learned justice of the high court:

> "therefore, in my view of the matter, the relevant date for the purpose of ascertaining the value of the share of the plaintiff is the date on which he ceased to be a partner as it is a case where there was an express agreement between the parties to sell the share of the plaintiff in favour of sri m subba reddy and with effect from that date he became a secured creditor and there was a debt due to him from the other partners who are continuing in the partnership business. It is in the nature of a debt due to him or the amount due to him is unpaid purchase money. Therefore, the relevant date is the date on which he ceases to be a partner."

Vishnu chandra verses a.p. Aggarwal and other

(section 32(i)(b)— a partner's right to retire would depend upon the terms of the agreement. If the terms, on their fair construction, permit a partner to retire, he would have the right to do so. In this context it would not be relevant, whether the firm was at will or whether dissolution was sought under section 44.)

facts

In the present case clause 18 of the partnership deed executed on 18-12-1975 provided that if a partner wanted to dissociate from the partnership business, then he could dissociate rafter serving one month's notice to remaining partners, but in that event, the partnership business was to come to an end. Clause 20 provided that no partner was to separate from the partnership business till one year from the beginning of business and if dissociated, then his capital was not to be given till the end of one year. The plaintiff appellant filed a suit for dissolution of the firm and rendition of accounts alleging that partnership was a partnership at will and by the notice and by the institution of the suit the firm dissolved with effect from 23-11-1976.

Issues

(1) whether the partnership was a partnership at will or for a fixed duration?

(2) whether the appellant was entitled for retirement from the partnership or for dissolution of the firm itself?

decision of the high court

After elaborate discussion and after specifically referring to section 7 and clauses 18 and 20 of the partnership deed the high court held that the partnership was not a partnership at will. According to clause 20 no partner could withdraw from the partnership before the end of a year and even if he did, his capital would not be paid back by the firm. The court said that was clearly a provision, fixing by contract the duration of partnership at least one year.

The high court held that non-payment of rs. 250/- p.m. To the plaintiff and the non-supply of 1/4h of the production to him, as provided in the deed, could be an adequate ground for dissolution of the partnership under section 44 of the indian partnership act. The non-withdrawal

of the amount by all partners was in the interest of the partnership as the partnership suffered loss. Moreover there was nothing on record from the side of the plaintiff that he ever demanded the same. With regard to the supply of '/4th production to the plaintiff it was stated that the plaintiff did not tender the price in cash of the ¼ production. The court refused to dissolve the partnership under section 44 (f) also. The court stated that under that section a partnership can be dissolved when the business of the firm cannot be carried on save at a loss. In the first six months of the business the loss was only rs. 1032 when the capital of the four partners and bank loan was about rs. One lakh.

Decision of the supreme court

It was held that combined reading of clause 18 and clause 20 would unmistakably show that a partner might retire from the firm after giving one month's notice, that he should not retire within a period of one year, but if he did retire within a period of one year, the capital invested by him was not refundable to him till the expiry of the period of one year. This right to retire from partnership might not be exercised till a period of one year but there was not a complete embargo on the exercise of such right conferred by clause 18. The high court was in error in holding that the plaintiff was not entitled to seek retirement from the firm.

Saligram ruplal khanna verses kanwar rajnath (1974)

(in the absence of a contract to the contrary, there is no question of the survival of a firm after the expiry of its term and the fact that the partners subsequent to the expiry of the term, consented to refer their disputes to arbitration did not amount to an agreement to the contrary.)

Facts

Saligram ruplal khanna (plaintiff-appellant), pessumal atalrai shahani (plaintiff-appellant) and kanwar rajnath (defendant-respondent) entered into a partnership agreement on august 30, 1952. They agreed to contribute rs. 1,00,000 each. They carried on business under the name and style of "shri ambernath mills corporation" (hereinafter referred to as samco). Partnership property consisted of three mills at ambernath known as "ambernath mills". The ambernath mills were evacuee property which being managed by the custodian. The custodian decided to grant a lease of the ambernath mills to the respondent and the two appellants. The respondent was a big industrialist and left in pakistan a large property. The period of partnership was five years "being the period of the said lease". The partnership took possession of ambernath mills on august 31, 1952. The respondent was in overall charge of the concern. The partnership made some progress in the first few months. The custodian called upon the partnership in april, 1953 to pay the sixth quarterly installment of rent of rs. 1 lakhs or furnish a bank guarantee for the said amount this payment could not be made by the partnership. On february 12, 1954 the custodian served a notice on the respondent and the two appellants to show cause why the agreement of lease should not be cancelled on account of the breach of conditions in the matter of payment of the aforesaid rent. A writ petition was thereupon filed by the partnership in february, 1954 in the bombay high court for quashing the notice issued by the custodian. The division bench of the high court dismissed the writ petition. The custodian made an order on may 25, 1954 cancelling the agreement of lease. The possession of the mills was voluntarily delivered by the partnership to the custodian on june 30, 1954. The supreme court held that there was no infirmity in the notice for the termination of lease issued by the custodian. On march 10, 1955 the central government issued notification for acquiring the mills. The mills were then advertised for sale. Suit was brought by the respondent and the appellants for permanent injunction restraining the government and the custodian for selling the ambernath mills to any person other than the partners of samco. The suit was dismissed by the division bench of the bombay high court on april 14, 1957. No appeal was filed against the decision of the bombay high court. The present suit for rendition of accounts was brought on december 20, 1960 i.e. More than three years after

the expiry of the fixed period of partnership, viz., august 30, 957. On april 12, 1955 dispute between samco and custodian was referred to arbitration.

Issue

Whether the firm stood dissolved on the expiry of the fixed period of partnership, viz., august 30, 1957?

Decision of the supreme court

A firm constituted for a fixed period shall stand dissolved, in the absence of a contract to the contrary, on the expiry of that term. According to the partnership deed dated august 30, 1952 the period of partnership was fixed at five fears, being the period of the lease. The possession of ambernath mills under the agreement of lease was delivered on august 31, 1952. The period of five years was thus to expire on august 30, 1957. As the partnership was for a fixed period of five years, the firm would in normal course dissolve on the expiry of the period of five years on august 30, 1957. No agreement between the partners to keep the firm in existence after the expiry of the fixed period of five years has been made. Therefore, the claim for rendition of accounts was not within time. The consent which was given by the respondent on behalf of samco on november 13,1957 to the arbitration award was with a view to get the dispute between samco with the custodian finally settled. This was a necessary step for the purpose of winding up the affairs of samco and to complete the transaction of arbitration proceedings which had begun on april 21, 1955 but remained unfinished at the time of dissolution, viz., august 30, 1957. According to s. 47 of the partnership act, after the dissolution of a firm the authority of each partner 10 bind the firm, and other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise. The word "transaction" in section 47 refers not merely to commercial transaction of purchase and sale but would include also all other matters relating to the affairs of the partnership. The completion of a transaction would cover also the taking of necessary steps in connection with the adjudication of a dispute .to which a firm before its dissolution is a party.

Santiranjan das gupta verses dasuram murzamull

(maintenance of separate accounts by parties tends to negative rather than support the plea of partnership.)

Facts

According to the plaintiff appellant (shantiranjan das gupta, proprietor of das gupta rice mills, nojai, nowgong) he was carrying on his milling business. The defendants (messers dasuram murzamull of gauhati) represented to him that if the milling business was carried on it partnership with them then the plaintiff would make large profits and on that representation and assurance he entered into a partnership with the defendants on or about january 10, 1948. In september, 1951, the plaintiff instituted a suit for dissolution of partnership and accounts. The defendants pleaded that there was no partnership between the parties and that there was only a milling agreement, dated january 11, 1948 between them under which the defendants were getting paddy milled in the plaintiffs rice mills for which dues had all along been paid to the plaintiff in accordance with the milling contract. The following were the conditions of the milling contract:

1. An amount of as 8 (annas eight only) per maund of paddy milled by me will be paid to me by messrs. Dasuram murzamull and this would include boiling, drying, milling, storing and loading in wagons of the rice produced in the mills. All the running expenses of the mills including cost of labour, lubricants, spare parts etc. Will be borne by me.

2. The stock of paddy maintained by messrs. Dasuram murzamull in my mills will be absolutely theirs and i shall have no claim on it or any rent for it. Creditors of mine will have also no claim for the paddy or rice or products thereof etc.

3. The milling charges will be payable to me either daily or weekly as may be demanded at the rate of eight annas per maund of paddy, rice, khudi, gura, husks etc., will all go to m/s dasuram murzamull.

4. That this milling arrangement will continue till 31st chaitra 1364 b.s.

Issue

Whether there was sufficient evidence to warrant a conclusion that the parties entered into an agreement of partnership?

Decision of the supreme court

The evidence on record revealed the following facts:

1. There was no written agreement of partnership, and no record was kept regarding its terms and conditions.
2. No accounts of the partnership business were maintained.
3. No account of partnership was opened with any bank.
4. No written intimation was conveyed to the deputy director of procurement with respect to the newly created partnership, only oral information having been sent to him.
5. The plaintiff agreed to charge very low rates for milling the defendant's paddy.

It was held that the evidence was wholly inadequate for coming to the conclusion that the plaintiff-appellant and the defendant firm had entered into a contract of partnership. Maintenance of separate accounts by the plaintiff and the defendant firm is no substitute for the maintenance of the accounts of the partnership business as such, accessible to both the parties and, indeed, keeping of separate accounts by the parties would tend to negative rather than support the plea of partnership.

M/s juggilal kamlapat verses m/s sew chand bagri

facts

The defendants-respondents were a firm of three members—manik chand bagri, motichand bagri and jankidas bagri. Sew chand bagri, the individual, was the father of these three persons. Two of them retired and the business was continued by the remaining single member and also in the same name. Neither the change in the constitution of the firm a public notice of the dissolution of the firm was given. A contract was made by the remaining member (bagrcc) with the plaintiffs (m/s. Juggilal kamlapat) after the retirement of the two members disputes arose about the contract. They were referred to arbitration. The award went in favour of the plaintiffs. They sought to enforce the award against the former partners also contending that their names were still there on the register of firms, public notice having not given. But these partners were not known to m/s. Juggilal kamlapat (plaintiffs) to have been partners of m/s. Sew chand bagri.

Issue

Whether sub-section (1) of s. 45 of the partnership act is brought into play or whether the point is covered by the proviso to the said section?

Decision of the calcutta high court

The court first compared the provisions of s. 45 with those of the english act as follows:

"section 45 sub-section (1) of our act without the proviso is no doubt somewhat similar to section 36 sub-section (1) of the english act but the provisions of the two acts are not identical. Under section 45 notwithstanding the dissolution of a firm the liability of the partners continues until public notice is given of the dissolution in respect of any act which would have bound the firm if done before the dissolution. But the proviso to this sub-section restricts the scope of it considerably and exempts the estate of a partner who dies or who is adjudicated an insolvent or of a partner, who not having known to the person dealing with the firm to be a partner, retires from

the firm if the act is done after the date on which he ceases to be a partner. Under section 36(1) of the english act an apparent member continues to be liable to an outsider unless the latter has notice of the change in the firm. But even if there be no such notice a partner who was not known to the outsider as such ceases to be liable after his retirement under sub-section (3) of section 36. In the indian act the proviso replaces sub-section (3) of the english section. The only difference between section 36 sub-section (1) of the english act and section 45 sub-section (1) of the indian act seems to be that under the former anyone who is an apparent member continues liable while under the latter anyone who was a member, whether apparently so or not remains liable until public notice of dissolution is given. *But the proviso to the indian section cuts down the liability in the case of a partner who was not known as such to the person seeking to make him liable.* Except for the use of the qualifying word "apparent" in sub-section 1 of section 36 of the english act the effect seems to be the same." the supreme court quoted lord macmillan:

"the proper function of proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case." *m. And s.m. Rly co. Verses bezwada municipality,* the supreme court further said :

"but for the proviso the dissolution of a firm would not have affected the liability of a partner who has gone out of it or of a dormant partner until public notice of the dissolution was given. The effect of the proviso is to except the case of a partner who was not known to the person dealing with the firm to be a partner and who has retired from the firm without any public notice of dissolution being given."

Applying these principles to the facts of the case, the court stated : "it was admitted by the rameshwar agarwalla (plaintiff) that he did not know manik chand bagri and moti chand bagri to be partners of m/s sew chand bagri until six months or a year ago and even this he came to know only from a copy of the entries made in the records of register of firms. These persons, therefore, were not known to m/s juggilal kamlapat to have been partners of the firm and they had gone out of the firm before the contract in this case was entered into. Clearly the proviso is attracted to the facts of the case and manik chand bagri and moti chand bagri cannot be made liable for payment of the decretal amount."

Sharad vasant **kotak verses ramniklal mohanlal chawla**

(section 69 (2-a) of the act as amended in the state of maharashtra)

facts

A partnership firm comprising seven members was registered with the registrar of firms. On the death of one of the partners his widow, the second respondent, was admitted as a partner of the firm and another deed of partnership was made consisting of six old partners and the newly admitted partner but the same was not registered. Clauses 4 and 5 of the second deed pertained to changes in regard to commencement of partnership and accounting year. Both in the original deed and the subsequent deed of partnership it was expressly made clear that the death, insolvency or retirement of any partner shall not dissolve the partnership firm. On the other hand, the partner shall be entitled to carry on the partnership business on the terms and conditions mutually agreed upon by the said partners (vide clause ii). However, the induction of the new partner was not brought to the notice of the registrar of firms by forwarding the required particulars. Later on another partners died and another partnership deed was brought into existence but the fact of death was not intimated to the registrar of firms. While so, the first respondent who was one of the founder partners of the registered firm and whose name was there in the register of firms filed a suit for dissolution of the firm in the high court of bombay.

Issue before the supreme court

Whether on the facts of this case, the suit for dissolution and accounts of partnership was hit by section 69(2) of the act?

Decision of the supreme court

The supreme court held that suit in question was not hit by section 69(2) of the. Act. On the induction of the second respondent, the existing firm was only reconstituted and, therefore, there was no necessity to get a fresh registration. If by virtue of non-compliance of certain mandatory provisions in not informing the registrar of firms about changes in the constitution of the partnership firm, certain penalties provided in the act alone are attracted, that will not lead to the conclusion that the registration of the firm ceased. This decision is based on the conjoint reading of sections 58-63 and the forms prescribed there under.

The court further held that in view of clause 11 of the second deed of partnership it cannot be contended by the appellants that by reason of death of one of the partners, the existing firm stood dissolved. By clauses 4 and 5 of the said deed relating to the commencement of the partnership and the accounting year, minimal changes were introduced in the second deed of partnership in place of clauses 4 and 5 in the first partnership deed and in other respects, namely, the name of the partnership firm, the address and location of the firm, the business carried on and shares allotted among the partners and the duration of the partnership, are identical. Having regard to the substance of the three deeds there was no indication that the all firm was dissolved. Thus the existing firm continued.

Section 69(3)(a) of the indian partnership act, 1932 enables the partners of both the registered and unregistered firms to file a suit for dissolution and/or accounts. By introducing sub-section (2-a) in section 69, the maharashtra legislature has placed certain restrictions to the extent that even the suit for dissolution of a firm or for accounts, the suit can be filed only if the firm is registered and the 'persons suing' as a partner is shown in register of firms as a partner in the firm. *In other words, a person who is not shown in the register of firms by induction after registration even though the firm is registered cannot file a suit for dissolution of accounts. This does not in any way mean that the registration given to the firm earlier will cease. In this case, the firm was registered and there was only a reconstitution of the firm and the first respondent, the plaintiff in this case, is a person whose name is shown in the register of firms along with the names of the appellants and, therefore, there is a compliance of section 69 (2-a).*

The name of the newly introduced partner, of course, does not find a place in the register of firms. That means the person whose name does not find a place in the register of firms may incur certain disabilities and that will not disable the plaintiff to press the suit against the firm, which was registered against the persons whose names find a place in the register of firms. For the purposes of section 69 (2-a), the -partnership firm will mean the firm as found in the certificate of registration and the partners as found in the register of firms maintained as per rule in form 'g'. The present case being one for dissolution and accounts by one of the partners, whose name finds place in the register of firms along with the name of the appellants, the requirements of section 69(2-a) are satisfied.

S. V chandra pandian verses s. V sivalinga nadar

[sections 48(b)(iv), 14, 18—entire property whether brought in by the partners on constitution of the partnership or acquired in course of business of the partnership would constitute property of the firm. During subsistence of the partnership, partners entitled to an undefined share in such property. But after dissolution and settlement of accounts, partners entitled to proportionate share in residue of the property.]

Facts

The four appellants and respondents 1 and 2 were brothers carrying on business in partnership in the name and style of messers sivalinga nadar & brothers and s.v. Oil mills, both partnerships being registered under the partnership act, 1932. Most of the properties were acquired by the firm of sivalinga nadar & brothers. The firm of ms. S.v. Oil mills merely had leasehold rights in the parcel of land belonging to the first-named firm on which the superstructure of the oil mil! Stood. Both the partnerships were of fixed durations. Disputes arose between the six brothers in regard to the business carried on in partnership in the aforesaid two names.

Issue

Whether on dissolution of partnership, distribution of residue among partners after settlement of accounts in terms of section 48 is to be treated as distribution of movable property not resulting

in partition, transfer or extinguishment of interest. So as to attract section 17 of the registration act, 1908?

Decision of the supreme court

The firm is not a legal entity, it has no legal existence, it is merely a compendious name and hence and hence the particular property would vest in all the partners of the firm. Regardless of its character the property brought into stock of the firm or acquired by the firm during its subsistence for the purposes and in the course of the business of the firm shall constitute the property of the firm unless the contract between the partners provides otherwise.

On the dissolution of the firm each partner becomes entitled to his share in the profits, if any, after the accounts are settled in accordance with section 48 of the partnership act. In the entire asset of the firm all the partners have an interest albeit in proportion to their share and the residue, if any, after the settlement of accounts on dissolution in the same proportion in which they were entitled to a share in the profit. Thus during the subsistence of the partnership a partner would be entitled to a share in the profits and after its dissolution to a share in the residue, if any, on settlement of accounts.

The mode of settlement of accounts set out in section 48 clearly indicates that the partnership asset in its entirety must be converted into money and from the pool the disbursement has to be made as set out in clause (a) and sub-clauses (i), (ii) and (iii) of clause (b) and thereafter if there is any residue that has to be divided among the partners in the proportions in which they were entitled to a share in the profits of the firm. Since the residue would in the eyes of law be movable property i.e. Cash, distribution of the residue among the partners in proportion to their shares in the profits would not attract section 17 of the registration act. Viewed from another angle since each and every partner of a firm has an unidentified interest in each and every property of the firm and no partner can claim a definite or earmarked interest in one or all the properties of the firm because the interest is a fluctuating one depending on the various factors, such as, the losses incurred by the firm, the advances made by the partners as distinguished from the capital brought in the firm, etc., it cannot be said unless the accounts are settled in the manner indicated by section 48 of the partnership act, what would be the residue which would ultimately be allocable to the partners. In that residue, which becomes divisible among the partners, every partner has an interest and when a particular property is allocated to a partner is proportion to his share in the profits of the firm, there is no partition or transfer taking place nor is there any extinguishment of interest of other partners in the allocated property in the sense of a transfer or extinguishment of interest under section 17 of the registration act.

Cit verses jayalakshmi rice and oil mills *(sections 58 and 59)*

On october 20, 1955 the respondent firm filed before the registrar of firm the statement under section 58 of the partnership act, 1932. On november 2, 1955 the registrar of firms filed the statement of the firm and made entries in the register of firms.

Issue

Whether the registration of a firm under the partnership act takes place with effect from the date on which the application for registration is made in accordance with section 58 of that act?

Decision of the supreme court

The court, after making references of section 58, section 59 and section 69, and the cases *of ram prasad verses kamta prasad. Danmal parshotamdas verses babitram chhotelal,* and *kerala road lines corporation verses c.i. T.,* held that a firm cannot be said to be registered when the statement prescribed by section 58 and the required fee are sent to the registrar. The registration of firm is effected only when the entry of the statement is recorded in the register of firms and the statement

is filed by the registrar as provided in section 59. It said that section 58 is not to be read in isolation but has to be read with the scheme of the other provisions of the act, namely, section 59 and section 69.

Jagdish chandra gupta verses kajaria tradesrs (india) ltd.

(reference of dispute to arbitration as envisaged in the partnership agreement is not barred by section 69.)

Facts

M/s kajaria traders (india) ltd. And m/s foreign import and export association (sole proprietary firm owned by the appellant jagdish chandra gupta) entered into a partnership to export between january and june 1956, 10,000 tons of manganese ore to phillips brothers (india) ltd., new york. Each partners was to supply a certain quantity of manganese ore. One of the clauses of the partnership agreement provided as follows:

> "that in case of dispute the matter will be referred for arbitration in accordance with the indian arbitration act."

It was alleged that jagdish chandra gupta failed to carry out his part of the partnership agreement. He objected to the appointment of an arbitrator on the ground, *inter alia,* that section

69(3) of the indian partnership act, 1932 afforded a bar to the petitioner because the partnership was not registered.

Issue

Whether reference of dispute to arbitration as envisaged in the partnership agreement barred by section 69?

Decision of the supreme court

The court held: "since the arbitration clause is a part of the agreement constituting the partnership it is obvious that the proceeding which is before the court is to enforce a right, which arises from a contract."

The court said: "section 69 provides for exclusion of suits in sub-section (1) and (2). Then it says that the same ban applies to a claim of set-off and other proceedings to enforce a right arising from a contract. Next it excludes the ban in respect of the right to sue (a) for the dissolution of a firm (b) for accounts of a dissolved firm and (c) for the realization of the property of dissolved firm. The emphasis in each case is on dissolution of the firm. Then follows a general exclusion of the section. The fourth sub-section says that the section as a whole, is not to apply to firms or to partners and firms which have no place of business in the territories of india or whose place of business are situated in the territories of india or whose place of business are situated in the territories of india but in areas to which chapter vii is not to apply and to suits or claims of set-off not exceeding rs. 100 in value. Here there is no insistence on the dissolution of the firm".

The court held that the word "proceeding" in section 69(3) is not limited to a proceeding in the nature of suit or a claim of set-off. The arbitration proceedings would also fall within the expression "other proceedings". The sub-section (3) provides for the application of sub-section (1) and (2) to claims of set-off and also to other proceedings of any kind which can properly be said to be for enforcement of any right arising from contract except those expressly mentioned as exceptions in sub-section (3) and (4).

Mahatta brothers verses bharat survodaya mills co. Ltd.

(in the case of a firm which is reconstituted by introduction of a new partner, no question of fresh registration of the firm arises if the continuing firm was already registered)

Facts

The plaintiff-firm (m/s mohatta brothers) with effect from 1 april, 1949 consisted of five partners. In addition to these five partners, shashi kumar, who was a minor and whose mother satyawati was his guardian, was entitled to four anna share in a rupee in the profits of the partnership but was not liable for the losses. Partnership deed was executed for this purpose on may 19, 1949 and was signed by five partners and satyawati. On october 24, 1949 another deed was executed wherein satyawati was shown as a partner of the plaintiff-firm instead of her minor son shashi kumar. The original partnership mentioned in the partnership deed dated may 19, 1949 had been registered but partnership deed dated october 24, 1949 was not registered.

Issue

Whether the suit filed by the firm is barred by section 69(2) of the partnership act.

Decision of the supreme court

The court held that satyawati had not become a partner of the plaintiff-firm and that the deed of partnership dated october 24,1949 had not been acted upon. Therefore, it is not necessary to go into the legal question as to what should be the proper construction of section 69(2). Such question would arise only in case satyawati had become a partner of the plaintiff firm and that deed of partnership dated october 24, 1949 had been acted upon.

The court found that in the register relating to the registration of firms kept under the indian partnership act, on entry was made on may 5, 1952 relating to registration-of the plaintiff-firm. The above entry shows that the position taken up on behalf of the plaintiff-firm even in the year 1952 was that there were only five partners of the plaintiff-firm and shashi kumar minor was admitted to the benefits of the partnership. Further satyawati did not become a partner of the plaintiff-firm in the registers of the defendant company. Again in the income-tax return filed by the plaintiff-firm shashi kumar minor under the guardianship of satyawati was shown entitled to four anna share in a rupee in the plaintiff firm.

Seth loonkaran sethiya verses ivan **e. John (1977)**

(a partner of an erstwhile unregistered partnership firm cannot bring a suit to enforce a right arising out of a contract falling within the ambit of section 69 of the partnership act.)

Facts

Seth loonkaran sethiya (the plaintiff and financier), ivan e. John, maurice l. John and doris marzano were partners of three spinning mills and one flour mills m/ s john & co. The firm ran into financial difficulties. It entered into a financial agreement to take a loan of rs. 8,00,000 of the security of yarn with sethiya & co., a partnership firm of plaintiff and seth sugan chand. On january 29,1948, the collector, agra attached movable and immovable properties of the m/s john & co. Pursuant to a certificate issued for realization of income tax dues for the years 1943 to 1945 outstanding against m/s john & co., which exceeded rs. 20 lakhs. On february 5, 1948, the collector, agra, appointed evan e. John and two other persons as custodian for running the mills of m/s john & co. The financial agreement with sethiya & co. Did not prove adequate to meet the monetary requirements of m/s john & co. Accordingly, on 9th february, 1948 they entered into another agreement with the proprietary concern of the plaintiff (seth loonkaran sethiya) carrying on

business under the name and style of 'm/s tejkaran sidkaran' whereby the latter agreed to advance certain accounts to them against 'mortgage' of cotton, its products and bye-products which might be in their stock from time to time during the continuance of the agreement. Nearly five months thereafter i.e. On july 6,1948, the aforesaid partners of m/s john & co. Succeeded in obtaining another financial accommodation from sethiya & co. On the security of all business assets of the aforesaid three spinning mills.

Describing himself as the sole proprietor of the firm 'sethiya & co.' and 'm/s tejkaran sidkaran', seth loonkaran sethiya filed a suit against m/s john & co. And its aforesaid partners (hereinafter referred to as 'the defendants first set') as also against munnilal mehra, hiralal patni and gambhirmal pandya and m/s john, jain, mehra & co. (hereinafter referred to as 'the defendants second set') for recovery of rs. 21,11,500 with costs and for permanent injunction restraining the defendants first set from committing any breach of the aforesaid agreement dated july 6, 1948, as also for declaration that he had a prior and floating change on all the business assets of m/s john & co. By amending the petition, the plaintiff sought a decree against defendants first set and the defendants second set.

The suit was contested by both sets of defendants on various grounds. It was pleaded *inter alia* that there was no settlement of accounts between them; that the accounts were tainted with fraud, mistakes etc. It was also pleaded that the plaintiff had no floating or prior charge on any of their stocks, stores etc., nor could any charge be claimed by him in law; that the suit was barred by the provisions of section 69 of the partnership act.

Issue

Whether the suit was barred by section 69 of the partnership act?

Decision of the supreme court

The supreme court held that as material alterations have been made by the plaintiff without the consent of the other party in the agreement dated july 6, 1948 (which is the basis of the suit) rendering it void and as the suit was barred by section 69 of the partnership act it was dismissed. The court said:

> "a bare glance at section 69 is enough to show that it is mandatory in character and its effect is to render a suit by a plaintiff in respect of a right vested in him or acquired by him under a contract which he entered into as a partner of an unregistered firm, whether existing or dissolved, void. In other words, a partner of an erstwhile unregistered partnership firm cannot bring a suit to enforce a right arising out of a contract falling within the ambit of section 69 of the partnership act. In the instant case, seth sugan chand had to admit in unmistakable terms that the firm sethiya & co.' was not registered under the indian partnership act. It cannot also be denied that the suit out of which the appeals have arisen was for enforcement of the agreement entered into by the plaintiff a partner of sehitya & co. Which was an unregistered firm. That being so, the suit was undoubtedly a suit for the benefit and in the interest of the firm and consequently a suit on behalf of the firm. It is also to be borne in mind that it was never pleaded by the plaintiff, not even in the replication, that he was suing to recover the out standings of a dissolved firm. Thus the suit was clearly hit by was suing to recover the out standings of a dissolved firm. Thus the suit was clearly hit by section 69 of the partnership act and was not maintainable."

Delhi development authority verses kochar construction work

Facts

Respondent 1, and unregistered firm, filed proceedings under section 20 of the arbitration act, 1940 in the high court of delhi. The delhi development authority contested the proceedings on various grounds including the ground of limitation. The learned single judge allowed the suit and directed the appointment of an arbitrator. Against that order an appeal was filed before the division bench of the high court by the respondent. That appeal was dismissed holding that the subsequent registration of the firm cured the initial defect since that was within the period of limitation.

Issue

Whether subsequent registration of the firm, before the period of limitation runs out, can cure the initial defect?

Decision of the supreme court

By virtue of section 69(2) a suit instituted in any court by or on behalf of a firm against any third party shall not be valid unless the firm is registered and the persons suing are or have been shown in the register of firms as partners of the firm. The institution of the suit is barred both by sub-section (1) and sub-section (2) of section 69 of the partnership act. On a plain reading of section 69 of the partnership act and section 20 of the arbitration act, it is clear that an application filed by unregistered firm under section 20 of the arbitration act would also be treated as a suit and would be hit by section 69(2), if the firm filing the application is not registered with the registrar of firms. The fact that it is an application to be registered and numbered as a suit would not make any difference for the obvious reason that though sub-section (1) and (2) of section 69 of the partnership act refer to a suit, sub-section (3) thereof makes those sub-sections applicable even to other proceedings which would include an application registered and numbered as a suit under section 20 of the arbitration act, 1940. The proceedings under section 20 were *ab initio* defective since the firm was not registered and the subsequent registration cannot cure that defect.

Gwalior oil mills verses supreme industries

(sections 69 and 63—suit by reconstituted firm -maintainability).

Facts

A registered firm of five partners was reconstituted w.e.f. 1.1.1976. Two partners retired from the firm and one partner continued as a partner. Two partners were partners in their individual capacity but w.e.f. 1.1.1976, they joined as huf. An application for recording the changes was filed with the registrar on 23.8.1976. The firm entered into a contract with another party and later filed a suit against that party on 26.5.1977 for breach of contract. Suit was filed through one of its partners who prior to reconstitution was partner in his individual capacity and w.e.f. 1.1.1976 joined as *karta* of

huf. Still later, the registrar recorded the changes on 28.2.1978 with retrospective effect from the date of actual reconstitution of the firm i.e. 1.1,1976.

Issue

Whether the suit was liable to be dismissed in view of the provisions of section 69 of the indian partnership act?

Decision of the supreme court

The m/s gwalior oil mills was registered with the registrar of firms originally on 29.7.1953. With the passage of time, the firm was reconstituted and as required by section 63 of the partnership act, 1932, changes in the constitution of the partners was recorded with the registrar of firms. The said section requires notice to be given to the registrar whenever there is a change in the constitution of the firm and that notice is required, *inter alia,* to specify the date from which the changes have occurred and it is on the said notice being given that the registrar carries out the act of recording the change in the constitution of the firm. In the instant case, the application under section 63 was filed on 23.8.1976 but the registrar made the changes only on 28.2.1978. It however, recorded that the partnership had been reconstituted w.e.f. 1.1.1976.

The implication of the registration so granted clearly was that the reconstituted partnership firm came into existence w.e.f. 1.1.1976. In any case, the firm of m/s gwalior oil mills never ceased to be a registered partnership firm. The suit was filed by the firm in 1977 and the partner who filed the plaint, was admittedly a partner in the firm in his individual capacity, and then as karta of his hindu undivided family. Even if the reconstitution of the firm is ignored, it cannot be said that on 26.5.1977, the registered firm was not in existence.

The aforesaid view was taken is in consonance with the observations of the supreme court in *shard vasant katak verses ramnilal mohanlal chawla*. Therefore, the suit was held maintainable.

Haldiram bhujiawala verses anand kumar deepak kumar

[section *69 (2)-infringement of trade mark]*

Facts

A person who had been carrying on business in the name of "halidram bhujiawala" since 1941 constituted in 1965 a partnership with his two sons m and s and his daughter-in-law k, who was the wife of his third son. In 1972, the firm got the said name registered with the registrar of trade marks. On 16th november, 1974 the partnership was dissolved, and under the terms of the dissolution deed the above trademark fell exclusively to the share of m for the whole country except west bengal. K was given the

ownership of the trademark rights for west bengal. K died in 1980. M died in 1985 leaving behind four sons. All of them got their names recorded as subsequent joint proprietors. Three of them formed a partnership in 1983 and were running a shop, in new delhi selling goods under the aforesaid trademark of haldiram bhujiawala. In the meantime, in 1977 k's husband and his sons applied for registration of this very name at calcutta claiming to be the full owners of the said trademark without disclosing the dissolution deed dated 16th november, 1974. The registered trademark of m's sons was, in the usual course, renewed on 29th december, 1986 till 28th december, 1993. They had also acquired a right on account of prior adoption and long user. They filed a suit in which the firm consisting of three sons of m was plaintiff 1 and the fourth son of m was plaintiff 2. The first defendant was newly constituted firm which intended to start its business and was formed by k's son. The second defendant was k's son in his individual capacity. The suit sought, *inter alia,* a permanent injunction restraining the defendant (appellants herein) from infringing the trademark/name "haldiram bhujiawala" and from using the same. The violation of the trademark by the defendants came to the notice of the plaintiffs when the defendants opened a shop in new delhi. The plaintiffs also claimed a certain amount by way of damages. The cause of action for the suit was that the defendants had acted "in violation of common law and contractual rights of the plaintiff. The defendants (appellants herein) sought to reject the plaint on the ground that the first plaintiff was a partnership not registered with the registrar of firms on the date of the suit i.e. On 10-12-1991 and that, therefore, section 69(2) of the partnership act, 1932 was a bar to maintainability of the suit. They further pleaded that the subsequent registration of the firm on 29-5-1992 would not cure the initial defect. The appellants contended that the suit sought to enforce a right "arising from a contract", namely, the contract of dissolution dated 16-11-1974 and that, therefore, the suit was barred by section 69(2).

Issues

(1) whether section 69(2) bars a suit by a firm not registered on the date of suit where permanent injunction and damages are claimed in respect of a trademark as a statutory right or by invoking common law principles applicable to a passing-off action?

(2) whether the words "arising from a contract" in section 69(2) refer only to a situation where an unregistered firm is enforcing a right arising from a contract entered into by the firm with the defendant during the course of its business or whether the bar under section 69(2) can be extended to any contract referred to in the plaint unconnected with the defendant, as the source of title to the suit property?

Decision of the supreme court

The court held that a suit is not barred by section 69(2) of the partnership act, 1932 if a statutory right or a common law right is being enforced. The court said:

"the question whether section 69(2) is a bar to a suit filed by an unregistered firm even if a statutory right is being enforced or even if only a common law right is being enforced came up directly for consideration in this court in *raptakas brett co. Ltd. Verses ganesh property,* (1998) . It that case, majumdar, j. Speaking for the bench clearly expressed the view that section 69(2) cannot bar the enforcement by way of a suit by an unregistered firm in respect of a statutory right or a common law right. On the facts of that case, it was held that the right to evict a tenant upon expiry of the lease was not a right "arising from a contract" but was a common law right or a statutory right under the transfer of property act. The fact that the plaint in that case referred to a lease and to its expiry, made no difference. Hence, the said suit was held not barred. It appears to us that in that case the reference to the lease in the plaint was obviously treated as a historical fact. That case is therefore directly in point. Following the said judgment, it must be held in the present case too that a suit is not barred by section 69(2) if a statutory right or a common law right is being enforced." *the court further said: "it is well settled that a passing-off action is a common law action based on tort. Therefore, a suit for perpetual injunction to restrain the defendants not to pass off the defendants' goods as those of the plaintiffs by using the plaintiff's trademark and for damages is an action at common law and is not barred by section* 69(2)..... *Likewise, if the reliefs of permanent injunction or*

damages are being claimed on the basis of a registered trademark and its infringement, the suit is to be treated as one based on a statutory right under the trade marks act and is not barred by section 69(2).

The court held that the partnership in the present case cannot be said to be enforcing any right fi arising from a contract"

In order to determine as to what the legislation meant when it used the words "arising from a contract" in section 69(2), the court referred to the report of the special committee (1430-31) which examined the draft bill and made recommendation to the legislature. After examining the report the court held that the purpose behind section 69(2) was to impose a disability on the unregistered firm or its partners to enforce rights arising out of contracts entered into by the plaintiff firm with the third-party defendants in the course of the firm's business transaction. Therefore, the contract by the unregistered firm referred to section 69(2) must not only be one entered into by the firm with the third-party defendant but must also be one entered into by the plaintiff firm in the course of the business dealings of the plaintiff firm with such third party defendant.

The present defendants who are sued by the plaintiff firm are third parties to the 1st plaintiff firm. Section 2(d) of the act defines "third parties" as persons who are not partners of the firm. The defendants in the present case are also third parties to the contract of dissolution dated 16-11-1974. Their mother, k (kamla devi) was no doubt a party to the contract of dissolution. The defendants are only claiming a right said to have accrued to their mother under the said contract dated 16-11-1974 and then to the defendants. In fact, the said contract of dissolution is not a contract to which even the present 1st plaintiff firm or its partners of the 2nd plaintiff were parties. Their father m (moolchand) was a party and his right to the trademark developed in the plaintiffs. *The real crux of the question is that the legislature, when it used the words "arising from a contract" in section* 69(2), *it is referring to a contract entered into in course of business transactions by the unregistered plaintiff firm with its defendant customers and the idea is to protect those in commerce who deal with such a partnership firm in business. Such third parties who deal with the partners ought to be enabled to know what the names of the partners of the firm are before they deal with them in business.*

Further, section 69(2) is not attracted to any and every contract referred to in the contract as the source of title to an asset owned by the firm. If the plaint filed by the unregistered firm referred to such a contract it could only be as a historical fact.

In fact, the act has not prescribed that the transactions or contracts entered into by a firm with a third party are bad in law if the firm is an unregistered firm. On the other hand, if the firm is not registered on the date of suit and the suit is to enforce a right arising out of a contract with the third-party defendant in the course of its business, then it will be open to the plaintiff to seek withdrawal of the plaint with leave and file a fresh suit after registration of the firm subject of course to the law of limitation and subject to the provisions of the limitation act. This is so even if the suit is dismissed for a formal defect. Section 14 of the limitation act will be available inasmuch as the suit has failed because the defect of non-registration falls within the words "other cause of like nature" in section 14 of the limitation act, 1963.

Therefore, it is clear that the suit is based on infringement of statutory rights under the trade marks act. It is also based upon (he common law principles of tort applicable to passing-off actions. The suit is not for enforcement of any right entered into by or on behalf of the unregistered firm with third parties in the course of the firm's business transactions. The suit is, therefore, not barred by section 69(2).

Kamal pushp enterprises verses d.r. Construction co.

(arbitration proceeding is not a suit or other proceedings to enforce any rights arising under a contract and hence not barred under section 69.)

Facts

Gas authority of india (gail ltd.) Entered into a contract with the appellant to execute certain works and the appellant in its ;urn entered into a separate contract with the respondent, an unregistered firm for carrying out the work, the execution of which was undertaken by the appellant under the contract with 'gail'. When dispute arose between the appellant and the respondent (an unregistered firm) involving

section 8(2) of the arbitration act, 1940, served a notice on the respondent seeking consent for appointment of an arbitrator in terms of the arbitration clause. The respondent gave its consent for appointment of a named person as arbitrator. The arbitrator passed an award in favour of the respondent and *suo motu* filed the award before the trial court under section 14(2) of the arbitration act, 1940. When the court issued notice to both the appellant and the respondent, the appellant filed various objections, one of which was based upon section 69 of the partnership act.

Issue

Whether the respondent being an unregistered firm, the proceedings regarding making the award a rule of court would be maintainable under section 69 of the partnership act?

Decision of the supreme court

Strong reliance was placed by the appellant upon *jagdish chandra gupta verses kajaria traders (india) ltd., to* substantiate his claim. The supreme court in that case construed the words "other proceedings" in sub-section (3) of section 69 giving them their full meaning untrammeled by the words "a claim of set-off, and held that the generality of the words "other proceedings" are not to be cut down by the latter words. The said case being one concerning an application before the court under section 8(2) of the arbitration act, 1940 in the light of the arbitration clause the court held that since the arbitration clause formed part of the agreement constituting the partnership the proceedings under section 8(2) was to enforce a right which arose from the contract/agreement of the parties.

In *raptakas brett co. Ltd. Verses ganesh property,* (1998) 7 scc 184, the court held that section 69(2) cannot bar the enforcement by way of a suit by an unregistered firm in respect of a statutory right or a common law right. On the facts of that case, it was held that the right to evict a tenant upon expiry of the lease was not a right "arising from a contract" but was a common law or a statutory right under the transfer of property act. The fact that the plaint in that case referred to a lease and to its expiry, made no difference.

It *was held that the prohibition contained in section 69 is in respect of instituting a proceeding to enforce a right arising from a contract in any court by an unregistered firm, and it had no application to the proceedings before an arbitrator and that too when the reference to the arbitrator was at the instance of the appellant itself* if the said bar engrafted in section 69 is absolute in its terms and is a destructive of any and every right arising under the contract itself it would become a jurisdictional issue in respect of the arbitration's power, authority and competency itself, undermining thereby the legal efficacy of the very award, and consequently furnish a ground by itself to challenge the award when it is sought to be made a rule of court. The present case was not one such and therefore, it was not open to the appellant to take up the objection based upon section 69 of the partnership act, at any stage-even during the post award proceedings to enforce the award passed. The award in this case cannot either rightly or legitimately be said to be vitiated on account of prohibition contained in section 69 of the partnership act, 1932 since the same has no application to proceedings before an arbitrator. Consequently, *the post-award proceedings cannot be considered by any means, to be a suit or other proceedings to enforce any rights arising under a contract.*

Narandas morardas gajiwla & other verses. S.p.a.m. Papammal & another

(though an agent has no statutory right for an account from his principal, nevertheless there may be special circumstances rendering it equitable that the principal should account to the agent.)

Facts

Marandas morardas gaziwala and lakshim chand and co. Were two firms of partnership carrying on business in lace and silver at surat. They had dealings with another firm krishna and company at

kumbakonam. Krishna and company acted as agents on behalf of the two firms for selling their goods in the three districts of tanjore, tiruchirapalli and mathurari in the state of madras (tamilnadu) on commission basis. It appeared that krishna and co. Was acting as commission agents on behalf of the two firms at surat from 1944 till 1951 when partnership of krishna and co. Was dissolved by mutual agreement. Murugesa chettiar, one of the partners of krishna and co. Took over all assets and liabilities of the firm on dissolution and other partner gopal chettiar retired from the firm. Krishna and co. Became indebted to the surat firm. On april 1, 1951 murugesa chettiar (the plaintiff) executed a promissory note in favour of narandas morardas gaziwal (surat firm) for a sum of rs. 7,500 the amount ascertainable as due and payable by krishna and co. In respect of dealings of that firm with the surat firm on a settlement of account. It was the case of the plaintiff that on april 1, 1951 the surat firm constituted murugesa chettiar as the sole agent for selling their goods for the three districts for period of 5 years from april 1, 1951 agreeing to pay commission at a flat rate of rs. 2 per 'mark' for all sales effected in those territories either on order booked by him or not. He contended that the surat firm circumvented the terms of this contract of sole agency and privately effected sales through others or direct to customers in those territories. He further contended that the surat firm as part of this agreement of sole agency agreed to have its indebtedness under the promissory note adjusted towards the commission that may be earned by him. The plaintiff therefore instituted suit for rendition of accounts from april 1, 1951 till the date of the suit in order to ascertain the amount due and payable to him. The surat firm in its turn filed suit seeking to recover the amount due on the promissory note. Both the suits were tried together by mutual consent of the parties. The subordinate judge held that the plaintiff was constituted as the solve selling agent for a period of five years for the aforesaid territories and granted a preliminary decree for rendition of accounts. The judge also granted a decree for the amount covered by the promissory note but directed that the decretal amount should be adjusted out of the commission that may be found due and payable on taking of accounts. The surat firm preferred an appeal. The high court, by its judgement dated september 20, 1961, dismissed the appeal.

Issue before the supreme court

1. Whether the plaintiff was entitled to sue for accounts, he being the agent and the defendant surat firm being the principal?

2. Whether the plaintiff is entitled to set up a parole agreement to prove the condition precendent as to the enforceability of the promissory note?

Decision of supreme court

Section 213 of the indian contract act specifically provides that an agent is bound to render proper accounts to his principal on demand. The principal's right to sue an agent for rendition of accounts is, therefore, recognised by the statute. There is no provision in the indian contract act as regards agent's right to sue the principal for accounts. Thus an agent has no statutory right for an account from his principal. The court said: "in our opinion, the statute is not exhaustive and the right of the agent to sue the principal for accounts is an equitable right arising under special circumstances and is not a statutory right." such a case may arise where all the accounts are in the possession of the principal and the agent does not possess accounts to enable him to determine his claims for commission against his principal. The right of the agent may also arise in an exceptional circumstance where his remuneration depends on the extent of dealings which are not known to him

where he cannot be aware of the extent of the amount due to him unless the accounts of his principal are gone into.

The supreme court quoted the following paragraph from 14th edition of story's equity jurisprudence.

"there are usually exceptions to all rules, and where the principal has kept the accounts between him and his agent and the matters and things transacted in the course of the agency are within his own peculiar knowledge, the agent may ask for accounting."

In the present case the high court had found that the transactions in respect of which the plaintiff was entitled to commission were peculiarly within the knowledge of the principal alone, viz., of the surat firm. There was also *prima facie* evidence adduced on behalf of the plaintiff in this case in support of his allegation that the surat firm had made direct sales to customers in contravention of the contract of sole agency granted to the plaintiff. Therefore, the[7] court was of the opinion that in the special circumstances of this case the plaintiff was entitled to sue the surat firm for accounts for the material period.

As regards the second question the court said: "where a promissory note is, by its express terms, payable on demand that is at once, the obligation under the note attaches immediately. A collateral oral agreement to make a demand until a specified condition is fulfilled has the intention and effect of superseding the coming into force of that obligation which is the contract contained in that note. Such an oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of the proviso 3 of section 92 of the evidence act."

Kuchwar lime and stone co. Verses. M/s dehrirohtas light railway and co. Ltd.

(having regard to the circumstances in which goods were loaded by (he colliery, there could be no doubt that the colliery was acting as an agent.)

Facts

At the material time coal was a controlled commodity; supply and delivery of coal could be made only under orders issued by the coal controller. Sale and delivery of coal were governed by the colliery control order, 1945 issued under rule 81 of the defence of india rules and continued under the essential supplies (temporay power) act, 1946 and the bihar coal control order, 1947. Coal could not be sold by colliery except under an order of the coal commissioner or his depty. The depty coal commissioner (distribution) issued an order, sanctioning the supply of steam coal by the east keshalpur colliery to the appellant company. By that order a priority supply of wagons was also sanctioned in favour of the company for transport of coal to the banjari railway station. It was also recorded in the order that the quantity of coal mentioned in the order "had been sanctioned on account of the company" and that sanction for priority supply of wagons had also been accorded, and the company was advised to instruct the colliery to indent for wagons according and to quote the sanction number given in the order when so indenting.

Persuant to the allotment of coal an order was placed on july 14, 1954 on behalf of the company, for supply of steam coal to the company at banjari railway station. Colliery dispatched coal by railway. The wagons of coal arrived at banjari railway station. The company declined to take delivery and intimated the colliery and the railway by their letters that it was not liable for less resulting from the detention of wagons. After waiting for sometime, the railway informed the company that they had decided to dispose of the consignment of coal under the railways act by public auction and claimed that they were entitled to demurrage which had accrued due till then. The coal controller bihar advised the railway to dispose of the coal lying undelivered "according to prevailing rules" by public auction. The railway thereafter sold the consignment of coal and sued the company in a sum representing demurrage. It was contended by the company that it being a consignee of the goods booked by the colliery there was no privity of contract between the company and the railway and no claim for demurrage or freight lay at the instance of the railway against the company.

Issue

Whether the colliery acted as an agent for the company in entering into the contract of consignment and the liability for payment of freight and demurrage charges for failure to take delivery of the goods was upon the company?

Decision of the supreme court

The supreme court held that normally the liability for payment of demurrage charges lay upon the consignee for whose convenience the wagon was detained. Even where the consignee did not ultimately take delivery, if the wagon was detained for his benefit, normally the railway would be entitled to hold him liable for demurrage. Having regard, however, to the circumstances in which the goods were loaded by the colliery, there could be no doubt that the colliery was acting as an agent of the company for the purpose of arranging for transport of coal in which the property had, under the order of the coal commissioner, passed to the company. Under the forwarding note the freight was made payable by the company. In the circumstances it would be reasonable to infer that the colliery acted as an agent for the company in entering into the contract of consignment and the liability for

payment of freight and of demurrage charges for failure to take delivery of the goods was upon the company.

It was further held that the railway had undoubtedly power to sell the consignment of coal under section 56 of the railways act after sewing notice upon the owner. But the railway was after the expiry of a reasonable period which might be necessary for taking delivery, in the position of a bailee qua the company and was bound to minimize the loss; it could not unreasonably detain the wagons and claim demurrage. Even granting that in view of the colliery control order, without the sanction of the coal commissioner the railway could not sell coal, the railway could have unloaded the coal from the wagons and put the wagons to use. The company had given intimation that it will not take delivery of the goods and therefore it was the duty of the railway to sell the goods by public auction without delay. In failing to take any action for more than six months the railway did not act reasonably. The railway having regard to all the circumstances, was entitled to demurrage for detention of the wagons for one month only and not for 202 days as claimed by it. Further the consignee would be liable for wharf age.

Lakshminaran ram gopal and sons ltd. Verses. Government of hyderabad

(a principal has the right to direct what the work the agent has to do, but a master has the further right to direct how the work is to be done. Held on facts of the case that the appellant was the agent and not the servant of the mills in question.)

Facts

Dewan bahadur ramgopal mills company was registered on 14th february, 1920 at hyderabad in the then territories of his exalted highness the nizam. The appellant were registered as a private limited company at bombay (now mumbai) on 1st march, 1920. On 20th april, 1920 an agency agreement was entered into between the mills company and the appellants appointing the appellants its agents for a period of 30 years on certain terms and conditions there in recorded. The appellants throughout worked only as the agents of the mills company and for the fasli years 1351 and 1352 they received their remuneration under the terms of the agency agreement. In reply to a notice issued under the hyderabad excess profit tax, the appellants submitted their accounts and contended that the remuneration received by them from mills company was not taxable on the ground that it was not income, profits or gains from business and was outside the pale of the excess profits tax regulation. This contention of the appellants was negatived and on 24th april, 1944 the excess tax officer made on order assessing the income of the appellants for the accounting periods 1351 and 1352 fasli at rs. 5,957 and rs. 83,768 respectively and assessed the tax accordingly. An appeal was taken by the appellants to the depty commissioner of excess profit tax who disallowed the same. A petition was made to the high court for statement of the case. The statement of the case was submitted by the commissioner on 26th february, 1946 to the high court. The high court decided against the appellants. The appellants appealed to the judicial committee (i.e. Privy council) in england. But before the judicial committee heard the appeals there was merger of the territories of hyderabad with india. The appeals finally came for hearing before the supreme court.

Issues

1. Whether under the terms of the agreement the petitioner is an employee of the mills company or is carrying on business?

2. Whether the remuneration received from the mills is on account of service or is the remuneration for business?

Decision of the supreme court

Under article 115 of the articles of association of the mills company the appellants and their assigns were appointed the agents of the company upon the terms, provisions and conditions set out in the agreement referred to in clause 6 of the company's memorandum of association. Article 16, inter alia, provided that the general management of the business of the company subject to the control and supervision of the directors, was to be in the hands of the agents of the company, who were to have power and authority on behalf of the company, subject to such control and supervision, to enter into all contracts and to do all other things usual, necessary and desirable in the management of the affairs of the company.

The agency agreement which was executed in pursuance of the appointment under article 115 provided that the appellants and their assigns were to be the agents to the company for a period of 30 years from the date of registration of the company and they were to continue to act as such agents until they of their own will resigned. The remuneration of the appellants as such agents was to be a commission of *2½% on* the amount of sale proceeds of all yarn cloth and other produce of the company. The appellants were to be paid in addition all expenses and all charges actually incurred by them in connection with the business of the company and supervision and management thereof. The appellants were entitled to appoint any person or persons in bombay to act as their agents in bombay and any other places in connection with the business of the company.

Clause 3 of the agency agreement provided "subject to control and supervision of the directors, the said lachminarayan ramgopal and son ltd. Shall have the general conduct and management of the business and affairs of the company and shall have on behalf of the company it acquire by purchase, lease or otherwise lands tenements and other buildings and to erect, maintain, alter and extend factories, warehouses, engine house and other building in hyderabad and elsewhere in the territories of his exalted highness the nizam and in india and to purchase, pay for, sell, resell, repurchase machinery, engines, plant, daco cotton, waste, jute, wool and other fibres and produce, stores and other materials and to manufacture yarn cloth and other fabrics and to sell the some either in the said territories as well as elsewhere in india...and are not specifically reserved to be done by the directors."

Clause 4 of the agency agreement provided: "the said lachminaryan ramgopal & son ltd. Shall be at liberty to deal with the company by way of sale to the company of cotton, all raw materials and articles required for the purpose of the company and the purchase from the company of yarn cloth and all other articles manufactured by the company and otherwise, and to deal with any firm in which any of the shareholders of the said lachminaryan ramgopal & son ltd. May be directly or indirectly concerned, provided by the board of directors either before or after such dealings."

The distinction between a servant and an agent is thus indicated in powel ps law of agency, at page 16:

(a) generally a master can tell his servant what to do and how to do it.

(b) generally a principal cannot tell his agent how to carry out his instructions.

(c) a servant is under more complete control than an agent", and also at page 20:

"(a) generally, a servant is a person who not only receives instructions from his master but is subject to his master's right to control the manner in which he carries out those instructions. An agent receives his principal's instructions but is generally free to carry out these instructions according to his own discretion.

(b) generally, a servant, *qua servant,* has no authority to make contracts on behalf of his master. Generally, the purpose of employing an agent is to authorize him to make contracts on behalf of his principal.

(c) generally, an agent is paid by commission upon affecting the result which he has been instructed by his

Principal to achieve. Generally, a servant is paid by wages or salary. In halsbury's law of england—malisham edition—vol. 1, at page 193 article 345 the positions of an agent, a servant and independent contractor are thus distinguished:

"an agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct contract and supervision of his master, and is bound to conform to all reasonable orders given to him in the course of his work; an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent, as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant."

Considering the position of the appellants in the light of the above principles it was held that the appellants were to act as the agents of the company and carry on the general management of the business of the company subject to the control and supervision of the directors. That does not however mean that they acted under the *direct* control and supervision of the directors in regard to the manner or method of their work. The directors were entitled to lay down the general policy and also to give such directions in regard to the management as may be considered necessary. But the day to day management of the business of the company as detailed in article 116 of the articles of association and clause 3 of the agency agreement above set out was within the discretion of the appellants and apart from directing what work the appellants had to do as the agents of the company the directors had not conferred upon them the further right to direct how that work of the general management was to be done. The control and supervision of the directors was a general control and supervision and within the limits of their authority the appellants as the agents of the company had perfect direction as to how that work of general management was to be done both in regard to the method and the manner of such work.

The appellants for instance had perfect latitude to enter into agreements and contracts for such purpose and to such extent and in such manner as they thought proper. They had the power to appoint, employ, discharge, re-employ or replace the officers and servants of the company with such powers and duties and upon such terms as to duration of office remuneration or otherwise as they thought fit. They had also the power generally to make all such arrangements and to do all such things and acts on behalf of the company as might be necessary or expedient and as were not specifically reserved to be done by the directors. These powers did not spell a direct control and supervision of the directors as of a master over his control but constituted the appellants the agents of the company who were to exercise their authority subject to the control and supervision of the directors but were not subject in such exercise to the direct control or supervision of the principals. The liberty given to the appellants under clause 4 of the agency agreement to deal with the company by way of sale and purchase of commodities therein mentioned also did not spell a relation as between master and servant but empowered the appellants to deal with the company as principals in spite of the fact that under clause 8 of the agency agreement two of their members for the time being were to be ex-officio directors of the company.

There was further the right to continue in employment as the agents of the company for a period of 30 years from the date of the registration thereof and thereafter until the appellants of their own will resigned, which also would be hardly consistent with the employment of the appellant as mere

servants of the company. The remuneration by way of commission of 2[1]/2 per cent of the amount of sale proceeds of the produce of the amount of sale proceeds of the produce of the company savoured more of the remuneration given by a principal to his agent in the carrying out of the general management of the business of the principles than of wages or salary which would not normally be on such a basis.

All these circumstances together with the power of sub-delegation reserved under article 118 in the opinion of the court go to establish that the appellants were the agents of the company and not merely the servants of the company remunerated by wages or salary.

The court further held that the activities of the appellants as the agents of the company constituted a business and the remuneration which the appellants received from the company under the terms of the agency agreement was income, profits or gains from business.

Snow white industrial corporation, madras verses. The collector of central excise

(whether there was an agreement for sale or an agreement of agency must depend upon the facts, the circumstances and the terms of each case. Such facts and circumstances must be judged in the background of the totality of the circumstances. In the instant case the most important fact suggesting agency was the clause which enjoined that the stocks left over unsold beyond two years from their receipt could be returned to the appellants who were bound to replace these.)

Facts

The appellant manufactures 'supercem waterproof cement paint' in its factory at madras (now chennai). It has no branches and for sales offices in any part of the country. It entered into an agreement described as 'agreement of sale' dated 1st may 1962 with a gillanders arbuthnot & co. Ltd., of calcutta (hereinafter called 'gillanders') described as selling agents. The said company has a very big sales organisation having its offices located at all important places in the territory of union of india and they market goods of all types, not only of the appellants herein, but also of several other reputed manufacturers through their well staffed offices in all states of india. Excise duty was charged on the assessable value on the basis of price at which 'gilladers' had sold the goods to its customers. The appellant on the other hand claimed that the duty should be payable on the basis of the price at which the goods were sold by it to 'gillanders'. The tribunal in its order dated 20th january, 1984 referred to the agreement dated 1st may 1962 rejected the claim of the appellants.

In the said agreement, the appellants have been described as a partnership firm carrying on business at madras and referred to as 'the manufacturer' and gillanders of calcutta is 'the selling agents'. The agreement, *inter alia,* stated that the selling agents had agreed to stock adequate quantities of the product for the purpose of sale thereafter. The manufacturer however agreed to accept return of all stocks held by the selling agents for a period of more than two years and replace such stocks free of all charges, provided the lids of the containers were intact and sealed. The agreement further stated that all consignments would be dispatched by the manufacturer at railway risk. In cases there was any damage or shortage in transit the selling agents would lodge a claim on the railways, provided, however, that the manufacturer should take all suitable actions for recovery of the damages from the railway authorities and should reimburse the selling agents all losses and damages that they might suffer in the premises. It was further agreed that in consideration of the premises the manufacturer should pay the selling agents a discount, namely,17 *1/2%* on the transfer prices of all materials supplied against received from selling agents from its offices at calcutta, kanpur, delhi and bombay; 18% on transfer prices of all materials supplied against orders received from the selling agents from its madras office. The manufacturer further agreed to supply the selling agents with all necessary publicity materials and to advertise at their own cost at regular intervals through the media of the daily press, trade journals, government publications and cinema slides and in all such advertisements should mention that the selling agents were to be the sole selling agents of the products. All expenses such as go down rent, transport charges, postal and telegram charges, bank commission etc. Connected with the sale of the products, it was stipulated, would be borne by the selling agents.

The tribunal analysed the agreement and emphasized that gillanders were described as sole selling agents of the product of the appellants throughout india. It also noticed that the appellants were to supply to the gillanders with advertisement material. The tribunal also noted the clause which provided that the stocks left over unsold beyond two years from their receipt with gillanders could be returned to the appellants who were bound to replace these. The tribunal noticed that it was not the appellant who was to prefer claims for recovery of damages from the carriers. The tribunal referred to the clause which stipulated that gillanders were to promote sales of the product throughout india and were not to handle sales of any other material likely to conflict with the sale of the appellants' product. It noted that any reduction in price during the currency of the agreement was to be duly reflected in the price of stock lying unsold with gillanders. Although the appellants retained the right of sale directly to large government consumers, gillanders were to follow such transactions and were to be paid an overriding commission of 2.1/2%. Where, however, gillanders tendered for government supplies and followed it up, they were to be paid a commission of 5%. The tribunal also referred to the clause which provided that on termination of the agreement by either party (by giving three months notice), unsold stocks lying with gillanders were to be returned to the appellants. On analysis of the aforesaid aspects of the clauses, the tribunal came to that the title to and ownership of the goods continued with the appellants and did not pass to the gillanders. In order to be sale, the title should pass from the seller to the buyer for a price. If it is not so, the tribunal noted, then it was not sale. The tribunal come to the conclusion that it was an agreement for sole selling agency and not an agreement for sale.

Issue

Whether the tribunal was right in coming to the conclusion that the true nature of the agreement was an agreement for sole selling agency and not an agreement for sale?

Decision of the supreme court

Whether there was an agreement for sale or an agreement of agency, must depend upon the facts, the circumstances and the terms of each case. Such facts and terms must be judged in the background of the totality of the circumstances. All the terms and conditions should be properly appreciated. It is true that though the appellants described gillanders as selling agent, but that is not conclusive. It is also true that the difference of the prices between the transfer and the selling price is suggestive of an outright sale. But in the instant case the most important fact suggesting agency was the clause which enjoined that the stocks left over unsold beyond two years from their receipt could be returned to the appellants who were bound to replace these. This should be considered with the fact that the appellants were to prefer all claims for recovery of damages from the carriers and any reduction in price during the currency of the agreement was to be duly reflected in the price of stock lying unsold with gillanders and the obligation that on the termination of the contract by either the appellant or gillander, unsold stocks lying with the latter were to be returned to the former. Therefore, the tribunal was right in considering this agreement as the agreement for sole selling agency and not as an outright sale.

There being no sale in favour of gillander by the assessee appellant, the first sale was by gillander (agent) to the customers of the market. Then the price of that sale would be assessable value under section 4 of the central excise and salt article 1944.

In gordon woodroffe & co. Verses. Sheilch m.a. Majid & **co**, the respondent was a trader in hides and skins and the appellant was an exporter. During the period january to august, 1949,

there were several contracts between them. The contacts mentioned that the appellant was buying the goods for resale in u.k. The price quoted was c.i.f. Less *2y2%.* The contracts also provided that time should be the essence of the contract, that the sales tax was on respondent's account, that the respondent was answerable for weight as well as quality, that there should be a lien on the goods for moneys advanced by the appellant. The course of dealing between them showed that before the goods were shipped these were subjected to a process of trimming and re-assortment in the go downs of the appellant with a view to make them. Conforming to london standards, that the goods were marked with the respondent in case the goods supplied were of special quality. It was held that on the terms of the contract and the course of dealing between the parties, the contract was not one of agency for sale but was an agreement of sale. The appellant purchased the goods from the respondent at 2^{1}/2% less and sold them to the london purchasers at full price so that the 2!/2% was its margin of profit and not its agency commission. Reference was made to the passage from blackwood wright, 'principal and agent', second edn., page 5 at page 10 of the report, where it was stated that in commercial matters, where the real relationship was that of under and purchaser, persons were sometimes called agents when as a matter of fact, their relations were not those of principal and agent at all, but those of vender and purchaser. If the person called an 'agent' was entitled to alter the goods, manipulate them, to sell them at any price that he thought fit after those had been so manipulated, and was still only liable to pay them price fixed before hand, without any reference to the price at which he sold them, it was impossible to say that the produce of the goods so sold was the money of the consignors, or that the relation of principal and agent existed, according to the supreme court in that case.

In tirumala venkateshwara timber and bamboo firm verses. Commercial tax officer, rajamundary, (1968), at page 480 of the supreme court report: (at page 787 of air) it was observed that the essence of a contract of sale is the transfer of title to the goods for a price paid or promises to be paid. The transferee in such a case is liable to the transferor as a debtor for the price to be paid and not as an agent for proceeds of the sale. The essence of agency to sell is the delivery of the goods to a person who is to sell these, not as his own property but as the property of the principal who continues to be the owner of the goods and will therefore be liable to account for the sale proceeds. The true relationship of the parties in each case has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of legal relationship.