Privy Council Appeal No. 4 of 1922.

Jamnabai - - - - - - - - - *Appellant*

v.

Fazalbhoy Heptoola and others - - - - - *Respondents*

Same - - - - - - - - - *Appellant*

v.

Mulji Haridas - - - - - - - *Respondent*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JUNE, 1923.

Present at the Hearing:

LORD SUMNER.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD SUMNER.]

These are consolidated appeals by one Jamnabai, the widow and executrix of Tricum Nathoo, who died so long ago as 1892. He had been a partner in a muccadamage firm, Khimji Jiwa and Co., with a gentleman called Khimji Jiwa, who had retired from the firm and had died before the time at which Tricum Nathoo died. The widow Jamnabai commenced these proceedings against certain persons who continued to carry on the same business as had been carried on by her late husband in partnership, although they changed the name of the firm. She brought an action for accounts, the principal object of which, so far as

the present appeals are concerned, was to obtain an account and a share of certain buildings and the rents produced by those buildings, which originally had been purchased by her late husband and his partner while they were still in partnership. The buildings consisted on the one hand of a house built on the estate of the Port Trust in Bombay, and on the other of sundry godowns which were used in some way, not very clear, down to the date of the proceedings, by the defendants.

There are two appeals, from two decrees, which have been consolidated.

The first appeal relates to the alleged right of the plaintiff to have an account taken over a long series of years of the rents and profits of the godowns, she herself bringing into account the rents of the house, but this apparently is a secondary matter, for the house has fallen into decay and is almost worthless.

The second appeal is brought in order that the appellant, Jamnabai, may have the opportunity of establishing her late husband's interest in the partnership business beyond the date to which the partnership account had been stated and balanced, and may have an account for that purpose. In order to succeed in that appeal, she has to establish her right to have an order set aside, which was in point of fact consented to by her advocate before the learned judge who made the order. It may be convenient to dispose of the second appeal quite shortly.

The learned judge records that when he had expressed the opinion that the form in which a previous order had been drawn up did not prevent the plaintiff from being entitled to have its terms rectified and to have the accounts, which she desired to obtain, taken on a footing wider than its terms stated, her counsel, having apparently considered the matter, intimated that he did not press to have an account actually taken, and that he would be content with an order in her favour for payment of a particular sum which, according to the note which the learned Judge took, was accepted by the learned counsel, because he conceived it to be an amount agreed up to the date of the death of Tricum Nathoo, whereas it appears that it was really an amount agreed only up to the date of the last adjustment made in his lifetime, which was something like two years earlier. To that extent there is ground for saying, if the learned Judge's note was correct as a statement of the reasons which prompted the advocate at the time, that the advocate gave this consent under a mistake of fact, the gravity of which may be substantital or may not, and when the plaintiff discovered, as she afterwards did, that this order had been made, under which she would get payment of this particular sum, but would not get the account which she desired, she took proceedings to get the consent order set aside and to prefer her claim to the account.

Their Lordships have had on both appeals the advantage of an argument from Mr. De Gruyther, on behalf of the appellant, equally illuminating and candid. With regard to this appeal

he accepted as the law, which governs his position, that serious and substantial injustice to his client must be shown to result from letting the consent order stand which was made under the circumstances mentioned. There has been some controversy as to whether his client was consulted by her advocate at the time when the consent was given. Upon that the High Court express no definite opinion, and all their Lordships need say is that they have not formed the affirmative opinion that she and her brother, who was assisting her and was present in Court, were not cognisant of what was going on, but it is unnecessary to express a definite opinion about it. The High Court after examining the circumstances with some care came formally to the conclusion that, so far from any possible injustice having been done to the appellant by the course taken, it probably was beneficial so far as she was concerned, because, while the account which she asked for apparently might have secured some few hundred further rupees in addition to the very much larger sum that she got under the consent order, she would have had to run risks as to costs and possibly otherwise, from which it was advisable to protect her.

Their Lordships see no reason whatever for revising the opinion upon this point formed by the High Court, and, that being so, the foundation upon which Mr. De Gruyther based his right to ask to have that order set aside and the account directed has failed. This appeal therefore is unsuccessful.

The first appeal Mr. De Gruyther has also frankly stated to have been rested all along upon the contention that the properties in question, the dwelling house and the godowns, were assets of the partnership firm of Khimji Jiwa and Co., and not merely buildings which these two gentlemen, the plaintiff's deceased husband and Mr. Khimji Jiwa, had bought for their own reasons, and apparently held as co-owners in equal moieties.

The High Court examined the facts with some care and based their judgment upon the conclusion of fact that the true position was co-ownership in the properties and not that they were partnership assets belonging to the firm of Khimji Jiwa and Co.

Their Lordships cannot see their way upon this question of fact to say that the conclusion of the High Court in this appeal was wrong. They have been pressed by Mr. De Gruyther, who has missed no point which possibly could have been raised on behalf of his client, to say that because the record does not set out the account to which the High Court referred in one or two passages, and because it may be argued that the mode of dealing with the rents of the properties, which the learned Judges either inferred or had stated to them, might have been different, the conclusion that they were dealt with in the way assumed is one that ought not to be supported.

It appears to their Lordships that they ought to presume that the High Court did not make these statements and come to this conclusion as to the facts without having had materials

before it. Although normally all the materials are to be found in the record in one shape or another, certain documents have not been printed in this record which were available in the Court below, and the proceedings were proceedings in which there was much common ground, and their Lordships therefore think that they have nothing to justify them in saying that the *prima facie* assumption of the correctness of the judgment below, which the appellant has to displace, has been successfully met.

The result therefore is that the appellant fails in this appeal also.

In their Lordships' opinion both appeals ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

JAMNABAI

v.

FAZALBHOY HEPTOOLA AND OTHERS.

SAME

v.

MULJI HARIDAS.

(*Consolidated Appeals.*)

DELIVERED BY LORD SUMNER.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1923.