Privy Council Appeal No. 98 *of* 1923.
Patna Appeal No. 59 *of* 1921.

Musammat Nag Kuer - - - - - - *Appellant*

v.

Sham Lal Sahu and others - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1925.

Present at the Hearing :

LORD SHAW.
LORD BLANESBURGH.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD BLANESBURGH.]

The question now before the Board arises in the course of a suit for dissolution of a partnership firm. The suit has been depending in the First Court of Gaya since the 2nd February, 1915.

The firm's business was that of tobacco manufacturers, and at the commencement of the suit the partners in it were the plaintiff, Bishun Ram, entitled to a 10 anna share of profits, and the defendant, Bundi Lall, entitled to a 6 anna share. There were four branches of the business in different parts of India. The partnership was governed by a deed of the 2nd August, 1905, under which the management was vested in Bishun Ram, and there was a stipulation for annual accounts. Interest on capital contributed was allowed at 9 per cent., and each partner was at liberty to add his profits to his capital if he so desired.

Out of the profits of the business certain house properties had been from time to time purchased by the firm, and it seems

that these were left in the several possession of the partners according to their respective shares in profits. Probably for this reason, possibly also because Bundi Lall's proportionate interest in capital was by this time much greater than his interest in profits, a serious difference arose in the course of the proceedings upon the question whether in the final division these properties were to be specifically divided between the partners in the proportion of 10 to 6, or whether, like other partnership assets, they could be made available first to satisfy the partners' claims on capital account. That question still lies at the root of the present appeal, but so far as it turns upon the construction of the partnership deed their Lordships accept the view taken of it by the High Court at Patna. They are satisfied that thereunder these houses are partnership assets burdened with the liabilities of the partnership whether to outsiders or to the partners. It is only after all such liabilities have been adjusted and in full—with recourse, if necessary, to the houses for the purpose—that they, or such of them as then remain available, will be distributable as surplus assets between the partners severally and in proportion to their shares in profits. Their Lordships, however, do not fail to recognise that it was a desire shared by both partners that these houses should be the last assets to be resorted to for discharge of partnership liabilities, and they see in a provision of the preliminary decree in the suit to which, with some observations as to its true effect, they will call attention in the sequel, some fulfilment of that desire.

The accounts between the partners were not taken annually. The last one taken and adjusted before action covered the period prior to the 20th October, 1911. From that account it appeared that there had been contributed by the plaintiff to the partnership on capital account Rs. 43,039 : 2 : 9, and by the defendant Rs. 40,789 : 0 : 4½. The position in this respect changed further in favour of the defendant before the commencement of the suit. It now appears that by that time his capital claims exceeded in amount those of the plaintiff on any view of the position.

The suit, as has been said, was commenced on the 2nd February, 1915. On the 7th April, 1915, Bundi Lall, the defendant, died and the suit was thereafter continued against his legal representatives, the present respondents. To them their Lordships will refer as the defendants.

In March of the following year the defendants applied for the appointment of an independent receiver. The Court on that occasion refused to displace the plaintiff from his position of management under the partnership deed, but appointed him to be receiver and manager *pendente lite* without remuneration and without security, and directed him to submit his accounts every month.

The responsibilities of his office lay lightly upon the plaintiff, and many of the subsequent difficulties in the case, including

that with which their Lordships are now concerned, are attributable to two unauthorised, and so far as appears inexcusable, acts on his part committed while receiver. Without leave of the Court or consent of parties he withdrew from the partnership funds in his hands as such receiver, first, a sum of Rs. 22,049 : 4 : 7½, and later, one of Rs. 5,500, and although subsequently ordered on several occasions to pay over these moneys he failed, except to the extent of Rs. 2,000, to do so, with the result that Rs. 25,549 : 4 : 7½—now an adjusted balance of Rs. 24,345—if not long ago applied to his own purposes, has remained in his hands, or since his death, which has now occurred, in the hands of his legal representatives, the present appellants.

Their Lordships desire at once to associate themselves with the observations upon these withdrawals made by the learned Judges of the Court at Patna in the judgment here under appeal. Like them, their Lordships see in the comparative inaction of the First Court of Gaya, when the plaintiff's grave misconduct was brought to its notice, a failure to appreciate the extreme seriousness of what the plaintiff had done. Their Lordships see indications of the same want of appreciation in the readiness of that Court in later orders to condone the plaintiff's unauthorised retentions by treating them, without even any charge for interest, as being in account with the defendants both regular and final. In truth, the action of the plaintiff in this matter, fully acknowledged and neither explained nor excused, amounted to a breach of duty as serious in character as any that can be committed by an officer of the Court in his position. It ought not to have been overlooked to any degree by any Court jealous of its responsibility for the actions of its own officers.

The suit came on for trial in August, 1916. Many issues were framed and fought, but no further reference thereto need now be made. In the result, on the 15th August, 1916, the then Subordinate Judge of Gaya made a preliminary decree declaring the respective interests in profits of the partners as above stated, dissolving the partnership as from the 7th April, 1915, the date of the defendant, Bundi Lall's death, appointing Balin Durga Prasad in place of the plaintiff to " be the receiver of the partnership estate and effects in this suit and to get in all the outstanding book debts and claims of the partnership," directing the usual dissolution accounts, that of the dealings and transactions between the partners to be taken as from the 20th October, 1911, the date of the account already mentioned. The decree then proceeded as follows (this is the passage already above referred to) :

" It is further ordered that the goodwill of business heretofore carried on by the parties and the stock-in-trade be sold on the premises. Saving the houses and landed property for being divided as directed above "—that is, in the proportion of 10 to 6.

And a Commissioner was appointed to take and certify the accounts.

Notwithstanding the direction given by this order to the receiver to get in the outstanding book debts of the partnership, no steps were apparently taken by him to do so, and the Commissioner in his report, made after prolonged enquiry and dated the 9th February, 1918, found the total assets of the partnership, excluding house property, to amount to Rs. 67,641 : 6 : $1\frac{1}{2}$, consisting as to more than Rs. 40,000 of book debts still outstanding. The house properties—19 in number—were severally valued by the Commissioner at sums amounting in all to Rs. 57,300, and on the footing that the other assets of the partnership as above stated would suffice to satisfy all its liabilities both to outsiders and to the partners on capital account, he proposed to partition these 19 properties between the partners or their representatives in proportion to their shares in profits, awarding to the plaintiff properties valued at Rs. 35,812 : 8 and to the defendants properties valued at Rs. 21,487 : 8.

In arriving at the figure of Rs. 67,641 : 6 : $1\frac{1}{2}$ as the value of the remaining assets of the firm, the Commissioner included nothing in respect of the sums withdrawn by the plaintiff as above stated. It did not apparently occur to him to treat these sums as a partnership asset in the plaintiff's hands for which, with or without interest, he was accountable to the firm. He regarded them as proper receipts in respect of capital, merely operating a reduction *pro tanto* of his claim against the assets on that account.

And the Subordinate Judge of the First Court of Gaya, by his final decree of the 17th August, 1917, which it is the purpose of the present appeal to have restored, confirmed the Commissioner's report. He, too, treating the sum retained by the plaintiff as a receipt on account of capital, provided for discharge of the balance a sum which as, subsequently adjusted, was Rs. 9,713 : 2, by directing that Rs. 3,791 : 11 : $10\frac{1}{2}$ was to be paid him by the receiver out of cash in his hands and Rs. 5,921 : 6 : $1\frac{1}{8}$ by the appropriation to him of book debts of that amount due to the firm. To the defendants on the other hand the learned Judge allocated, in respect of their ascertained capital in the business a net amount, as subsequently corrected and adjusted, of Rs. 43,903 : 9 : $1\frac{1}{2}$ by directing that Rs. 9,523 : 2 was to be paid them by the receiver in cash, while the residue of Rs. 34,380 : 7 : $1\frac{1}{2}$ was to be satisfied by the appropriation to them of the remaining uncollected book debts of that nominal value.

Against the order of the Subordinate Judge the defendants appealed to the High Court of Judicature at Patna. Their principal grievance—that with which alone their Lordships are now concerned—was that while the plaintiff had been permitted to retain cash in respect of over Rs. 24,000 of his capital, he was now allowed in respect of the balance a further sum of over Rs. 3,700 in cash and was required to accept no more than Rs. 5,921 of his entire claim in book debts, the defendants were, in respect of as much as Rs. 43,903 of their capital, required to accept book debts, which as they asserted were "bad, mostly barred, and not at all recoverable."

The High Court on this point agreed with the defendants. The learned Judges of that Court in their judgment of the 4th May, 1921, held that as the plaintiff had received in cash a sum which they adjusted as being Rs. 24,345, the defendants should receive a similar amount in cash before there was any further receipt by the plaintiff, and they accordingly made a decree which contained the following clause :—

> "The first direction must be to pay to the defendants towards the amount due to them as capital Rs. 24,345 in cash, if there is cash in hand to that amount, and, if not, in cash and house property. The balance of his capital still due to the plaintiff and the balance then due to the defendants will be paid in house property. The plaintiff will get 10/16 and the defendant will get 6/16 of the house properties remaining after repayment of capital and of the debts due to the firm."

The last sentence in this clause is not intelligible to their Lordships. There must, they think, be a typist's error somewhere. While, however, this seems to be so, their Lordships cannot escape the impression—and it is convenient to indicate it now—that the learned Judges of the High Court, while fully conscious that there were uncollected book debts—that fact is referred to in the oral judgment of Ross J.—did not, apparently any more than did the Subordinate Judge, intend that these should be collected and applied so far as they would go in discharging partnership liabilities. Their intention apparently was to throw any otherwise unsatisfied portion of these, in the first instance, at all events, upon the house properties. To this point their Lordships will recur. Against that order of the High Court the legal representatives of the plaintiff—he is now dead—now appeal. They insist that the order of the Subordinate Judge of the 17th August, 1917, should be restored. They contend that there was ample jurisdiction to require the defendants to accept in satisfaction of their capital claims uncollected book debts of any amount, and they say that even if this be not so, still by the deed of partnership—and if not then by the preliminary decree in the suit from which there has been no appeal, the house property is destined for division, as it was in the result divided by the Commissioner and Subordinate Judge irrespective of the question whether the claims of the partners in respect of capital had been so satisfied or not.

Their Lordships cannot agree. In their judgment it was entirely improper to distribute the assets in the way directed by the Subordinate Judge. The strict order, they think, would have been one charging the plaintiff with the sums withdrawn by him as being partnership assets in his hands with, they should have thought, at least mercantile interest from the dates of withdrawal. No claim has, however, been made against the plaintiff for interest, and their Lordships say no more about that. A strict order would then have directed the receiver to proceed with the collection of the outstanding debts in obedience to the order of the 15th August, 1916, and would have declared that, subject to the discharge of all outside liabilities, costs and

expenses, the sum so realized ought to be applied as far as it would extend in satisfaction of the respective claims on capital account of the plaintiff and defendants, any deficiency being made good out of the house properties as now directed by the High Court. As their Lordships have already said, they can see in the partnership deed no foundation for the appellant's present contention, while as to the direction in the preliminary decree, it amounted to no more than this: that the house properties were the last of the assets to be resorted to for the discharge of partnership liabilities to the intent that they might so far as was possible remain for appropriation between the partners in specie and as profits.

While, however, their Lordships can see no foundation for the appellant's appeal on the grounds on which it was pressed, they think, for reasons already indicated, that the clause in the order appealed from, above set forth, does not give full effect to the preliminary decree, and that clause should, in their judgment, be somewhat varied. They think the clause should read as follows (their Lordships retain the phraseology of the High Court) :—

> "The first direction must be to the receiver to get in, so far as they now subsist, the outstanding book debts as directed by the order of the 15th August, 1916, with full power to him to agree for the sale of any particular debt or debts to either of the parties for such consideration as he shall in each case consider adequate. The next direction must be to pay to the defendants towards the amount due to them as capital Rs. 24,345 in cash if the cash so collected and in hand and available for the purpose is sufficient, and if not, then in cash and house property. The balance of his capital still due to the plaintiff and the balance then due to the defendants will be paid in cash or house property, or partly in one way and partly in the other. The plaintiff will get 10/16 and the defendants 6/16 of the house property remaining after repayment of the capital and all other liabilities of the firm."

Their Lordships think that, with those variations in the clause referred to, the decree of the High Court should be affirmed. The variations, in their judgment, ought not to affect the costs of this appeal. These the appellant must pay.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

MUSAMMAT NAG KUER

v.

SHAM LAL SAHU AND OTHERS.

DELIVERED BY LORD BLANESBURGH.

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

1925.