Privy Council Appeal No. 42 *of* 1916.

Rehmat-un-nissa Begum and Others - - *Appellants,*

v.

Price, since deceased, and Others - - *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH DECEMBER, 1917.

Present at the Hearing:

LORD BUCKMASTER.

SIR JOHN EDGE.

SIR WALTER PHILLIMORE, BART.

SIR LAWRENCE JENKINS.

[*Delivered by* SIR LAWRENCE JENKINS.]

This is an appeal from a decree of the High Court at Bombay in its appellate jurisdiction, dated the 8th September, 1914, varying a decree of that Court in its original jurisdiction passed on the 28th March, 1914. The suit is for a dissolution of partnership. The original plaintiff was Nawab Kamal Khan, but he has died in the course of the suit and the present appellants are his representatives. The defendants, his partners, are the respondents in this appeal. The partnership was constituted on the 11th March, 1908, and its terms are contained in an instrument of that date. To appreciate its purpose and legal effect it will be convenient to describe briefly the events that led up to its execution. The defendants, a firm of contractors, had undertaken the construction of the New Alexandra Dock in the island of Bombay, and they required for the work a large supply of granite and other stone. They accordingly made two contracts in 1906 for this supply, and in both of them the Nawab was either directly or indirectly interested.

For reasons which need not be discussed, the supply of granite and stone under these contracts was so unsatisfactory

that the defendants' manager complained, and declared that he would be compelled to look elsewhere if he could not get delivery according to contract.

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

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

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

The instrument then provided that the Nawab and the defendants should be interested in the working of the quarries at Lingampalli and Dharur, and should share the profits and losses half and half (clause 1); that the granite and stone produced from the quarries should be furnished to the defendants for their works at the dock in accordance with their requirements and sent, delivered, and paid for as therein provided (clause 3); that the working of the quarries and the partnership should continue until the supply of granite or other stone for the construction of the docks was completed, and that the partnership should then terminate and be wound up (clause 4); that the expenditure incurred in managing and supervising the quarries should not exceed the proportion of 10 per cent. on the cost of the work, including all charges (clause 17); that the royalty should be one of the expenses of working the quarries, to be defrayed out of the partnership funds or the income earned (clause 22); and "that the average rate of expense per cubic foot at which the stone has hitherto been quarried, exclusive of management and superintendence, shall not be exceeded in future except under extraordinary circumstances, when the rate of expense may be increased by 10 per cent." The work contemplated by the partnership was carried on, but with the one unvarying result of annual loss, which amounted to upwards of three lakhs of rupees on the 30th June,

1910. In these circumstances the present suit was instituted in October 1912, praying for a dissolution on the ground that the business of the partnership had been, and only could be, carried on at a loss.

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

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

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

The Court of Appeal's decision that the Nawab when he filed his suit was not entitled to claim a dissolution was based on the continuance of the partnership involved in the terms of the partnership agreement and on section 252 of the Contract Act. And the Court proceeded to express the opinion that, even if it had jurisdiction, it would have refused to declare the partnership dissolved at any period earlier than the completion of the work. The first and the more extreme of these propositions was not seriously pressed in argument before this Board, nor indeed could it be.

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

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

A partner's claim to a decree for dissolution rests, in its

origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract.

It was not, therefore, any contravention of that section for the plaintiff to seek a dissolution or for the Court to decree it though the partnership agreement contemplated the continuance of the partnership beyond the date at which the suit was instituted. No man can exclude himself from the protection of the Courts, and yet, if the view of the Appellate Bench is to prevail, this is what the Nawab has done, for a decree for dissolution would be the protection appropriate in the circumstances of this case. It is no answer to say that this partnership was not terminable at will; it is to meet that precise predicament that the Court's power to decree dissolution is conferred in the events enumerated in section 254. For a partnership terminable at will no such provision would be required.

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

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

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

The next inquiry involved in this appeal is as to the amount of the average rate of expense prescribed as a limit by clause 25 of the partnership instrument. This clause was

inserted as a protection for the Nawab; it in effect imposed a limit on expenditure by the controlling partners, and the measure of that limit was the rate of expenditure in the past.

It had originally been arranged that the rate should be embodied in the document. Its ascertainment had been entrusted to Mr. Chukerbutty on behalf of the Nawab, and Mr. Stuart on behalf of the defendants, but they were unable to agree to a figure in time for its inclusion in the engrossment.

On the 10th March, 1908, however, the two representatives agreed to a figure, and the contest is as to what the figure covered. On the same day Stuart wrote on behalf of the defendants, and sent to the Nawab a letter in the following terms :—

"We beg to confirm the rate agreed upon with Mr. Chukerbutty this day as referring to clause No. 25 in the proposed agreement between you and ourselves, viz., Bombay Government, rupee 1, annas 7, per cubic foot for all labour on granite for quarrying, dressing, and hauling to station."

On the 11th the partnership instrument was executed by the Nawab at Hyderabad, and from an endorsement it appears that it was read over and interpreted to him by Chukerbutty. It probably had been previously signed by or on behalf of the defendants at Bombay, though no distinct proof as to this has been brought to their Lordships' notice.

On the 14th March the Nawab wrote to the defendants as follows :—

"In reply to your letter dated the 10th regarding the working expense of granite stone at Lingampalli, I beg to point out the rate of 1/7 rupees was arrived at on calculation on wrong basis. This has got to be revised on actual working before it can be acceded to."

Here it becomes necessary to refer to an admission made in the course of the suit and contained in a letter of the 30th July, 1913, written by the plaintiffs' attorneys to the defendants' solicitors. It is expressed to be in confirmation of what had passed between counsel for the parties at a meeting on the previous day and after stating that "with a view to shortening proceedings" certain charges were abandoned, it runs as follows :—

"We also give notice that for the above reasons and for the purposes of this suit only our client admits that at or about the time of signing the partnership agreement . . . . it was agreed between the parties that the cost of working the quarries should not exceed the rate of 1/7 rupees (British currency) per cubic foot of stone. We think it right to add that this admission must not be taken as an admission that the said rate included only the items apparently contended for by the defendants as shown in the accounts submitted by them to our client."

This admission is of vital importance: it controls this branch of the case, and narrows the region of enquiry. Not only does it decisively affirm and place beyond controversy the fact that there was an agreement and that according to that agreement the rate was not to exceed 1/7 rupees, but it excludes the possibility of any objection to its admissibility under sections 91 or 92 of the Evidence Act. The one qualification is that the rate did not only include the three items of quarrying, dressing, and hauling. All therefore that has to be considered and determined is whether under the agreement between Chukerbutty and Stuart three items only or more than three items were covered by the accepted rate of 1/7 rupees. It is beside the point to speculate as to whether this figure was assessed in error; for if error there was, the proceedings are not aptly framed for its correction

On the question whether, in the agreement between Chukerbutty and Stuart these three items and these alone were included, the evidence stands thus. The letter of the 10th March is explicit on the point; it states that the 1/7 rupees were for these three items and for nothing else. It was written and sent on the very day the agreement was made and just after Chukerbutty had left, so there would be no room for forgetfulness in the matter. Nor is it reasonable to suppose that Stuart would have at once sat down and deliberately given a false version of the agreement. And then there is the significant circumstance that the agreement was subsequently signed by the Nawab without any protest or repudiation of the terms contained in the letter, and this was done in the presence of Chukerbutty, who, it is sworn, was always first consulted by the Nawab before signing anything, and who on this occasion acted as interpreter. It is true that on the 14th the Nawab wrote objecting to the letter of the 10th, but his objection was not that no agreement had been made in the terms stated by Stuart, but that the calculation had been on a wrong basis. And then there is the evidence of Stuart. He declares that the rate agreed upon between Chukerbutty and himself was 1/7 rupees per cubic foot, and that the letter of the 10th March correctly states the agreement. His veracity has not been impugned, but it has been strenuously contended on behalf of the Nawab that in view of the figures in Exhibit 27, the estimate of cost of stone prepared by Mr. Gay, and of Stuart's evidence as to the use made of those figures in arriving at the rate on which he and Chukerbutty ultimately agreed, it is impossible that the rate of 1/7 rupees could have been for the three items of quarrying, dressing, and hauling only, and that it must also have included loading, depreciation, royalty, quarry expenses, and incidentals.

Their Lordships recognise the force of this criticism, and realise that the coincidence of the figures in Exhibit 27 with this contention is worthy of consideration. But at the same time

they feel that it would be easy to attribute too much weight to it, and more particularly as Stuart's evidence was given in answer to interrogatories and cross-interrogatories administered on commission, so that there was no opportunity of giving the examination a direction which would have elucidated the full significance of answers which now remain obscure. In the circumstances it is at least as probable that the estimate of 1/7 rupees was limited to the three items as the result of a compact between Chukerbutty and Stuart reached by accommodation or possibly even in error, as that the agreed rate of 1/7 rupees was not limited to the three items. As it is involved in the Nawab's admission of the 30th July, 1913, that there was an agreement for a rate of 1/7 rupees, and the only evidence on the record is that this rate covered the three items and no more, in the absence of contradiction by Chukerbutty or anyone else able to speak to the point, their Lordships hold that this must be accepted, and the decision of the Appellate Bench on this point upheld.

It only remains to consider the defendants' contention that they had established such "extraordinary circumstances" as would justify the increase of the rate as provided by clause 25. The burden of making this good was on the defendants, and the question is whether they have succeeded in this. What then are the "extraordinary circumstances"? The only direct evidence is that of Gay, and all that can be spelt out of his evidence is that the circumstances occasioning greater expenditure were (1) the preparation of culvert stones, and (2) the importation of labour. The first of these cannot be regarded as an extraordinary circumstance, for the schedule to the partnership instrument shows that it must have been within the contemplation of the parties when the contract was made.

So there only remains the importation of labour. This may have occasioned an increase of expenditure, but it certainly is not shown that it was an extraordinary circumstance that should raise the limit on the rate of expense prescribed in clause 25. This importation was due to an extension of the quarrying operations and was a normal development of the business made by the defendants to suit their own convenience and meet their requirements, not as partners of the Nawab, but as contractors engaged on the construction of the dock in Bombay.

Their Lordships, therefore, hold that no "extraordinary circumstances" within the meaning of clause 25 have been proved.

Their Lordships will accordingly humbly advise His Majesty to allow this appeal and to direct that the decree of the Appeal Court should be set aside and that of the original Court restored, (1) with the variation that so much thereof as orders that in taking the account thereby directed "the Commissioner do allow for the costs of quarrying provided for in clause 25 of the partnership agreement for the Lingampalli quarries rupee one and annas five per cubic foot exclusive of

management and supervision, and add thereto annas two for royalty" be omitted, and that in lieu thereof it be ordered and decreed that "the rate for the purpose of clause 25 of the partnership agreement was and shall be rupee one and annas seven per cubic foot for the cost of the quarrying of the Lingampalli quarries mentioned in the plaint in the suit, and that this rate covers only the expenses of labour on quarrying and dressing the stones and hauling the same to the railway station, and that neither royalty nor any depreciation of plant or machinery is included in the rate so fixed"; and (2) with the further variation that the declaration "that the defendants are justified in adding ten per cent. for extraordinary circumstances under the said clause 25 of the said agreement" be also omitted. Their Lordships recommend an order in the above form, as they do not wish to interfere with the discretion exercised by the original Court in its direction as to costs; and as to the costs of this appeal and the appeal to the High Court, they will recommend that there be no order save that each party bear his own.

In the Privy Council.

REHMAT-UN-NISSA BEGUM AND OTHERS.

v.

PRICE, SINCE DECEASED, AND OTHERS.

DELIVERED BY

SIR LAWRENCE JENKINS.

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