Privy Council Appeal No. 87 of 1914.

Ahmed Musaji Saleji and others - - *Appellants,*

v.

Hashim Ebrahim Saleji and others - - *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JANUARY 1915.

Present at the Hearing:

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

[*Delivered by* LORD SUMNER.]

This was an action to have partnership accounts taken, and for that purpose to have various matters decided by the Court. Three questions only were raised before their Lordships on the present appeal.

The circumstances raising the first question were as follows. The membership of the firm was in dispute. Certain persons were alleged, on one side, to have been partners, and, on the other, to have been only employees remunerated by a share of annual profits. The suit was begun on 30th June 1908, and on 30th August 1909 the Trial Judge, Fletcher J., by his formal adjudication (to use a neutral term) "declared" that the partnership in question was dissolved

as from 1st July 1907, and then "ordered and decreed" that—

"It is referred to the assistant referee of this Court to "take the following account and to make the following "enquiries, that is to say :-

1. To enquire who were the partners who were entitled to share in the assets and goodwill of the said partnership business ;

2. To take an account of the dealings of the parties with the assets of the said partnership business ;"

and, further, certain other matters not now material.

This adjudication was immediately appealable but was not appealed. The assistant referee duly held the enquiries directed, and all matters were gone into at a great expenditure of time and money. His report on enquiry No. 1 was adverse to the appellants, and being excepted to by them was confirmed by Fletcher J.

The appellants then, by memorandum of appeal dated 23rd May 1912, raised the question whether enquiry No. 1 was rightly included in the adjudication dated 30th August 1909, or whether it was not one which should have been made by the learned Judge himself. This at once and for the first time raised the question, which is the first and chief issue in the present appeal, whether the above-mentioned determination of Fletcher J. was a "decree" or an "order" within the meaning of those terms in the Civil Procedure Code, Act V. of 1908. If it was a decree it was a preliminary decree within Section 97, and any appeal was incompetent and barred thereby ; if it was an order it was appealable still. Their Lordships would unfeignedly deplore a state of procedure which enabled the appellants to take their chance of success before the assistant referee at such a cost in time and money and then, after they had lost the day, to contend that the matter never should have gone

before him at all; yet it must be so if such be the meaning of the Code.

The High Court, while thinking that the enquiry in dispute should not have been directed, decided at the same time that the adjudication of Fletcher J., which included this direction, was itself a decree and therefore being a preliminary decree could not under Section 97 of the Code be questioned on the final appeal. Their Lordships are in accord with the learned Judges of the High Court.

The adjudication itself began by declaring that the partnership was dissolved as from a certain date, and thus *in limine* settled rights between the parties. This declaration was the foundation for all subsequent accounts and proceedings, which were merely incidental thereto and consequential thereon. It matters not whether the instrument of partnership fixed the dissolution at a date which had passed before the suit began, or whether the parties had agreed to a dissolution or agreed in submitting to a dissolution by the Court, or whether the Court decreed a dissolution for cause shown before it after a *litis contestatio*. The declaration when so made was what the Court's adjudication, and indeed the appellants' own case, call it, a decree. The Code makes no provision for something which is neither a decree nor an order, nor for anything which is both, neither does it provide that one adjudication by the Court can be resolved into divers elements, some of which are decrees and some orders. This was in substance a decree: it did not cease to be such, because a subordinate part of it, if correctly made, might have been made separately as an order. It conclusively determined the rights of the parties in regard to certain, and those essential, matters, involved in the suit, and the expression "matters in controversy" in Section 2 (2), the (definition of "decree") cannot,

in their Lordships' opinion, be pressed so as to exclude matters which, though as it happened they were common ground, must have been actually decided, if any question had arisen and were the foundation of the whole determination. The Code has got rid of such doubts as were debated in *Khadem Hossein* v. *Emdad Hossein* (I.L.R. 29 Cal. 758). Accordingly Section 97 of the Code applies: the appellants took their objection too late and the High Court rightly decided against them.

The residue of the case may be shortly disposed of. The appellants were ordered to bring certain money into Court and to pay interest as from a certain date. The contention on the former point, namely that the amount was excessive, was not raised below at all and but faintly before their Lordships. In any case the amount ordered to be brought into Court was a matter of discretion and that discretion does not appear to have been exercised on any wrong principle. No more need be said as to this. The other point is equally short. It is well settled that in certain cases, when on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he may be ordered to account for these assets with interest thereon, and this apart from fraud or misconduct in the nature of fraud. The report of the assistant referee disclosed conduct of this sort on the appellants' part falling within the decided cases, even if it did not amount to fraud, as probably the referee meant to find that it did. Both Courts below adopted this report and therefore there are concurrent findings of fact against the appellants and no question of law is raised at all.

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

In the Privy Council.

AHMED MUSAJI SALEJI AND OTHERS

v.

HASHIM EBRAHIM SALEJI AND OTHERS.

[Delivered by LORD SUMNER.]

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