APPELLATE CIVIL.

Before Khosla and Falshaw, JJ.

MR. P. S. NAGARUNJAN, SOLE PROPRIETOR, M/S BLISS AND COTTON, SIMLA,—*Defendant-Appellant*

versus

MR. ROBERT HOTZ, ADMINISTRATOR OF THE ESTATE OF LATE MR. A. B. POOK, WILLOW BANK COTTAGE, SIMLA,—*Plaintiff-Respondent.*

Civil Regular First Appeal No. 243 of 1950.

1954

June, 23rd

Indian Partnership Act (IX of 1932), Section 37—Business of the partnership carried on by the surviving partner after the death of the other partner—Share of assets and profits of the deceased partner utilized therein—Whether the representative of the deceased partner en-

titled to the profits earned. Indian Limitation Act (IX of 1908), Section 17 and Article 106—Suit under section 37 of the Indian Partnership Act for accounts—Accounts claimed for period before and after death of the Partner——Limitation.

Held, that there was no term in the contract whereby after death of a partner the surviving partner could acquire his share and carry on the business of the firm, nor have any accounts been taken between the partners either before or after the partner's death and since the partnership stood dissolved by the partner's death, his representatives have a right to claim a share in the profits of the firm to the extent of his share in the property of the firm.

Held further—

(1) that with regard to the period subsequent to the death of the partner, there can be no question of applying the Limitation Act. The cause of action continues from day to day and as long as the business continues, the firm continues to make profits and the plaintiff (the representative of the deceased partner) is entitled to claim the deceased partner's share in the profits. The suit in so far as it relates to the period after the partner's death is clearly within time. It does not fall under Article 106 of the Limitation Act, and since the business is being continued till the present day the plaintiff is entitled to a decree for accounts in respect of the entire period beginning with the partner's death and ending with the date on which the decree is passed;

(2) that with regard to the period before the partner's death the suit fell within Article 106 of the Limitation Act and the Limitation was not saved by section 17. The right to institute the suit must accrue after the death of the person concerned and not because of his death. Death must not in any way affect the right to sue and must not give rise to the cause of action. If that were so the deceased person cannot be said to have the right to institute the suit because it is only his death which entitles his legal representative to bring the suit. But a suit for the accounts relating to the period before the death of the partner could not be said to be barred by time because it was necessary to account for the previous period in order to determine what the share of the deceased partner's assets in the hands of the surviving partner was. The plaintiff was entitled to accounts

after partner's death and is entitled to know what was the extent of partner's assets in the hands of the defendant. The extent of those assets could only be determined by taking accounts for the period before the partner's death, and for this reason if cannot be said that the plaintiff is barred by the statute of Limitation from demanding accounts of that period.

Nilmadhab Nandi v. *Shrimati Nirada Sundari Dasi* (1), *Ahinsa Bibi and others* v. *Abdul Kader Saheb and others* (2), *Abdul Jaffar Sahib and others* v. *Venugopal Chettiar and others* (3), *Lachhmi Narain* v. *Beni Ram* (4), followed. *Venkateswara Sarma* v. *S. N. Venkatesa Ayyar and others* (5), relied on.

First Appeal from the decree of Shri *J. N. Kapur, Senior Sub-Judge, Simla, dated the 28th September, 1950, passing a preliminary decree for rendition of accounts in favour of the plaintiff against the defendant and appointing L. Rattan Chand, Advocate, of Simla as Commissioner to go into the accounts of business upto date and submit his report on or before the 26th October, 1950, what amount is due to which partner and from whom, consisting of profits and assets. The assets of the plaintiff will be taken into consideration up to the date of the death of Mr. A. H. Pook and the deceased's estate shall not be responsible for any liabilities incurred by the firm after the death of Mr. Pook and the plaintiff shall only be entitled to profits, and that also on the profits and assets which stood in the name of Mr. Pook on the date of his death The Commissioner will fix a reasonable remuneration for the defendant for having carried on the business and also the price of the goodwill. The Commissioner will be paid Rs. 100 as his fee for the present by the parties in equal shares. It is also ordered that the accounts be taken and all the other acts required to be done be completed before the 26th day of October, 1950, and that the Commissioner L. Rattan Chand do certify the result of accounts and that all other acts are completed and have his certificate in that behalf ready for the inspection of the parties and that on receipt of the Commissioner's report and after hearing the parties, a final decree will be passed.*

K. L. GOSAIN and D. K. KAPUR, for Appellant.

D. K. MAHAJAN, for Respondent.

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(1) 45 C.W.N. 1065.
(2) I.L.R. 25 Mad. 26.
(3) A.I.R. 1924 Mad. 708
(4) I.L.R. 1931 All 387
(5) A.I.R. 1941 Mad. 449

JUDGMENT

KHOSLA, J. This is a defendant's appeal in a suit under section 37 of the Partnership Act. The plaintiff Robert Hotz represents the estate of A. H. Pook, deceased. He was appointed administrator of Pook's estate by an order of this Court on the 18th September, 1949. According to the plaint Pook and the defendant Nagarajan were partners of a firm of chemists named Bliss and Cotton which had branches at Simla and at New Delhi. The partnership was started on the 1st January, 1941, and Pook died on the 26th April, 1943. The defendant as the surviving partner, however, carried on the business of the firm and continues to do so till the present day. He made large profits from the business and when asked to render accounts refused to do so. He did, however, pay a sum of Rs. 18,344-13-0 into the account of Pook's estate as the share of Pook's profits. The plaintiff therefore prayed for a declaration from the Court dissolving the partnership of the firm and a decree for rendition of accounts of the partnership firm. It is scarcely necessary to mention that the plaintiff also claimed reliefs regarding the appointment of Receiver and the costs of the suit. Khosla, J.

The defendant resisted the plaintiff's claim and pleaded that the partnership firm stood dissolved automatically on the death of Pook on the 26th April, 1943. Thereafter he had taken accounts of the business, had prepared a balance-sheet and had set apart Pook's share. He had then continued the business in his own name and therefore the profits accruing from this business belonged solely to him. On a demand being made he had paid a sum of Rs. 18,344-13-0 representing the amount due to Pook's dues for the period of the

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partnership which ended with his death in April, 1943. He further contended that the suit was barred by time. On these pleadings the trial Court framed the following issues:—

(1) Whether the partnership continued even after the death of Mr. A. H. Pook, on the 26th April, 1943, and what is its effect?

(2) Whether the suit is within time?

The issues unfortunately are not very clearly worded but there is no doubt that both parties knew the real points in dispute. It cannot be contended that the partnership continued after Pook's death. The allegation of the plaintiff was that the surviving partner continued the business and therefore he is liable to render accounts under the provisions of section 37 of the Indian Partnership Act.

With regard to the first issue there can be no doubt that the defendant carried on the business of the firm as before after Pook's death under the same name and style. Both branches of the firm continued at Simla and at New Delhi respectively. The defendant's allegation is that on Pook's death he struck a balance-sheet and separated Pook's share of the profits. Nothing, however, was done with regard to the capital investment. The capital of the firm at that time consisted of—(1) the stock-in-trade, (2) the goodwill of the firm, and (3) a number of Defence Bonds which had been purchased by the partners jointly. These were assets of the firm which at the time of Pook's death were in the hands of the defendant. He continued to use these assets and the business of the firm continued to bring him profits. Even the profits due to Pook were not paid into a separate account at once. The defendant has admitted that he could not withdraw large sums of

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money from the assets of the firm at once and the amounts were paid into a separate Saving Bank Account gradually and in instalments. Therefore on the defendant's own showing even the profits due to Pook remained in his hands and were used by him after Pook's death. D. W. 4, the Manager of Bliss & Cotton, Delhi, stated that the amounts standing in the name of Mr. Pook were removed "by and by because it was not possible to remove them at once." The sum of Rs. 18,344-13-0 represented the profits due to Pook together with interest and these undoubtedly were paid into the account of his estate but no account was given of the assets of the firm. It was pleaded by the defendant that the firm had contracted certain loans and it was this money with which the business was carried on. The loans were subsequently paid off by the defendant himself. But this again is a matter of accounting. The loans were contracted by the partnership. As the business was carried on assets were acquired including the goodwill of the firm and even though monies were owing to some creditors it cannot be said that on Pook's death the firm was not in a solvent state. I must therefore hold that the business of the firm was continued by the surviving partner after it stood dissolved on Pook's death.

As to what is the effect of this is clear not only from the provisions of section 37 of the Indian Partnership Act but also on general principles. The principle is clearly laid down in *Knox* v. *Gye* (1). The Lord Chancellor observed in his judgment:—

> "There is a fiduciary relation between them. The surviving partner alone having the legal interest in the partnership property, and being alone able

(1) 5 English and Irish Appeals 656

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to collect it, there arises a right in the representatives of the deceased partner to insist on the surviving partner holding the property, whenever received, subject to the rights of the deceased partner, and he cannot make use of the partnership assets without being liable to an account for them."

In *Kathoom Bi* v. *Abdul Wahab Sahib and others* (1), a Division Bench of the Madras High Court held that where one out of four brothers who were carrying on a joint business died and the business was carried on by the three surviving brothers the daughter of the deceased brother could sue for her share of the profits. The right of the heirs of a deceased partner to claim a share in the profits of the partnership business where it is continued by the surviving partners has been recognised in this country by section 37 of the Indian Partnership Act which reads as follows:—

> "Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the

(1) A.I.R. 1939 Mad. 313.

rate of six per cent per annum on the amount of his share in the property of the firm * * *."

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It is quite clear that in this case there was no term in the contract whereby after Pook's death the defendant could acquire his share and carry on the business of the firm, nor have any accounts been taken between the partners either before Pook's death or after, and since the partnership stood dissolved on Pook's death, Pook's representatives have the right to claim a share in the profits of the firm to the extent of Pook's share in the property of the firm. The plaintiff in the plaint claimed a decree for the dissolution of the partnership. This was clearly an error and due to a misapprehension on his part. There can be no doubt about the nature of the relief claimed because he made a reference to section 37 of the Partnership Act and this Act only applies when the partnership has ended or stands dissolved and in that event there can be no question of asking the Court to dissolve the partnership. The plaintiff's suit therefore must be taken to be a suit for the rendition of accounts and for Pook's share in the profits of the business under the provisions of section 37 of the Partnership Act, and a suit of this nature is competent. There are many instances of such a suit having been brought to which a reference will presently be made when discussing the question of limitation.

Regarding the question of limitation the accounting period may be divided into two parts—(1) the period between 1st January, 1941, the date when the partnership came into existence and 26th April, 1943, when the partnership was dissolved on Pook's death, and (2) the period subsequent to Pook's death. With regard to the first

it is clear that the suit is governed by Article 106 of the Indian Limitation Act because it is clearly a suit for the rendition of partnership accounts. The suit with regard to the second period clearly does not fall under Article 106 of the Limitation Act because the partnership had been dissolved on Pook's death and in respect of this period the accounting is not of partnership accounts but under the provisions of section 37 of the Partnership Act. I shall discuss the law of limitation applicable to both these periods separately.

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With regard to the second period there can be no question of applying the Limitation Act. The cause of action continues from day to day and as long as the business continues, the firm continues to make profits and the plaintiff is entitled to claim Pook's share in the profits. *Nilmadhab Nandi* v. *Shrimati Nirada Sundari Dasi* (1), was a case rather similar to the present one: Three brothers were carrying on a business in partnership. One of them died leaving two sons. One of the sons died leaving a widow and this widow brought a suit against the two surviving brothers for accounts of the moneylending business. A plea of limitation was taken by the defendants and it was held—

> "A suit brought on the death of a partner by his legal representative for accounts of the partnership business since such partner's death, is not governed by Article 106 of the Limitation Act, inasmuch as the right of the legal representative is not to a share of the profits of a dissolved partnership within the meaning of Article 106 of the Limitation Act but is a right accruing to him

(1) 45 C.W.N. 1065.

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by the subsequent dealings with the assets belonging to the deceased partner."

The learned Judges pointed out that the remedy which was available to the representative of the deceased partner formerly under section 88 of the Indian Trusts Act was now available to him under section 37 of the Partnership Act. *Ahinsa Bibi and others* v. *Abdul Kader Saheb and others*, (1), was a case brought by the legal representatives of a deceased partner in similar circumstances. The learned Judges held—

"The present suit could not be regarded (within the meaning of Article 106 of schedule II to the Limitation Act) as a suit in part for an account and a share of the profits of the original partnership. When a partnership is determined by death and the surviving partners continue to carry on the business, the Limitation Act is no bar to taking the accounts of the new partnership by going into the accounts of the old partnership which have been carried on into the new partnership without interruption or settlement."

Abdul Jaffar Sahib and others v. *K. Venugopal Chettiar and others* (2), was another case of the same type. In that case too the partnership came to an end on the death of one of the partners but the surviving partners continued the business. Krishnan, J., following '*Ahinsa Bibi and others* v. *Abdul Kader Seheb and others* (1), observed that even the accounts of the old partner-

(1) I.L.R. 25 Mad. 26.
(2) A.I.R. 1974 Mad. 70.

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ship could be taken in order to determine what share of the deceased partner had remained in the hands of the surviving partners, and said—

> "If the remaining partners continue the business for the purpose of ascertaining what shares those remaining partners brought into the new partnership an account may have to be taken of the old partnership, and there will be no question of limitation at all in such a case as that, for the account of the old partnership is taken not for the purpose of enforcing the claim to the money due as profits in that partnership, but for the purpose of ascertaining what the capital supplied by the continuing partners was to the new partnership."

With regard to the accounts in respect of the period after the death of the partner there can be no question of limitation and the suit would be held within time whenever brought. *Lachhmi Narain* v. *Beni Ram* (1), was another case in which the minor son of a deceased partner was held entitled to accounts from the surviving partner who had carried on the partnership business for a period ending with the date upon which the final decree is passed.

It is therefore clear that the suit in so far as it relates to the period after Pook's death is clearly within time. It does not fall under Article 106 of the Limitation Act, and since the business is being continued till the present day the plaintiff is entitled to a decree for accounts in respect of the entire period beginning with Pook's death and ending with the date on which the decree is passed.

(1) A.I.R. 1931 All. 327.

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With regard to the period before Pook's death the argument was that although the suit fell within Article 106 of the Limitation Act, limitation was saved by the operation of section 17 of the Act. Section 17 is in the following terms:—

> "Where a person, who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application.
> * * *"

Therefore it is clear that the right to institute the suit must accrue after the death of the person concerned and not because of his death. In my view the death must not in any way affect the right to sue and must not give rise to the cause of action. If that were so the deceased person cannot be said to have the right to institute the suit because it is only his death which entitles his legal representative to bring the suit. In the present case it cannot be said that Pook's right to sue for accounts accrued after his death in this sense. He could sue at any time for dissolution of partnership and for rendition of accounts. According to the plaintiff it is Pook's death which dissolved the partnership and therefore gave him (the plaintiff) a right to demand accounts from the other partner. In other words it is Pook's death which has resulted in the right to sue accruing. The case therefore does not fall within the terms of section 17. This matter was considered by a Full Bench of the Madras High Court in *Venkateswara Sarma* v. *S. H. Venkatesa Ayyar and others* (1). This was

(1) A.I.R. 1941 Mad. 449.

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a suit by a manager to recover a property alienated by his predecessor-in-office who died without nominating his successor. The suit was under Article 134-B. The plaintiff claimed the benefit of section 17 of the Limitation Act. Abdur Rahman, J., observed at page 466—

> "Cases of this nature are very different from those which are covered by section 17, Limitation Act. The language of this section makes it clear that the right to institute a suit or make an application must be independent of the death of the person and must have been such as should have accrued during his lifetime if he had lived but did not do so on account of his death This section does not seem to contemplate cases where the right of action is connected with or arises in consequence of the death."

In the present case Pook's death is set up as the event which imposed an obligation upon the defendant to render accounts. In this view of the matter the argument that the administrator is not in the same position as an executor under the will scarcely arises. The learned counsel argued and in my view rightly that an administrator can claim exemption under section 17 of the Limitation Act although an executor cannot because an executor is a creature of the will and is in existence at the time of the testator's death. An administrator on the other hand is appointed by an order of the Court and his title vests in him on the day he is so appointed and therefore an administrator can validly say that there was no legal representative of the deceased capable of instituing a suit until the date of his appointment on

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the 18th September, 1949,—*vide Soona Mayna Kena Roona Meyappa Chitty* v. *Soona Nayones Suppramamai Chitty* (1). But as I have observed above the plaintiff cannot claim the benefit of section 17 because a case of this type is not covered by section 17.

The view was expressed in *Abdul Jaffar Sahib and others* v. *V. K. Venugopal Chettiar and others* (2), that in a case of this type a suit for accounts relating to the period before the death of the partner could not be said to be barred by time because it was necessary to account for the previous period in order to determine what the share of the deceased partner's assets in the hands of the surviving partners was, and this appears to me to be the correct view of the matter. The plaintiff was entitled to accounts after Pook's death. He is also entitled to know what was the extent of Pook's assets in the hands of the defendant and the extent of these assets could only be determined by taking accounts for the period before Pook's death. According to the defendant a balance-sheet was struck by him and he set apart the share of Pook's profits which had accrued up to the date of his death. It may be that the plaintiff is not entitled to claim profits in excess of the figure determined by the defendant, but in order to find out what was the extent of Pook's assets in the business which remained in the hands of the defendant it will be necessary to take accounts of the period before his death also, and for this reason it cannot be said that the plaintiff is barred by the statute of limitation from demanding accounts of that period

I would therefore dismiss this appeal with costs. As directed by the trial Court the estate of the deceased will not be responsible for any

(1) 20 C.W.N. 833.
(2) A.I.R. 1924 Mad. 708.

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liabilities which may have been incurred by the firm after Pook's death. A reasonable allowance should be made for the fact that the defendant has been carrying on the work of the business alone and he will therefore be entitled to an amount representing the labour and time expended by him. The commissioner appointed by the trial Court will submit his report to the trial Court within a period of two months and after hearing objections of the parties the trial Court will proceed to pass a final decree.

FALSHAW, J. I agree.