1962

December, 17.

BANARSI DAS

v.

SETH KANSHI RAM & OTHERS
(and Connected Appeals)

(S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR and J. R. MUDHOLKAR, JJ.)

Limitation—Date of dissolution of partnership—Indian Limitation Act, 1908 (9 of 1908), Art. 106—Indian Partnership Act, 1932 (9 of 1932), s. 43—Code of Civil Procedure, 1908 (Act 5 of 1908), O.20, r. 15.

The plaintiff filed a suit against his brothers who had formerly constituted a joint family for a declaration that the partnership which had been formed by them after they ceased to be joint in respect of a sugar mill stood dissolved on May 13, 1944, on which date one of the brothers had filed an earlier suit for dissolution of the partnership. The earlier suit had been dismissed for default.

The plaintiff in the present suit also prayed for a decree for accounts from defendants 1 and 2 as well as for the appointment of a Receiver. The trial court decreed the suit, ordered winding up and appointed a Commissioner. It also directed the accounts prayed for. Before the High Court Kanshi Ram who had not filed a written statement and against whom the proceedings in the trial court had been ex-parte contended that the suit was barred by limitation and in any event he should not be called upon to account. The plaintiff contended that the suit was one for distribution of the assets of a dissolved firm and was not barred by limitation. The High Court while noticing that the plea of limitation taken by one of the parties was raised before it for the first time, held that by reason of s. 3 of the Limitation Act it was bound to take notice of the bar of limitation and dismissed the suit. Having decided Kanshi Ram's plea the High Court passed consequential orders with regard to the several appeals by the other defendants. On appeal it was contended in this Court that the question of limitation which was not raised even in the grounds of appeal before the High Court was a mixed question of fact and law and it should not have been entertained by the High Court.

Held, that the suit for dissolution filed on May 13, 1944, had ended in a dismissal for default, and as such no date

of dissolution of the partnership as contemplated by O.20, r. 15, of the Code of Civil Procedure had been fixed by the Court; the plaint could not be construed as the notice contemplated by s. 43 of the Partnership Act, to terminate the partnership. Even on the assumption that the summons accompanied by the plaint could be said to be the service of notice for dissolution of the partnership, the date of dissolution could only be the date on which the last of the partners was served. With all these questions of fact to be investigated, the High Court had committed an error in treating the question of limitation as purely one of law and allowing it to be raised at the hearing for the first time before it, at the instance of a party who had not filed a written statement and raised an issue on the question before the trial court.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 94 to 97 of 1960.

Appeals from the judgment and order dated March 15, 1956, of the Allahabad High Court in First Appeals Nos. 172, 364, and 379 of 1954.

Veda Vyasa, R. K. Garg, D. P. Singh, Shiv Shastri and *K. K. Jain,* for the appellant (in C. As. Nos. 94-96/60) and respondent No. 2 (in C. A. No. 97 of 1960).

Rameshwar Nath, S. N. Andley and *P. L. Vohra,* for the appellant (in C. A. No. 97/60) respondent No. 2 (in C. A. No. 94/60) and respondent No. 1 (in C. As. Nos. 95 and 96/60).

K. L. Gossain and *Sohan Lal Pandhi* for respondent No. 1 (in C. As. Nos. 94 and 97/60) respondent No. 2 (in C. A. No. 95 of 60) and respondent No. 4 (in C. A. No. 96/60).

Harbans Singh, for respondent No. 3 (in C. A. No. 94/60).

J. P. Agarwal, for respondent No. 4 (in C. A. No. 94/60) respondents Nos. 3 and 4 (in C. A. No. 95/60) respondents Nos. 1 and 3 (in C. A. No. 96/60) and respondents Nos. 3 and 4 (in C. A. No. 97/60).

1962

Banarsi Das
v.
Seth Kanshi Ram

Mudholkar, J.

1962. December 17. The Judgment of the Court was delivered by

MUDHOLKAR, J.—These are appeals by certificates granted by the High Court of Allahabad under Art. 133 (1) (c) of the Constitution from its judgments dated March 15,1956. The relevant facts are briefly as follows :

The plaintiff Kundanlal and the defendants 1 to 5 Banarsi Das, Kanshi Ram, Kundan Lal, Munnalal, Devi Chand and Sheo Prasad are brothers and formed a Joint Hindu Family till the year 1936. Amongst other properties the family owned a sugar mill at Bijnor in Uttar Pradesh called "Sheo Prasad Banarsi Das Sugar Mills". After the disruption of the family the brothers decided to carry on the business of the said sugar mill as partners instead of as members of a Joint Hindu Family. The partnership was to be at will and each of the brothers was to share all the profits and losses equally. The mill was to be managed by one of the brothers who was to be designated as the managing partner and the agreement arrived at amongst the brothers provided that for the year 1936-37, which began on September 1,1936, the first defendant Banarsi Das, who is the appellant in Civil Appeals 94 to 96 of 1960, was to be the managing partner. The agreement provided that for subsequent years the person unanimously nominated by the brothers was to be the managing partner and till such unanimous nomination was made, the person functioning as managing partner in the previous year must continue. For the years 1941-44, Kundanlal was the managing partner. On May 13,1944, Sheo Prasad defendant No. 5, now deceased, instituted a suit in the court of the Subordinate Judge, First Class, Lahore, for dissolution of partnership and rendition of accounts against Kundanlal and joined the other brothers as defendants to the suit. In the course of that

suit the court, by its order dated August 3,1944, appointed one Mr. P. C. Mahajan, Pleader, as Receiver but as the parties were dissatisfied with the order the matter was taken up to the High Court in revision where they came to terms. In pursuance of the agreement between the parties the High Court appointed Kanshiram as Receiver in place of Mr. Mahajan as from April 5,1945. In the meanwhile, the District Magistrate, Bijnor took over the mill under the Defence of India Rules and appointed Kundanlal and his son to work the mill as agents of the U. P. Government for the year 1944-45. This lease was renewed by the Government for the year 1945-46. On August 28,1956, the parties, except Devi Chand, made an application to the Court at Lahore praying that the Receiver be ordered to execute a lease in favour of Banarsidas for a period of five years. It may be mentioned that this application was made at the suggestion of the District Magistrate; Bijnor. The Subordinate Judge made an order in terms of the application. In September 1946, Banarsidas obtained possession of the mill. It may be mentioned that Sheo Prasad had in the meanwhile applied to the court for distribution amongst the erstwhile partners of an amount of Rs. 8,10,000/- (out of the total of Rs. 8,30,000/-) which was lying with the Receiver and suggested that the amount which fell due to Kundanlal and Banarsidas should be withheld because they had to render accounts. However, the aforesaid amount lying with the receiver was distributed amongst all the brothers and Devichand acknowledged receipt on November 14, 1946. On October 11, 1947, the Lahore suit was dismissed for default, the parties having migrated to India consequent on the partition of the country.

On November 8,1947, Sheo Prasad instituted a suit before the court of Civil Judge, Bijnor against his brothers for a permanent injunction restraining Banarsidas from acting as Receiver. The suit, how-

1962

Banarsi Das
v.
Seth Kanshi Ram

Mudholkar, J.

ever, was dismissed on March 3,1948. On July 16, 1948, Sheo Prasad transferred his 1/6th share to Banarsidas and since then Banarsidas has been getting the profits both in respect of his own share as well as in respect of that of Sheo Prasad.

On October 7,1948, the suit out of which these appeals arise was instituted by Kundanlal against all his brothers claiming the reliefs set out in para 29 of the plaint. The reliefs are as follows :

"(a) That it may be declared that the partnership of the Shiv Prasad Banarsi Das Sugar Mills, Bijnor between the parties was dissolved on 13th May, 1944 and if in opinion of the court the partnership is still in existence, the court may be pleased to dissolve it. Valued at Rs. 5000.

(b) That an account be taken from defendants 1 and 2 or any of them and decree be passed in favour of the plaintiff for the amount that may be found to be due to the plaintiff on account of his share in the assets and profits and sums of money in their possession. Valued at Rs. 500.

(c) That a pendete lite interim Receiver may be appointed for the Seth Shiva Prasad Banarsi Das Sugar Mills, Bijnor.

(d) Any other relief which the plaintiff may be entitled against any or either of the defendants as the court may deem fit to grant.

(e) Costs may be awarded to the plaintiff."

On July 30, 1949, Banarsidas filed his written statement but none of the other defendents put in an

appearance. On December 18, 1950, an application which had been made for the appointment of a Receiver was dismissed on the ground that Kanshi Ram who had been appointed as Receiver by the Lahore High Court continued to be the Receiver. It may be mentioned that during the pendency of this suit the appellant Banarsidas entered into an agreement with Devichand and Kanshi Ram whereunder he took over all their rights and interests in the said mill for a period of five years commencing from July 1, 1951. On February 19, 1951, he made an application to the court for directing Kanshi Ram to give a lease of the mill to him for a period of five years commencing from July 1, 1951. It may be mentioned that under an earlier arrangement Banarsidas had obtained a lease for a similar term which was due to expire on June 30, 1951. On April 26, 1951, one Mr. Mathur was appointed Receiver by the court and in July 1951, he granted a lease for five years to Kundanlal on certain terms which would be settled by the court. It may be appropriate to mention here that issues in the suit instituted by Kundanlal were framed on December 7, 1951, and one of the important issues was whether the lease dated September 12, 1946, granted to Banarsidas was void *ab initio* or was voidable and in either case what was its effect. On April 2, 1954, the advocate appearing for Kundanlal stated that he did not wish to press this issue and that the only question left was of taking accounts. In view of this concession by the plaintiff, the Court decreed the suit in the following terms :

> "1. The suit is decreed for declaration that the S. B. Sugar Mills, Bijnor, stood dissolved with effect from 13th May, 1944. The plaintiff's share is declared to be 1/6th; of defendant No. 1 Seth Banarsi Das as 1/3rd and of defendants 2 to 4 1/6th each.

1962

Banarsi Das
v.
Seth Kanshi Ram

Mudholkar, J.

2. Seth Kanshi Ram is held liable to render accounts to the plaintiff and other defendants in respect of joint stores and lubricants in Exhibits 1 and 7.

3. Shri P. N. Mathur shall continue to be the receiver till further orders.

4. And it is ordered that Shri Kashi Nath who is appointed Commissioner for the purpose of winding up the affairs of the Mills, in this case, shall prepare accounts of the credits, properties and effects and stocks now belonging to the said mills and then submit the report to the court. After the report has been submitted and objections heard and decided, the court would fix a date for the sale of the assets of the Mills. The Commissioner shall receive instructions from the court from time to time.

... ..."

Three appeals were preferred before the High Court against this decision. One was by Kanshi Ram, another by Banarsidas and the third was by Munnalal. It may be mentioned here that the suit has been decreed *ex-parte* against both Kanshi Ram and Munna Lal. It may also be mentioned that even in the appeals the winding up of the partnership business and the appointment of Mr. Kashi Nath as Commissioner for this purpose was not challenged by any party to the appeals. These appeals were heard together and were disposed of by a common judgment by the High Court on March 15, 1958. The High Court, in effect, dismissed the appeals of Banarsidas and Munnalal but granted partially the appeal of Kanshi Ram. As a result of the High Court's decision, Kundanlal's suit stood decreed for declaration that the partnership

should be dissolved with effect from May 13, 1944, and that the six brothers had shares in the partnership as found by the trial court. But the suit stood dismissed with regard to other reliefs. As there were three appeals before the High Court, the appellant Banarsidas has preferred three separate appeals for complying with the requirements of the law.

Before the High Court the stand taken by the parties was this : Devichand and Munnalal wanted that the winding up order should be set aside while Kundanlal wanted that it should be upheld but that he should not be asked to render any accounts. Kanshi Ram contended that the suit was barred by time and that at any rate he should not be called upon to account. The appellant Banarsidas wanted that the winding up order should be maintained and also wanted that accounts should be rendered both by Kundanlal and Kanshi Ram. The ground on which the High Court dismissed the suit was that the suit for accounts was barred by Art. 106 of the Limitation Act. It was, however, contended before the High Court on behalf of the plaintiff that although a suit for accounts and share of profits may be barred by time, the suit in so far as it related to the distribution of the assets of the dissolved firm was not barred by limitation as such a suit falls outside Art. 106 of the Limitation Act. This contention was also rejected by the High Court and it held that not only the claim for accounts and share for profits was time-barred but also the claim for distribution of the assets of the dissolved firm was time-barred. The High Court was alive to the fact that the plea of limitation was not taken by any of the defendants in the trial court but was of the opinion that the plaint itself disclosed that the suit was barred by time and, therefore, it was the duty of the court under s. 3 of the Limitation Act to dismiss it. It was then contented before the High Court on behalf of the plaintiff that as in none of the appeals preferred

1962

Banarsi Das v. Seth Kanshi Ram

Mudholkar, J.

before it the appellants had questioned that portion of the decree which granted the plaintiff the relief of a share in the assets of the partnership and therefore it ought not to be interfered with. The High Court, however, resorted to O. 41, r. 33 of the Code of Civil Procedure and held that under this provision, it was competent to it to disallow the claim decreed by the trial court. Upon this view, the High Court allowed Kanshi Ram's appeal, but lost sight of the fact that same order had to be made with regard to the moneys lying in the court.

In his appeal, it was contended by Banarsidas that that portion of the decree which declared the partnership to have been dissolved on May 13, 1944, should be set aside. But the High Court refused to permit him to urge this point inasmuch as he had admitted in his written statement that the partnership was dissolved on May 13, 1944. The High Court also said that the decree which had been passed against Banarsidas in so far as this relief is concerned was a consent decree and that an appeal therefrom is barred by s. 96, sub-s. (3), of the Code of Civil Procedure. Upon this view, the High Court dismissed his appeal.

Dealing with Munnalal's case, the High Court observed that the only relief sought by him was that Banarsidas should be asked to render accounts for the year 1944-1945, and that as it had already held, while dealing with Kanshi Ram's appeal that this claim was barred by time, his appeal should also be dismissed.

Banarsidas has come up in appeal against the judgments and decrees of the High Court in all the three appeals and his appeals are Civil Appeals Nos. 94 to 96 of 1960. Kundanlal has preferred an appeal from the judgment and decree of the High Court in Kanshi Ram's appeal, which is numbered

Civil Appeal No. 97 of 1960. This judgment governs all these appeal.

The points raised by Mr. Veda Vyasa on behalf of Banarsidas are these :

(1) Under the Partnership Act, the partners are entitled to have the business of the partnership wound up even though a suit for accounts is barred under Art. 106 of the Limitation Act.

(2) Kanshi Ram having been appointed a Receiver by the Court stood in a fiduciary relationship to the other partners and the assets which were in his possession must be deemed to have been held by him for the benefit of all the partners. Therefore, independently of any other consideration, he was bound to render accounts.

(3) The question of limitation was not raised in the plaint or the grounds of appeal before the High Court and as it is a mixed question of fact and law, it should not have been made the foundation of the decision of the High Court. If it was thought necessary to allow the point to be raised in view of the provisions of s. 3 of the Limitation Act, the courts should at least have followed the provisions of O. 41, r. 25, Code of Civil Procedure, and framed an issue on the point and remitted it for a finding to the trial court.

(4) The Court was wrong in holding that limitation for the suit commenced on May 13, 1944.

(5) The High Court was wrong in resorting to the provisions of O. 41, r. 33, of the Code of Civil Procedure.

Before we consider the points raised by Mr. Veda Vyasa, we would like to point out that at

1962

Banarsi Das
v.
Seth Kanshi Ram

Mudholkar, J.

the commencement of the argument, Mr. Veda Vyasa made an offer that if all the parties agreed, Banarsidas was prepared to waive his claim for accounts against Kundanlal and Kanshi Ram provided that the decree of the trial court was restored in other respects. While the learned counsel appearing for those two Parties were willing to accept the offer, two others were not, and, therefore, we must proceed to decide the appeals on their merits. The most important point to be considered is whether the suit was barred by limitation. If the appellants in these appeals succeed on this point, the first, second and fifth points will really not arise for consideration.

In the plaint in the present suit, the plaintiff Kundanlal alleged in para 10 that the partnership being at will it stood dissolved on May 13, 1944, when Sheo Prasad filed suit No. 105 of 1944 in the court of the Sub-Judge, Lahore. No doubt, as pointed out by the High Court, Banarsidas has admitted this fact in his written statement at no less than three places. The admission, however, would bind him only in so far as facts are concerned but not in so far as it relates to a question of law. It is an admitted fact that the partnership was at will. Even so, Mr. Veda Vyasa points out, the mere filing of a suit for dissolution of such a partnership does not amount to a notice for dissolution of the partnership. In this connection, he relies upon 68, Corpus Juris Secundum, p. 929. There the law is stated thus: The mere fact that a party goes to court asking for dissolution does not operate as notice of dissolution. He then points out that under O.20, r. 15, of the Code of Civil Procedure, a partnership would stand dissolved as from the date stated in the decree, and that as the Lahore suit was dismissed in default and no decree was ever passed therein it would be incorrect even to say that the partnership at all stood dissolved because of the institution of the suit. On the other hand, it was contended on behalf of some

of the respondents that the partnership being one at will, it must be deemed to have been dissolved from the date on which the suit for dissolution was instituted and in this connection reference was made to the provisions of sub-s. (1) of s. 43 of the Partnership Act which reads thus :

> "(1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm."

The argument seems to be based on the analogy of suits for partition of joint Hindu family property, with regard to which it is settled law that if all the parties are majors, the institution of a suit for partition will result in the severance of the joint status of the members of the family. The analogy however cannot apply, because, the rights of the partners of a firm to the property of the firm are of a different character from those of the members of a joint Hindu family. While the members of a joint Hindu family hold an undivided interest in the family property, the partners of a firm hold interest only as tenants-in-common. Now as a result of the institution of a suit for partition, normally the joint status is deemed to be severed, but then, from that time onwards they hold the property as tenants-in-common i.e., their rights would thenceforth be somewhat similar to those of partners of a firm. In a partnership at will, if one of the partners seeks its dissolution, what he wants is that the firm should be wound up, that he should be given his individual share in the assets of the firm (or may be that he should be discharged from any liability with respect to the business of the firm apart from what may be found to be due from him after taking accounts) and that the firm should no longer exist. He can call for the dissolution of the firm by giving a notice as provided in sub-s. (1) of s. 43 i.e., without the intervention of

1962

Banarsi Das
v.
Seth Kanshi Ram

Mudholkar, J.

the court, but if he does not choose to do that and wants to go to the court for effecting the dissolution of the firm, he will, no doubt, be bound by the procedure laid down in O.20, r. 15, of the Code of Civil Procedure, which reads thus :

> "Where a suit is for the dissolution of a partnership or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate share of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit."

This rule makes the position clear. No doubt, this rule is of general application, that is, to partnerships at will as well as those other than at will; but there are no limitations in this provision confining its operation only to partnerships other than those at will. Sub-s. (1) of s. 43 of the Partnership Act does not say what will be the date from which the firm will be deemed to be dissolved. For ascertaining that, we have to go to sub-s. (2) which reads thus :

> "The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice."

Now, it will be clear that this provision contemplates the mentioning of a date from which the firm would stand dissolved. Mentioning of such a date would be entirely foreign to a plaint in a suit for dissolution of partnership and therefore such a plaint cannot fall within the expression "notice" used in the sub-section. It would follow therefore that the date of service of a summons accompanied by a copy of a plaint in the suit for dissolution of

partnership cannot be regarded as the date of dissolution of partnership and s. 43 is of no assistance.

Even assuming, however, that the term "notice" in the provision is wide enough to include within it a plaint filed in a suit for dissolution of partnership, the sub-section itself provides that the firm will be deemed to be dissolved as from the date of communication of the notice. It would follow, therefore, that a partnership would be deemed to be dissolved when the summons accompanied by a copy of the plaint is served on the defendant, where there is only one defendant, and on all defendants, when there are several defendants. Since a partnership will be deemed to be dissolved only from one date, the date of dissolution would have to be regarded to be the one on which the last summons was served. Now, if the High Court wanted to give the benefit of the provisions of s. 43 to any of the parties—defendants before it, it should have borne in mind the full implications of those provisions. We have no material on record for ascertaining the date on which the last summons was served in this case. Since that date is not known or could have been known by the High Court, it was in error in holding that the suit was barred by time.

The High Court has overlooked the fact that even upon the argument addressed before it on behalf of Kanshi Ram, the question of limitation was not one purely of law but was a mixed question of fact and law and, therefore, it was not proper for it to allow it to be raised for the first time in argument. We are satisfied that what the High Court has done has caused prejudice to some of the parties to the suit and on that ground alone, we would be justified in setting aside its decision. If the High Court felt overwhelmed by the provisions of s. 3 of the Limitation Act, it should at least have given an opportunity to the parties which supported the

1962

Banarsi Das
v.
Seth Kanshi Ram

Mudholkar, J.

decree of the trial court to meet the plea of limitation by amending their pleadings. After allowing the pleadings to be amended, the High Court should have framed an issue and remitted it for a finding to the trial Court. Instead of doing so, it has chosen to treat the pleading of one of the defendants as conclusive not only on the question of fact but also on the question of law and dismissed the suit. It is quite possible that had an opportunity been given to the defendants, they could have established, in addition to proving the dates on which the summonses were served, that the suit was not barred by time because of acknowledgment in the course of the discussion, the High Court had said that it was not suggested before it by anyone that the claim was not barred by reason of acknowledgments. Apparently, no such argument was advanced before it on behalf of the plaintiff and the defendant Banarsidas because the counsel were apparently taken by surprise and had no opportunity to obtain instructions on this aspect of the case. We are clearly of opinion that the High Court was in error in allowing the plea of limitation to be raised before it particularly by defendants who had not even filed a written statement in the case. We do not think that this was a fit case for permitting an entirely new point to be raised by a non-contesting party to the suit.

In view of our decision on this point, it would follow that the High Court's decision must be set aside and that of the trial court restored. We may, however, mention that some of the parties including the appellant Banarsidas and the plaintiff-respondent, Kundenlal as well as the defendant-respondent Kanshi Ram were agreeable to certain variations in the decree. But as there were other parties besides them to whom these variations are not acceptable, we are bound to decide the appeals on merits. For the aforesaid reasons, we allow the appeals of Banarsidas and Kundanlal and restore the decree of the trial

court, but make no order as to costs.

Along with the appeals, we heard two Civil Miscellaneous Petitions, Nos. 1482 of 1962 and 1534 of 1962. The first is to the effect that the lease granted by this Court during the pendency of these appeals should be terminated early. It is said that the reason why the term of five years was fixed was that this Court was seized with the litigation and it was expected to last for five years. But as it happens, it has terminated within about a year and a half and therefore there is no reason for the lease to continue. Apart from the fact that it would not be in the interest of the parties to determine the lease before its expiry we doubt whether we can legally do so. We, therefore, reject this application. As regards the other application, it is agreed between parties that it should be considered by the Receiver when the assets are distributed.

We may also mention that during arguments it was stated before us on behalf of Banarsidas that he had installed some new machinery for the efficient running of the mill and that before the mill is sold he should be allowed to remove the machinery. It was suggested that perhaps it would be in the interest of all the parties if the mill is sold along with the new machinery at the date of sale. The other parties, however said that it would be best if Banarsidas removes the machinery before the expiry of the lease. In the circumstances, we can give no direction in the matter. It will be open to the parties, however, to agree upon the course to be adopted when the Receiver sets about selling the machinery, or if they do not agree, to obtain directions from the High Court.

While we dismiss the Civil Miscellaneous Petitions, we make no order as to costs.

Appeals allowed.